Mortimer Sellers
Tadeusz Tomaszewski
Editors

Ius Gentium: Comparative Perspectives on Law and Justice 3

The Rule of Law in Comparative Perspective

Springer

THE RULE OF LAW IN COMPARATIVE PERSPECTIVE

IUS GENTIUM

Comparative Perspectives on Law and Justice

VOLUME 3

THE RULE OF LAW IN COMPARATIVE PERSPECTIVE

Edited by
MORTIMER SELLERS
and
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Springer

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ISBN 978-90-481-3748-0 e-ISBN 978-90-481-3749-7
DOI 10.1007/978-90-481-3749-7
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2010921004

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

This book is dedicated to the memory of
Tadeusz Kosciuszko
apostle of liberty and the rule of law

Preface

The papers collected in this volume grow out of a series of discussions on the concept of "The Rule of Law" held at meetings of the European American Consortium for Legal Education in Warsaw (2008), the American Society for Legal History in Tempe, Arizona (2007), and the Association of American Law Schools in San Diego, California (2009). The gathering of the European-American Consortium for Legal Education was particularly significant, because it also marked the two-hundredth anniversary of the University of Warsaw Faculty of Law. We would like to thank those who attended these meetings for their insightful remarks and for their inspiration, suggestions and encouragement in better understanding the rule of law from a comparative perspective.

Thanks are also due to the faculty, staff and students of the University of Baltimore Center for International and Comparative Law who prepared this volume for publication, and particularly to Katie Rolfes, Laurie Schnitzer, Barbara Coyle, Kathryn Spanogle, Morad Eghbal, James Maxeiner, Nicholas Allen, Caroline Andes, Michael Beste, Suzanne Conklin, Pratima Lele, Shandon Phan, T.J. Sachse, Toscha Stoner-Silbaugh and Björn Thorstensen. We are also grateful to David Bederman, Michael Hoeflich, Carl Landauer, David Lieberman, Jules Lobel, Ileana Porras, and Brian Tamanaha for their comments of earlier versions of the chapters published here.

Imperia legum potentiora quam hominum esto!

Baltimore, MD, USA — Mortimer Sellers
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Chapter 1
An Introduction to the Rule of Law in Comparative Perspective

Mortimer Sellers

The rule of law has a long history in the aspirations of oppressed peoples everywhere.[1] Developing societies seek to establish the rule of law, well-regulated societies seek to preserve it, and most governments claim to maintain it, whatever the nature of their actual practices.[2] This makes the rule of law a nearly universal value, endorsed by the United Nations General Assembly, for example, which has repeatedly identified "human rights, the rule of law and democracy" as "universal and indivisible core values and principles of the United Nations."[3] The Universal Declaration of Human Rights, approved by the Assembly without dissent, recognized that "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."[4] These ringing assertions, repeated or paraphrased by the European Convention on Human Rights[5] the American Convention on Human Rights,[6] the African Charter on Human and Peoples Rights[7] and numerous other regional agreements and

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[1] On the history and philosophy of the Rule of Law, *see* Costa, Pietro and Zolo, Danilo, *The Rule of Law: History, Theory and Criticism* (Dordrecht, 2007) and Tamanaha, Brian Z., *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004).

[2] *See*, e.g., *Constitution of Russia* Article 1; Interview with Dmitry Medvedev, President of Russia, *Financial Times*, 24 March, 2008

[3] *See*, e.g., U.N.G.A. /RES/61/39, 18 December, 2006, on "The rule of law at the national and international levels." *Cf.* A/RES/62/70; A/RES/63/128.

[4] *Universal Declaration of Human Rights* (December 10, 1948), Preamble.

[5] *The European Convention on Human Rights* (4 November, 1950), Preamble.

[6] *The American Convention on Human Rights* (22 November, 1969), Articles 8 and 9.

[7] *The African Charter on Human and Peoples Rights* (June 27, 1981), Articles 3, 6, and 7.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_1,

national constitutions,[8] illustrate the necessary moral component always present in appeals to the "rule of law." The "rule of law" in its usual sense implies the fulfillment of justice and the negation of government by and for the benefit of those in charge.[9]

The struggle for freedom usually begins with the demand for written laws, to constrain the discretion of those in authority, then proceeds to the pursuit of just laws, a much more difficult undertaking.[10] The advance of modern constitutionalism on six continents has grown out of the ancient insight that law (in its strictest sense) arises only from the application of reason to human circumstances.[11] The "enactments" or "decrees" of those in power cannot attain legitimacy in the eyes of their subjects without some claim to serve right reason and justice.[12] The advance of law over the past five centuries against arbitrary government has always struggled towards answering the "great question": "What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance."[13] Put more simply, this became the search to establish an "*imperium legum*"[14] or "the empire of laws and not of men."[15]

The battle of the rule of law against arbitrary government takes place in every human society, when those with power seek to expand their discretion (and control), and their subjects resist.[16] Nor are the advocates of unfettered power without arguments in their favor. The most famous apostle of despotism, Thomas Hobbes, denied any distinction between "right and wrong," "good and evil," "justice and injustice," beyond our separate

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[8] For example, the Constitution of the People's Republic of China, Article 5.

[9] *See*, for example, Aristoteles, *Politika* III, 1287a, associating the rule of law with the rule of reason.

[10] The famous story of the *decemviri* and the struggle for the rule of law in Rome was told by Livy in the third book of his *History* (*Ab urbe condita* III. 33ff). For similar developments in Athens, *see* Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, 1986).

[11] *See*, e.g., Marcus Tullius Cicero, *De re publica* III.xxii.33. *Cf*. Aristoteles, *supra* note 9.

[12] This insight was famously expressed by Marcus Tullius Cicero, *De legibus* 1.vii.23: "inter quos etiam ratio, inter eosdem etiam recta ratio communis est: quae cum sit lex" on the importance of this famous insight, *see* M.N.S. Sellers, "The Influence of Marcus Tullius Cicero on Modern Legal and Political Ideas," to appear in *Ciceroniana*, *Colloquium Tullianum Anni MMVIII* (2009).

[13] John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787) at I.128.

[14] *See*, e.g., Titus Livius, *Ab urbe condita*, 2.I.I.

[15] *See* e.g. James Harrington, *The Commonwealth of Oceana* (1656), ed. J.G.A. Pocock (Cambridge, 1992), p. 20.

[16] *See* the other chapters of this volume for examples in a variety of cultures and continents.

and conflicting desires.[17] Hobbes had seen in the horrors of England's civil war the indiscriminate misery of anarchy, "which is the greatest evil that can happen in this life."[18] From this it follows (his followers believe) that we need an absolute and uncontested sovereign power to rule us and that "whatsoever [the sovereign] doth, it can be no injury to any of his subjects; nor ought he be by any of them accused of Injustice."[19] Hobbes insisted that "This great Authority [is] Indivisible, and inseparably annexed to the sovereignty."[20] Anarchy, insecurity, and the inevitable conflicts of private desires justify the absolute power of government, according to this theory, and new definitions of "law," "justice," "right," and "wrong," determined through the arbitrary commands of sovereign power.[21]

European theorists such as Thomas Hobbes developed a "positivist" conception of law and sovereignty that has considerable appeal for those with "*de facto*" political power over subject populations.[22] If "law" can be reduced to the simple commands of those in power, then the "*Rechtsstaat*" becomes an instrument of oppression[23] and law becomes a weapon, like a knife, to be wielded for good or ill by whomsoever holds it in her hands.[24] The conflict between this "*de facto*" theory of law, as the instrument of power, and the "*de jure*" conception of law, as the product of reason and justice, has been the driving force of legal modernity, and the development of constitutional government throughout the world.[25] The Venetian Donato Gianotti[26] observed in a passage repeated by the Englishman James Harrington a century later,[27] and again by the American John Adams, at the time of his own Revolution,[28] that they all belonged to the timeless party of justice, fighting over the centuries to establish government under law ("*de*

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[17] Thomas Hobbes, *Leviathan* (London, 1651), at I.vi.24; I.xiii.63.

[18] Ibid. at II. xxx.175.

[19] Ibid. at II.xviii.90.

[20] Ibid. at II.xxvi.93.

[21] Ibid. at II.xxvi.137.

[22] For the formula "auctoritas, non veritas, facit legem" *see* the Latin translation of Hobbes in *Thomas Hobbes, Opera* ed. W. Molesworth (1837–1845) at III.26.202.

[23] *See*, e.g., Carl Friedrich Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865).

[24] Joseph Raz, Authority, Law and Morality, 68 *The Monist* 285 (1985) at 299. Law exists to "allow those in authority to express a view on how people should behave."

[25] *See* M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2004).

[26] Donato Gianotti, *Libro della Republica de' Viniziani* (1540) in F. Diaz (ed.) *Opere politiche* (Milan, 1974).

[27] James Harrington, *The Commonwealth of Oceana* (1656), ed. J.G.A. Pocock (Cambridge, 1992), p. 6.

[28] John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787) at I.126.

jure"), in the public interest, against arbitrary ("*de facto*") government, maintained in the interest of those in charge.[29]

This, then, is the central definition and purpose of the rule of law: the effort to discover what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance.[30] This formula bears repetition because it captures the rule of law in its fullest sense, as the application of reason to reality in order to maintain a just and stable legal order. The rule of law implies constitutionalism, and all states or societies that struggle towards the rule of law are also working towards constitutional government, to control power with reason, or (more prosaically) make "ambition . . . counteract ambition,"[31] with the constant aim to "divide and arrange the offices in such a manner as that each may be a check upon the other—that the private interest of every individual may be a sentinel over the public rights."[32]

A proper understanding of the rule of law—maintaining the famous "empire of laws and not of men"[33]—begins with the perception that "in establishing a government which is to be administered by men over men" the greatest difficulty "lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Even in the worst of times, partisans of the rule of law have hoped to establish "liberty" through the instrument of a "well-ordered constitution" so that justice could prevail (idealists hoped) "even among highwaymen," by "setting one rogue to watch another," so that "the knaves themselves may in time, be made honest men by the struggle."[34] Many of these necessary legal and political controls were as well-known (as John Adams expressed it) "at the time of the neighing of the horse of Darius" as they are today.[35] The basic guarantors of the rule of law include representative government, a divided legislature, an elected executive, and above all, an independent judiciary serving for extremely long and non-renewable terms in office.[36]

To recognize the necessary connection between the rule of law as an ideal and well-constructed constitutional government does not and should not be taken to imply that all states can or should maintain the same

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[29] For an early example of this distinction, *see* Cornelius Tacitus, *ab excessu divi August annalium libri* at I.2.

[30] *See supra* note 12.

[31] "Publius" [James Madison] *The Federalist* LI, February 6, 1788.

[32] Ibid.

[33] *Supra* notes 13 and 14.

[34] John Adams, *Defense of the Constitutions of Government of the United States of America* vol. III (London, 1788) at 505 (Letter VII, December 26, 1787).

[35] Ibid., Preface, at I.ii.

[36] Ibid.

constitutional structures in practice. The social, historical, geographical and other circumstances in different societies will always differ, limiting what is appropriate, prudent and possible in practice. Certain practices will never be justified, however, and certain standards and basic institutions will be shared by every society that aspires to attain "the government of laws and not of men." The chapters gathered in this volume consider how best to establish and extend the rule of law in a variety of circumstances, ranging from highly developed but now ethnically diverse European societies, to societies emerging from conflict or revolution, to highly tradition-bound but institutionally weak regimes of self-help and customary law and justice.

This brief introduction to a collection of deeper and more detailed discussions of particular societies and situations cannot and should not presume to offer a complete theory of the rule of law, but it can help to establish a basic outline of the common elements necessary to any rule-of-law society, reviewing some of the exceptions and compromises that may be needed to establish the rule of law, and identifying a few of the limits that even the most principled and self-aware proponents of the rule of law should not allow themselves to cross, even to advance their struggle against arbitrary government and oppression. Those seeking to establish the "impartial execution" and "faithful interpretation" of "good and equal laws" must always remember the limits of their own judgment. To be well-intentioned is not in itself a guarantee of infallibility. All rulers make mistakes and these mistakes, more often than not, closely track their own class, sectional or personal self-interest.

The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor. The great breakthrough in securing the rule of law in most societies occurs when judges attain tenure *quam diu se bene gesserint* (or during good behavior) rather than *durante bene placito* (at the whim of those in authority). This transition took place in England with the "Glorious Revolution" of 1688, confirmed by the Act of Settlement in 1701, which also prevented the executive from diminishing judicial salaries, once they had been established by law.[37] The Act of Settlement was a turning point in the progress of the rule of law, which made Britain the envy of other European nations.[38] Wherever judges do not enjoy secure tenure in their offices, their rulings are subject to improper influence and coercion.[39]

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[37] *Statutes of the Realm* VII, 636f.; 12–13 William III, c.2.

[38] *See*, e.g., Voltaire [François-Marie Arouet], *Lettres Philosphiques* (1734), *Lettre* 8, *Lettre* 9.

[39] *See*, e.g., Alexis de Tocquerille, *De la démocratie en Amérique* (Paris, 1835, 1840), volume I, part 2, Chapter 8, for how even the elections of judges by the people poses a threat to the rule of law.

Judges secure in their salaries and tenure in office, who believe the law to be just, will do their best to uphold law's empire, not least because their own status and prestige depends upon the legal system's standing in society. This confirms the second great basis of the rule of law, which is that laws themselves should seek justice. Not only must judges apply the laws fairly, but the process of legislation must also attempt to advance justice, for its products properly to attain the status of "law." This is a complicated point. The concepts of law and fidelity to law imply a claim to justice.[40] The rule of law assumes a theory of law that separates law from the volition of those who serve it. Thus pursuit of the rule of law also requires the maintenance of legislative procedures that will generate legislation for the public good, and not to promote the private interests of those with power.

This link between the rule of law and a "common good" theory of justice is profound and essential. The "empire of laws and not of men" seeks a world of "equal" laws that serve all those subject to their control.[41] This absence of partiality is what sets government "*de jure*" apart from government "*de facto*" (to use the old terminology) and distinguishes "the empire of laws" from "the government of men."[42] But the question remains how to find "good and equal laws."[43] "Representative government" and "checks and balances" in the legislature (and the separation of both from the actual administration of justice) seem necessary precursors to "good and equal laws,"[44] but here we begin to reach the limits of the "essential" or "necessary" rule of law.[45]

John Stuart Mill advanced a theory of liberty and government, still extremely popular among statesmen, according to which some societies may not yet be sufficiently developed in their institutions and culture to support even such simple requirements of just government as the separation of powers between the executive and legislative powers, checks and balances in the legislature and administration of justice, or representative institutions in any branch of the government.[46] In circumstances such as

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[40] *See* M.N.S. Sellers, "The Value and Purpose of Law" 33 *Baltimore Law Journal* 145 (2004).

[41] *See* the citations to John Adams and Voltaire above. *Cf*. John Rawls, *The Law of Peoples with, The Idea of Public Reason Revisited* (Cambridge, MA, 1999), p. 71.

[42] *See supra* notes 25–28.

[43] To use John Adams' felicitous description. *Supra* note 12.

[44] *See* ibid. at I.1.

[45] For the concept of "necessary" law, *see* Emerich de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la conduit et aux affaires des Nations et des Souverains* (London, 1758) at Preface pp. xx–xxi. His "voluntary" law is also "necessary," in the more natural sense of the terminology. *Cf*. Christian Wolff, *Jus gentium methodo scientifica pertractatum* (1764).

[46] John Stuart Mill, *On Liberty* (London, 1859) referred to "backward states of society in which the race itself may be considered as in its nonage."

these perhaps "a ruler full of the spirit of improvement" may be "warranted in the use of any expedients that will attain an end perhaps otherwise unattainable."[47] But there are offensive implications in making the judgment that certain peoples or nations are not yet capable of being trusted with political freedom and equality.[48] Despotism in the common interest, even when pursued with a view to developing the higher faculties of those subject to its rule, is still despotism, and susceptible to all the vices of tyranny.[49]

The dependence of the rule of law upon the institutions of representative government arises from the observation that government *by* any subgroup within the larger society will inevitably become government *for* the interests of that subgroup, above the others.[50] And even were the natural effects of self-interest somehow avoided, the laws of a benevolent despot would suffer from a very incomplete knowledge of the actual needs and circumstances of the citizens that all laws must actually serve, to be worthy of the name.[51] So the concept of the rule of law implies an attempt to establish just laws, which in turn implies representative government, in order to achieve the degree of general knowledge and commitment to the common good necessary for impartial laws and government.[52] The rule of law entails the impartial pursuit of justice, which requires an equal concern for the welfare of all members of society.

While the rule of law without representative government may be a near impossibility, due to the fallibility of human nature, representative government by itself does not assure the rule of law, and may sometimes impede it. The earliest recorded musings about law and justice already distinguish "tyranny" from the rule of law, and contemplate the dangers of the tyranny of the majority, as well as by smaller factions.[53] The word "democracy" implied a sort of popular despotism for most of its history,[54] and the concept of "representative" government was developed to distinguish elected

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[47] Ibid.

[48] And Mill was not shy in spelling these out. Ibid.: "Despotism is a legitimate mode of government in dealing with barbarians."

[49] *See* Philip Pettit, *Republicansim: A Theory of Freedom and Government* (Oxford, 1997).

[50] John Stuart Mill, *Considerations on Representative Government* (London, 1861), Chapter III.

[51] *See* James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA, 1996).

[52] *See* M.N.S. Sellers, "Republican Impartiality" 11 *Oxford Journal of Legal Studies* 273 (1991).

[53] *See, e.g.*, Aristoteles, *Politika* IV.2.1 (1289 a 26 ff).

[54] So much so that Kant baldy stated that democracy was "im eigentlichen Verstande des Worts notwendig ein Despotismus." Immanual Kant, *Zum ewigen Frieden* (1795).

deliberative assemblies from more narrowly "democratic" governments.[55] Representative legislatures should be so constructed that they respect the rights of minorities, and will require the checks and balances of divided power to guide them away from populism and oppression.[56]

The checks and balances of constitutional government play a very important role in preserving the rule of law, but here too there must be room for variation. At a minimum, the executive and legislative powers should be separated from one another, internally divided against themselves, and subject to periodic rotation in office. Obvious provisions such as these were well-known by the eighteenth century and to most advocates of "de jure" government long before they had much influence on the actual institutions of power.[57] The "checking" in this context is more important than the complete integrity of the separation. There may be circumstances in which executive powers can have some useful influence on legislation or legislators on the administration of the laws, provided their roles remain limited and always controlled by others, but unchecked power will always tend to undermine the rule of law.

This short review of the primary attributes of the rule of law provides a brief reminder of the principles and institutions towards which nations and their subject peoples struggle, as they seek to create "an empire of laws and not of men." Establishing the rule of law requires constant attention to the "combination of powers in society" that will form the most impartial laws, for the benefit of everyone, without regard to the interests of those in power. These include representative government, a divided legislature, an elected executive, the separation of powers, and an independent and self-confident judiciary, with the power to declare the laws impartially, without any interference (or influence) over actual cases by the executive or legislative powers.

The greatest threats to the rule of law will differ at different times and places, but the underlying principle remains the same: to separate the law from arbitrary power. In many societies, custom and public opinion are the best and only constraints against despotism. More developed polities create written statutes to constrain those in authority. The single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power. "Rule of law" states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent

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[55] "Publius" [James Madison], *The Federalist* No. LXIII (March 1, 1788).

[56] This necessity is well expressed by James Madison ("Publius") in *The Federalist* No. 10 (November 22, 1787).

[57] John Adams, in the three volumes of his *A Defence of the Constitutions of Government of the United States of America* (London, 1787–1788) gives numerous examples of the literary and historical antecedents of this way of thinking.

judges. These fundamental preconditions of an impartial legal system can be vastly improved upon and infinitely refined—but they are hard enough to achieve in themselves and do not entirely prevail under any existing polity.[58]

The rule of law may be difficult to attain, but its absence is never hard to perceive. Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. Government will always be needed to protect liberty against aggression and to secure the many social goods that require large-scale collective action, but the rule of law constrains those in power to the purposes that justify their authority. Scholars may sometimes advocate partial departures from the rule of law, or its incomplete realization, or its differing application in different societies, because of transient or unfortunate circumstances, but no one can deny that every departure from the rule of law is a denial of justice. The ultimate goal of every society and every legal system should be equal and impartial justice for all. *Imperia legum potentiora quam hominum esto.*

[58] To give just one example, the United States still retains popular elections of sitting judges in many States of the Union.

Chapter 2
The Rule of Law in Ancient Greek Thought

Fred D. Miller, Jr.

The rule of law is a normative principle that political power may not be exercised except according to procedures and constraints prescribed by laws which are publicly known. The rule of law requires all persons, including governmental officials, to obey the laws and be held accountable if they do not. Moreover, the laws can be changed only through constitutional procedures and may not be nullified or overridden by individual fiat. The concept of the rule of law can be found in ancient Greek theories of law (*nomos*), and it is implicit in many other Greek legal ideas. Greek legal practice encouraged the rule of law, and its theoretical underpinnings were examined in the writings of Plato and Aristotle.

2.1 The Law of Gortyn

In the fifth century B.C., the city of Gortyn in Crete, although apparently of little importance at the time, left us the largest and best preserved Greek legal inscription, the Gortyn Law Code, a set of laws primarily concerning family and property matters, that runs to twelve columns and some 3,000 words.[1] It is striking that the first sentence of this document establishes the principle that the process of law must take precedence over extra-legal action: "If anyone wishes to contest the status of a free man or a slave, he is not to seize him before a trial." The provisions that follow set substantial fines for violating this rule and procedures for adjudicating disputed cases.

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[1] *See* John Davies, "The Gortyn Laws," in *The Cambridge Companion to Ancient Greek Law*, ed. Michael Gagarin and David Cohen (Cambridge: Cambridge University Press, 2005), pp. 305–27.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_2,

This endorsement of law over an earlier system of self-help enforcement is notable, as is the large number of inscribed laws, which date as early as the late seventh century.

One of the early provisions from Gortyn limits the term in office of the highest official, the *kosmos*, by prescribing a minimum interval of 3 years between terms. A similar provision at Dreros requires a 10-year interval. These *kosmoi* and other public officials at Gortyn and elsewhere could also be fined if they did not enforce the law properly. Gortyn and some of the other cities where such provisions occur had aristocratic forms of government, but they all seem to share the sense that the highest officials are subject to the law like everyone else. Such provisions, together with other evidence, indicate that these early Greeks adhered to the principle of the rule of law.

2.2 Demosthenes

During the fourth century B.C. the Athenian orator Demosthenes (384–322) invoked the rule of law as part of the ideology of Athenian democracy.[2] Demosthenes defended a moderate form of democracy rather than the extreme democracy condemned by Plato and Aristotle. In the suit *Against Meidias*, Demosthenes claims that "the laws are strong through you [i.e., the people] and you through the laws" (21.224). In the indictment *Against Neaera*, he adds that the people are sovereign and have the freedom to do whatever they want, but that they constrain themselves by law, for example, concerning the grant of the right of citizenship (59.88, compare Lysias 1.36). Demosthenes approves of the Locrians, who were so committed to their traditional laws that "if anyone wishes to propose a new law, he legislates with a noose around his neck. If the law is deemed noble and beneficial, the proposer lives and departs, but if not the noose is tightened and he dies." (*Against Timocrates* 24.139) In Athens the rule of law was enforced by a process called the indictment for illegality (*graphê paranomôn*) in which a citizen could prosecute another citizen for proposing an unconstitutional measure. This procedure anticipated provisions in modern constitutions for judicial review, as when the United States Supreme Court rules that acts of Congress or state legislatures are unconstitutional and hence null and void.

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[2] *See* Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford: Blackwell, 1991), Ch. 7; and David Cohen, "Crime, Punishment, and the Rule of Law in Classical Athens," in *The Cambridge Companion to Ancient Greek Law*, pp. 211–35.

2.3 Plato *Republic*

Plato (427–348) provided a theoretical basis for the rule of law with his own theory of the rule of reason.[3] This theory involves three basic principles. (1) *A thing is in a correct condition if, and only if, it exhibits proper order*. This principle is implicit in Plato's analogy between health and justice, and it is asserted explicitly in a parallel passage in the *Gorgias*: "It's when a certain order (*kosmos*), the proper one for each thing, comes to be present in it that it makes each of the things there are, good."(506e). (2) *A thing exhibits proper order if, and only if, some part of it is the natural ruler over its other parts.* This principle is implied by the analogy in the *Republic* between health and justice: "To produce health is to establish the components of the body in a natural relation of control and being controlled, one by another, according to nature, while to produce disease is to establish a relation of ruling and being ruled contrary to nature. And to produce justice is to establish the parts of the soul in a natural relation of control, one by another, while to produce injustice is to establish a relation of ruling and being ruled contrary to nature." (IV.444d) (3) *The rational part is the natural ruler over the non-rational part.* This principle explains how natural rule is established within the soul. Socrates had argued that the soul has three parts—reason, spirit, and appetite. Why then "Isn't it appropriate for the rational part to rule, since it is really wise and exercises foresight on behalf of the whole soul . . .?" (IV.442e)

Socrates argues in the *Republic* that the ideal city-state is also divided into three classes: the guardians, the warriors, and the producers. The role of guardians should be performed by the philosophers, those who have knowledge of what is best for the city-state as a whole. Thus in the Callipolis (or "beautiful city") of the *Republic* the rule of reason consists in the absolute rule of philosopher-kings.

2.4 Plato *Statesman*

In Plato's *Statesman* the Eleatic Stranger argues along similar lines that the best regime is ruled by an omnipotent scientific statesman, because "there is no mistake for wise rulers, whatever they do," provided their aim is just

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[3] *See* Glenn R. Morrow, "Plato and the Rule of Law," *Philosophical Review* 50 (1941), 105–26; Fred D. Miller, Jr., "Plato on the Rule of Reason," *Southern Journal of Philosophy* 43 (2005), 50–83; and Richard F. Stalley, "Platonic Philosophy of Law," in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* ed. Fred D. Miller, Jr. and Carrie-Ann Biondi (Dordrecht: Springer, 2007), pp. 57–77. Morrow's essay is reprinted in *Plato and Modern Law*, ed. Richard O. Brooks (Aldershot Hants: Ashgate, 2007), 443–464, which includes other essays of interest. All translations of Plato are from John M. Cooper, ed., *Plato Complete Works* (Indianapolis: Hackett, 1997).

(297a). The statesman, must however, have recourse to legislation even in the ideal case. Just as in gymnastics experts, who must train large numbers and do not have time for individualized instruction, "regard it as necessary to make rough prescriptions about what will bring physical benefit, as suits the majority of cases and a large number of persons," similarly the statesman cannot issue individualized prescriptions but must "set down the law for each and every one according to the principle of 'what works for the majority of people, or for the majority of cases,' whether expressing it in writing or in unwritten form, legislating by means of ancestral customs" (295a). However, the legislator may override his own laws when necessary (295e–296a). Nor is the legislator required to persuade his subjects to accept his commands. For if a doctor forces his patient to do what is healthy for him, he will not commit an "unhealthy mistake" (296b). Similarly if the rulers force the ruled to do just, good, and noble acts, it does not matter whether they use persuasion or not (296d). All that matters is that "by always distributing to those in the city-state what is most just, as judged by the intelligent application of their expertise, they are able both to preserve them and as far as they can to bring it about that they are better than they were" (297b).

Unfortunately, infallible statesmen are in short supply. Thus ordinary city-states must follow the policy "that no one in the city-state should dare to do anything contrary to the laws, and that the person who dares to do so should be punished by death and all the worst punishments. This is very correct and fine as a second choice, when one changes the principle [of absolute rule by the wise], which is our first choice." (297e1–5)

The Eleatic Stranger goes on to argue that constitutions which are lawful are closer "imitations" or approximations of the ideal constitution than are lawless ones. Unfortunately, he does not explain *why* the rule of law is preferable to lawlessness.

2.5 Plato *Laws*

Plato does offer a rationale in the *Laws*, a dialogue in which an Athenian Stranger proposes a constitution for a city-state in Crete. The Athenian Stranger remarks that "reflection and practical experience will soon show that the organization of a state is almost bound to fall short of the ideal." (V.739a) Although no human law may take precedence over true knowledge, nobody will be found equipped with such wisdom, except for a hint of it here or there, so we must choose the second-best course, reliance upon law and regulation (IX.875c–d). The Athenian Stranger declares, "Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view is not far off; but if law is the master of the government and the government is its slave, then the situation is

full of promise and men enjoy all the blessings that the gods shower on a state." (IV.715d) There must be a fixed code of law that is very difficult to change (VI.772b–d; XII.957a–b), and the officials must be subject to law in everything that they do (945b–948b). The underlying argument assumes that there are objective standards of right or wrong that can be known by reason and embodied in law. For example, the Athenian Stranger (at I.644d–645b) compares human beings to "puppets" of the gods who are pulled not only by the "tough and inflexible" strings of passions and desires, but also by the "pliant golden cord" of reasoning, which is called the "common" (i.e., public) law of the city-state. He insists that wherever people have mortals rather than gods as rulers they will have no rest from trouble unless they imitate the rule of the god by ordering their homes and their cities in obedience to "the immortal element within them." The Athenian Stranger contends that the law is the embodiment of reason (IV.713e–714a, VIII.835e).

Plato supports this position with a long and closely argued preamble to the law on atheism in Book X. This responds to those who distinguish nature (*phusis*) from convention (*nomos*) and see the latter as the source of all ethical standards (888e–890b). Plato suggests that the universe is directed by a divine soul, or souls, that is concerned with human affairs (893c–899b, 901d–903c). Thus the universe is ultimately the product of rational design. The legislator must therefore insist that law is "either part of nature or exists by reason of some no less powerful cause," since it is "the creation of reason" (890d). In other words, law is the product of the same divine mind that creates order in the universe.

2.6 Aristotle *Politics*

Aristotle (384–322) also speculated in his *Politics* about the theoretical foundations for the rule of law, which he contrasted with the rule of an individual or group according to their mere will.[4] Willful rule occurs when monarchs substitute edicts for laws, or democratic majorities substitute decrees (*Politics* IV.4.1292a6–7, 18–21). The rule of law is typically found when the citizens take turns in holding offices, and statutes define eligibility, selection, review, etc. (III.6.1279a8–13). The rule of law may be enforced by special officials, such as "guardians of the laws" who see to it that assemblies or magistrates do not transgress the laws (see IV.14.1298b26–1299a1).

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[4] *See* Fred D. Miller, Jr., "Aristotle's Philosophy of Law," in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, 79–110. *See* also *Aristotle and Modern Law* ed. Richard O. Brooks and James B. Murphy (Aldershot Hants: Ashgate, 2003). Translations of Aristotle are by the author.

The central thesis of Aristotle's *Politics* is that the best constitution is one in which all political offices are held by virtuous persons. This leaves open the question whether many virtuous citizens should share power under the rule of law or whether only one supremely virtuous king should have absolute power over everyone else. Some of Aristotle's arguments echo Plato (*Laws* IV.714b–715d) and others are commonplaces. For example, Aristotle was not the first to observe that the law should be impartial (*Politics* III.16.1287a41–b5; cf. *Nicomachean Ethics* V.6.1134a35–b2). If all political activity were left up to decisions by individuals on a case-by-case basis, there would be a danger that these public choices would be influenced by particular factors such as friendship, animosity, and self-interest rather than justice. The process of framing the laws involves considerable deliberation and those legislating in advance can take a broader view of the relevant issues (see *Rhetoric* I.1.1354a34–b11; cf. *Politics* III.9.1280a 14–16). Moreover, the law is the embodiment of "reason (*nous*) without desire" (III.16.1287a32; cf. Plato *Laws* IV.714a, and I.644d, 645a, VIII.835e). The rule of law is therefore superior to the rule of man. "The capacity for passion is not present in the laws, but every human soul necessarily has it" (*Politics* III.15.1286a18–20). The Platonic equation of law with reason would be interpreted by Aristotle as the claim that legislation is the product of a legislator endowed with practical wisdom (*phronêsis*) and thus able to frame the best constitution and legal system.

Aristotle also recognizes a problem with the rule of law, arising from the nature of the law itself: "[A]ll law is universal but about some things it is not possible to make a universal statement that is correct" (*Nicomachean Ethics* V.10.1137b13–14). Legislators try to lay down laws that are almost always correct, but they cannot anticipate all the exceptional circumstances that may occur. Legislators must recognize that they are "unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part, or where it is not easy to be complete owing to the unlimited number of cases that may arise, such as the kinds and sizes of weapons that may be used to inflict wounds—a lifetime would be too short to enumerate these" (*Rhetoric* I.13.1374a26–33). For example, the written law may forbid striking another person with a metal weapon and not specify every exception. If one strikes another while wearing a golden ring, has he committed a crime? In order to recognize that this is an exceptional case, we need the virtue of equity (*epieikeia*) rather than justice in the sense of strict lawfulness (*Nicomachean Ethics* V.10.1137b34–1138a3; *Rhetoric* I.13.1364a33–b1). Equity is the correction of a law insofar as it is defective due to its universality. In such a case the equitable decision is just, because it is what the legislator would have decided in these particular circumstances if he had been present. Not all things can be decided according to the laws; in some cases, a decree is needed. Aristotle compares the use of decrees to the use of a Lesbian rule made of soft lead—just as the rule is not rigid but adapts itself to the shape of the stone, so the decree is adapted

to particular circumstances (*Nicomachean Ethics* V.10.1137b26–32). This provides a limitation to the rule of law. Aristotle maintains that "the laws ought to have authority, when they have been correctly laid down; but the ruler, whether one or many, ought to have authority concerning these matters on which laws cannot speak with precision because it is not easy to make a universal declaration about everything" (*Politics* III.11.1282b1–6; cf. 15.1286a10).

Aristotle acknowledges an even more radical departure from the principle that "where the laws do not rule, there is no constitution" (IV.4.1292a32). This involves the case for absolute kingship. Although Aristotle accepts Plato's principle of the rule of reason, he rejects Plato's claim that philosopher-kings are uniquely qualified to rule over non-philosophers. Aristotle holds instead that practical wisdom and moral virtue qualify a person for political office. He suggests that if there were one person (or a small number) so outstanding in practical wisdom, moral virtue, and political ability that the others are not even commensurable with him, then this superior person (or persons) should have absolute authority over all. Such a person would be like a god on earth, and to deny him complete authority would be unjust and unnatural (III.13.1284a3–11, 17.1288a 24–9). Aristotle tries to relieve the problem by remarking that the absolute kings are a law unto themselves (13.1284a13–14, 17.1288a3). This might mean that the supremely virtuous king is above the laws that govern ordinary mortals. Or it could mean that such a person acts on his own accord the way that an ordinary person would who consistently obeys the laws. In any case, Aristotle remarks elsewhere that there are no legitimate candidates for absolute kingship, so that this is merely a theoretical possibility, and "it is evident due to many causes that everyone must share in ruling and being ruled in turn" (VII.14.1332b23–27). Practically speaking, then, the best constitution involves the rule of law provided that there is a large enough group of citizens who are at least proportionately equal in virtue.

2.7 Conclusion

In conclusion, Plato and Aristotle offer similar defenses of the rule of law. They insist that the rule of law would be unnecessary in the ideal constitution, where the ruler possesses philosophical wisdom (in the theory of Plato) or practical wisdom (in the theory of Aristotle). However, they also endorse a policy for practical politics which Aristotle expresses as follows: "While it is clearly best for any being to attain the real end, yet, if that cannot be, the nearer it is to the best the better will be its condition." (*De Caelo* 2.12.292b17–19) This is the policy of *approximism*. Along similar lines, in the *Federalist* No. 51 (published February 6, 1788), James Madison defends the proposed United States constitution against the objection that it was an imperfect instrument.

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable he government to control the governed; and in the next place oblige it to control itself.

In the same spirit, Plato and Aristotle hold that if the rulers possessed complete wisdom and virtue, they should not be subject to higher laws. But, they concluded, the prospect of such enlightened rulers is exceedingly remote, and the rule of law is necessary for justice in ordinary politics.

Chapter 3
The Liberal State and Criminal Law Reform in Spain

Aniceto Masferrer

Throughout the nineteenth century, European legal science experienced a profound transformations whose consequences are still relevant today.[1]

It would be a mistake to suppose, however, that all the legal reforms that took place in Europe in the nineteenth century, originated and developed from nothing. The roots of this process of transformation can already be seen in the sixteenth, seventeenth and especially in the eighteenth century, and the course of the European Enlightenment.

The transformation of legal science was part of a broader development in attitudes towards science in general and towards the duties of the scientist in society. Nineteenth-century legal reforms can only be understood in the context of this altered conception of science, a conception that expressed a new understanding of humankind and society.

I do not intend to present here a panorama of the diverse factors that favoured this transformation, nor to discuss the characteristic traits of nineteenth-century legal science. I will limit myself to giving a brief explanation of two conflicting concepts of law that were current in the nineteenth century.[2]

3.1 Codification Versus Compilation

The process of Codification was made possible by the triumph of the concept of rational law over the concept of law prevalent in the Ancién Regime.

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[1] I would like to thank Andrew O'Flynn for his help with making my English more readable.

[2] On this subject, *see* Javier Alvarado Planas, in *Juristas Universales* (edit. by Rafael Domingo). Marcial Pons, Madrid, 2004, vol. 3 (Juristas del siglo XIX. De Savigny a Kelsen, "Introducción"), pp. 23–57.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_3,

This change eventually led to the abandonment of the old compilation technique of understanding the law. Under this older dispensation, compilers would collect all the legislation that was in force, including some laws which might have been promulgated centuries before.

During the nineteenth century lawyers began to see existing laws more in the context of history, and of historical developments that altered the structure of law and society. This raised fundamental questions about the nature of law. What was law? There were two main positions:

1. That law was the product of reason (law was the result of purely rational operations).
2. That the law was the product of history (in which case, law was the result of each group or community's own historical tradition).

On a deeper level, there was a conflict between two ways of understanding not only law, but also life itself,

1. The rationalist conception advocated the world of reason. A world of ideas, of pre-established order, of the importance of systems, and of deduction, and this conception disassociated itself from history and tradition, since it was believed that they impeded both progress and modernization.
2. The romantic and historical conception, which defended and exalted the world of feelings, of passion, of the spontaneous, and all that was concrete, tangible, and palpable. In short, a world without a pre-established order or system.

This confrontation lasted an entire century, and ended with the triumph of rationalist theory. An accurate reflection of this final result can be seen in the outcome of the dispute between Jacobins (who were rationalists) and *Girondins* (traditionalists) during the French Revolution after 1789.

One of the clearest signs of the triumph of rationalism over historicism was the codification movement.

The idea of a "Legal Code" signified, for those who promoted the idea, much more than a mere collection of rules gathered in a single book, edition, or volume. The introduction of a "Code" meant a break with the past and with tradition; to dispose of the old and incorporate the new. This "new" arrangement was not meant to be understood as a mere reform of the old, but rather as an authentic break with the past, as if the "new" had no connection at all with what had existed up until that moment. This is how one of the protagonists of the codification movement expressed it:

> "... a legal order in which nothing was worthy of respect, or conservation: no part of which could be saved for the ordering of a future society. All of it, absolutely all of it, needed to be left behind. (...) The cart of destruction and reform had to pass through the ruined building, because in it there was scarcely an arch, scarcely a

column that neither could nor should be saved. In Spanish Criminal law there was only one legitimate and viable system, the system of codification, the system of absolute change."[3]

"The system of codification, the system of absolute change, was the only legitimate and indeed, the only possible system," affirmed the commentator Joaquín Francesco Pacheco, highlighting the identification of "codification" with "absolute change," ideas which were antithetical to "compilation" and "tradition." If the criminal legislation contained in the Compilations of the modern age represented the law that came from tradition, and the concrete history of each locality, kingdom or crown, the criminal legislation that constituted the Codes responded not to tradition, but rather to reason: to that which the mentality of the time judged to be rational and reasonable. Considering that which was historical and traditional to be reactionary and unworthy of modern times, reason became the emblem and sign of the (new) modernity.

The codifying phenomenon was not simply another demand of liberal enlightenment thought, but was rather a "postulate of the whole movement," and was brandished "as a symbol of radical renovation."[4] Codification and rationalist natural law theory (iusnaturalism) were closely linked concepts. They both took for granted the existence of conditions of equality in society, conditions that patently did not exist, in fact, as one commentator remarked, "(society) literally overflows with inequality."[5] The codifying phenomenon seemed to be the final stage in the already secular tendency toward legal unification. The eighteenth century ideologies of the Enlightenment acted as vehicles for the codification movement, and it is obvious that the objective of this movement was not to produce compilations, but rather, in keeping with enlightenment thought, to reform and to innovate. The codification movement was able to collate systematically the

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[3] Pacheco, Joaquín Francisco: *El Código penal concordado y comentado*. Madrid, 1848 (from the latest edition: Madrid, Edisofer, 2000), p. 82; Pacheco is one of the most remarkable nineteenth century Criminal law scholar and the main commentator of the Spanish Criminal Codes of 1848 and 1850; on this matter, *see* Cuello Calón, Eugenio: "Centenario del Código de 1848: Pacheco, penalista y legislador", *Información Jurídica*. Madrid, 1948, pp. 5–8; Jiménez De Asúa, Luis: "Pacheco, en el centenario del Código penal español", *El Criminalista* (Buenos Aires) 9 (1951), pp. 20–22); Antón Oneca, José: "El Código penal de 1848 y D. Joaquín Francisco Pacheco", *ADPCP* 18 (1965), pp. 473–495; Candil Jimenez, Francisco: "Observaciones sobre la intervención de D. Joaquín Francisco Pacheco en la colaboración del Código Penal de 1848", *ADPCP* 28 (1975), pp. 405–441; RODRÍGUEZ GIL, M. Magdalena: "Joaquín Francisco Pacheco, un penalista en el marco constitucional", *Revista de la Facultad de Derecho de la Universidad Complutense* 83 (1993–1994), pp. 259–294; Pacheco also wrote his *Estudios de Derecho Penal* (lectures given at the *Ateneo* of Madrid). Madrid, 1868.

[4] Caroni, Pio: *Lecciones catalanas sobre la historia de la Codificación*. Madrid, 1996, p. 35.

[5] Caroni, *Lecciones catalanas sobre la historia de la Codificación*, p. 43.

new ideas of the Enlightenment, which provided a doctrinal body that was extraordinarily critical of authoritarian political systems. These systems were finally dismantled thanks to the triumph of the Liberal revolutions.

According to the legal historian Giovanni Tarello, the codification of modern Criminal law was carried out at the end of the eighteenth century and the beginning of the nineteenth century. Its objective was to create a brief and concise criminal justice system that could realize three great, elementary principles: (1) the unity of the subject of Criminal law; (2) the reduction of the objects of Criminal law to two: the public sphere (organization and public order) and the private sphere (life, health, and property); and (3) the reduction of punishments to three (the death penalty, the deprivation of freedom and financial penalties) two of which were quantifiable.[6]

Criminal law codification was perceived as the ideal tool to introduce a secularized penal law that could satisfy the political and intellectual demands of modern times. It also marked the definitive abandonment of the old legal arguments based purely on "authority" and substituted the casuistic method for the systematic method.

The process of codification was intended to introduce both a new law and a new legal science that had nothing to do with the Ancién Regime. Nevertheless, one must ask to what extent this aim was achieved. If the rupture were as sharp as its advocates claimed, there would be little reason even to remember the older system. It might indeed be better to leave history behind and begin directly with the study of contemporary Criminal law. But in fact, so clean a break with history is almost never complete. Tradition still helps in understanding many elements of modern Criminal law.

The dichotomy between rationalism and historicism is never as complete as the advocates of either position imagine. Law always has of both a rational and a historical component. Law can be in part both relatively static and dynamic at the same time. Some of its principles achieve near permanence, while others might come to be criticized as outdated. This responds to the human condition itself, as there are some permanent principles and values that can be comprehended by reason, and some rules that derive from the culture and idiosyncrasies of each group or society. It was an analysis of these questions that led me to examine in a critical light the common belief that the Codification of Criminal law wiped the slate clean with respect to the Criminal law tradition of the past.[7]

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[6] Tarello, Giovanni: *Cultura jurídica y política del Derecho* (trad. I. Rosas Alvarado), Mexico, 1995, p. 54.

[7] On this question, which is rather more complex than I have expounded, *see* Masferrer, Aniceto: *Tradicion y reformismo reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodologico e historiográfico del movimiento codificador penal europeo*. Prologue

Anyone who has even a summary knowledge of the Spanish or European Criminal law tradition knows that current penal law is indebted and sometimes quite heavily indebted, to ancient traditions, and that the same may be said of private, commercial, or procedural law.

Thus the history of Criminal law should not be of interest only to scholars of dead institutions, but also to jurists who seek a thorough understanding of contemporary European Criminal law. Looking back at the tradition of Criminal law one may find many concepts that are out of phase with current thinking, but there are also a number of elements and principles that are maintained in modern European legal systems. There are even occasions when tendencies and concepts that had seemed to be buried by history centuries ago resurface, and gain new relevance.

The reformists saw codification as the only adequate instrument that would enable them to obtain the changes they desired. They did not realize, however, that, in much the same way as had occurred in private law, and despite all the innovations that the "new science" might promise, lawyers would continue to rely on the conceptual instruments provided by the Roman-canonical tradition, "and in fact the systematic whole that was constructed from individual concepts, although re-examined, could only be Roman."[8] It has been said that the main merit of codification was not so much the creation of new figures or principles, "but rather its formulation of dogmas that, together comprised a system."[9] Codification was the modern method of rationalist natural law (iusnaturalism), but it constructed over a base of notions, concepts, figures, and principles that came from Roman-canonical Law.[10]

3.2 Constitutionalism, Liberalism, and Reform

The first part of this article, discussed the codifying ideal.

The second part will continue by examining the fundamental characteristics of the science of Criminal law in the nineteenth century, as crystallized in the legal framework of codification. I will make a distinction between questions of a political nature and those that belong strictly to the field of criminal science. The story begins with the fundamental political-criminal law postulates of Enlightenment thought. It is quite clear that Enlightenment principles could only be put into practice once

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by J. Sainz Guerra. University of Jaen, 2003, research in which this problem is more extensively developed.

[8] Cannata, Carlo Augusto: *Historia de la ciencia jurídica europea* (trad. L. Gutiérrez-Masson). Madrid, 1989, p. 178.

[9] Lalinde Abadía, Jesús: *Iniciación histórica al Derecho español*. Barcelona, 1983, p. 669.

[10] Zajtay, Imre: "The permanence of Roman Law Concepts", *European Legal Cultures* (V. Gessner / A. Hoeland / C. Varga, eds.). Dartmouth, 1996, pp. 67–68.

there had been to political change. If the political reformist movement had not prospered, then it is unlikely that these principles would have been applied.[11]

It is not my intention to focus on nineteenth century criminal historiography,[12] nor to comment on the different doctrinal currents and scientific schools of thought that existed throughout the nineteenth century.[13] I shall concentrate instead on enlightenment liberalism, and its influence on the reform of Spanish Criminal law.

The evolution of criminal legal science can only be understood by recognizing its fundamental departure point: the intimate connection between enlightenment thought, the Liberal system, and political-criminal legal reform. It is important to bear in mind that scientific criminal law reform was only made possible by the advent of the Liberal State, the political regime that permitted the incorporation of new political and criminal legal principles that would constitute the foundation of the new criminal legal science.

Taking this to be the starting point, it seems logical to continue with a brief analysis of Enlightenment thought, the Liberal system, and political-criminal legal reform.[14]

As is well known, in the legal field, the Enlightenment movement took its bearings from rationalist theories of natural law (ius naturalism). The supporters of these theories advocated a social ethic that stemmed from their perception of nature, an ethic that was crystallized in a law (the natural) that could enter in conflict with positive law. "The axis of the new

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[11] Here it really is consistent to speak of a total rupture between the old and the new order, a true reflection of two very different political systems that were opposites in many respects.

[12] On this point, *see* the works of Baró Pazos, "Historiografía sobre la Codificación del Derecho penal en el siglo XIX", in *Doce estudios de historiografía contemporánea*. Santander, 1991, pp. 11–40; Álvarez Alonso, Clara: "Tendencias generales de la historiografía penal en España desde el siglo XIX", in *Hispania. Entre derechos propios y derechos nacionales. Atti del'incontro di studio Firenze-Lucia 25, 26, 27 maggio 1989. Per la storia del pensiero giuridico moderno 34/35*, Milano-Giuffrè Editore, vol. II, pp. 969–984; Masferrer, Aniceto: "El *ius commune* en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo", O. Condorelli, E. Montanos-Ferrín, K. Pennington, Hgg., *Studi in Onore di Manlio Bellomo*, Roma, 2004, t. III, pp. 563–587; SAINZ GUERRA, Juan: *La evolución del Derecho penal en España*. Jaén, Universidad de Jaén, 2004, pp. 47–69.

[13] Sánchez González, María Dolores del Mar: "Historiografía penal española (1808–1870): La Escuela Clásica española", in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maíllo, eds.). Madrid, Dykinson, 2007, pp. 69–129, where a clear exposition on the Spanish Classical School can be found.

[14] For a wider panoramic of this question, *see* Masferrer, *Tradición y reformismo en la Codificación penal española*... cit., pp. 69–91.

methodology" states Cannata, "resided in the rejection of the principle of authority that had characterized the Middle Ages."[15]

It was the humanitarianism of the Enlightenment, and the postulates that animated the French Revolution, that demanded certain reforms in the legal system. The legal historian Jeśus Lalinde has synthesized these reforms into six: the legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, and the concepts of favourable decision, favourable interpretation, and the presumption of innocence.[16] These reforms would probably never have been carried out if it had not been for the triumph of the Liberal State, as it was the Liberal State that created the political conditions that enabled the reform of Criminal law. However, I would like to insist on an idea that seems fundamental to me: many of these legal reforms did not constitute true victories of the codifying movement, as the majority of these principles had already been defended by the doctrine of *ius commune*. They were not a discovery of the new penal science that was rooted solely in Enlightenment thought.

In this sense, the "merit" of the Enlightenment was more or less opportunism, as it offered a doctrinal platform for political-criminal law at a moment in which, following the pace of political conquests, these ideas could effectively be taken into account and introduced into the legal systems of the day. This began a new era in Criminal law that can justifiably be referred to as the beginning of modern criminal science. It stands in marked contrast to previous criminal science that, constrained by absolutist political systems, belonged to a completely distinct era, i.e., the Ancién Regime.

3.2.1 The Rise of Enlightenment Political-Criminal Legal Thought in Europe and Spain

As is widely known, the theories of René Descartes (1596–1650) opened up a new stage in European legal culture. Using deductive reasoning as its method, the Cartesian approach was rooted in the idea of the rational and social nature of humanity. Its followers believed that deductive reasoning led to the construction of a system of values and principles with universal validity, and it was from these universal values and principles that positive law had to be judged and justified. Rational natural law (iusnaturalism) abandoned the medieval doctrine of *ius naturale* and created a new law,

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[15] Cannata, *Historia de la ciencia jurídica europea*, p. 173.

[16] Lalinde Abadia, *Iniciación histórica al Derecho español*, p. 669; about the presumption of innocence in Enlightenment thought and its roots in the glossators' doctrine, *see* the work of Hruschka, Joachim: "Die Unschuldsvemutung in der Rechtsphilosophie der Aufklärung", in *ZStW* 112 (1990) Heft 2, pp. 285–300.

using for this purpose the experience of historicity and the materials of the Corpus Iuris, in order to formulate a rationally-based legal system.

"Iusrationalism" was closely linked with the wider intellectual and political movement of the Enlightenment that dominated European thought in the eighteenth century. Although "iusrationalism" adopted different forms in England, France, and Germany, they all shared an attitude of rational criticism towards the social and legal orders of the time.[17]

From the second half of the eighteenth century onwards, Enlightenment thought initiated an intense debate throughout Europe concerning (to use the expression of the legal historian Giovanni Tarello) the "criminal problem."[18] The demands for the reform of Criminal law made by enlightenment thinkers were a sign of a new way of thinking about law in general. In this sense, the concern for a more systematic Criminal law is consistent with the logical and deductive methodology and the systematic ideal of the new rational legal science. The aim of secularizing the Criminal law is also perfectly coherent with the Enlightenment goal of secularizing society and law in general[19]. Furthermore, the humanizing ideal of Criminal law in this period followed the path of the new social ethic adopted by enlightenment thinkers.

These three principles—the systematic principle, secularization and humanization—synthesize, in my opinion, the main contributions of Enlightenment thought to Criminal law. The development and implementation of these principles in positive Criminal law reflect the most important aspects of nineteenth-century criminal legal science.

Although the humanization of the Criminal law had already been demanded by both medieval and contemporary doctrine,[20] it is indisputable that the political-legal thought of the Enlightenment was keen to

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[17] The rationalist methodology in the legal field was cultivated first by Hugo Grotius (1583–1645) in the Netherlands, and by Pufendorf (1632–1694), Thomasius (1655–1728) and Wolff (1679–1754) in Germany, and by Domat (1625–1696) in France.

[18] Tarello, Giovanni: *Storia della cultura giuridica moderna*. Vol. I: Assolutismo e codificazione del diritto. Bologna, 1976, p. 383; for an interesting treatment of Enlightenement thought and criminal law, *see* pp. 383–483.

[19] For this aspect, *see Cristianesimo secolarizzazione e diritto moderno* (a cura di Luigi Lombardi Vallauri / Gerhard Dilcher). Per la storia del pensiero giuridico moderno 11/12. Nomos Verlagsgesellschaft (Baden-Baden)—Giuffrè Editore (Milano), 1981, pp. 1201 ff., where some articles about criminal law are collected; the secularization process began in Germany in the sixteenth century, as Sellert has shown: SELLERT, Wolfgang: "Die Krise des Straf- und Strafprozeßrechts und ihre Überwindung im 16. Jahrhundert durch Rezeption und Säkularisation", in *Säkulare Aspekte der Reformationszeit*. München-Wien, 1983, pp. 27–48.

[20] The principle most open to question among those I have mentioned would be that of the humanisation of criminal law. This is not because one can doubt the sincerity of the humanitarian theses linked to Enlightenment ethics, but rather because this was not a new contribution with respect to the previous criminal law tradition, at least as far as legal scientific doctrine is concerned. Some jurists from the *ius commune* tradition

humanize the Criminal law. This can be seen in the gradual process of decriminalization of certain acts and the overall reduction in the number of acts considered to be criminal offences. However, these tendencies, while certainly in keeping with the desire to humanize Criminal law, might also be said to be partly a consequence of its secularization.

Tarello maintains that both the, "removal of the figures that Criminal law sought to repress and (...) the drastic reduction of the instruments of repression" responded to the new demands of the codifying task. In effect, "a brief and systematic body of rules governing the repression (of criminal acts) was not possible without destroying a large part of both the objects and the methods of repression."[21] Despite the truth of this formal explanation of the codifying technique, no one, including Tarello, is unaware of the fact that the reduction in the number of acts classed as crimes was also due to the rationalist ideology that sought to make sure that punishments were in proportion to the crimes committed. Furthermore, it was humanitarian ideology that favoured, not only the decriminalization of many acts, but also showed a preference for imprisonment and economic sanctions as forms of punishment.[22]

Among those who best represent the move for both political and Criminal law reform at the time were Cesare Beccaria (1738–1794), Gaetano Filangieri (1752–1788), Gian Domenico Romagnosi (1761–1834) and Paul J.A. Feuerbach (1775–1833). Only Feuerbach and Filangieri can be considered true experts in Criminal law, the other two were enlightened authors that vehemently criticized the existing system of Criminal law. Before them, Voltaire, Montesquieu, Grotius, Hobbes, Pufendorf and Locke had all been critical of their respective legal systems. The most well-known Spanish figure was Manuel de Lardizabal.[23]

3.2.2 The Political Reforms of Liberalism and Their Consequences for Criminal Law

The demands for Criminal law reform made by enlightenment thinkers would not have prospered, at least in the short term, without the success

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had already considered the importance of humanising punishments, as well as the convenience of introducing punishments that were proportional to the offences committed. According to Lalinde, *iusnaturalism* of the sixteenth and seventeenth centuries, which developed the theories of Saint Thomas, had already defended the need for proportionality between crime and punishment, stating that the punishment ought to be less severe than the gravity of the offence (Lalinde Abadía, *Iniciación histórica al Derecho español*, p. 667).

[21] Tarello, *Cultura jurídica y política del Derecho*, p. 53.

[22] Tarello, *Cultura jurídica y política del Derecho*, p. 54.

[23] On this matter, *see* RAMOS VÁZQUEZ, Isabel: "El Derecho penal de la ilustración", in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maíllo, eds.). Madrid, Dykinson, 2007, pp. 43–68.

of the Liberal revolutions. Criminal law was reformed not only thanks to the development of new ideas but because those that advocated its reform gained political power and proceeded to dismantle the Ancién Regime. This led to a new phase in history, the Liberal age. The conditions that would allow for the reform of Criminal law were now in place, through the coupling of Enlightenment thinking with the Liberal State. Of course, codification was not entirely dependant on the success of the Liberal revolutions; in fact, some of the first works that attempted to codify Criminal law took place within the framework of non-liberal political systems. That is the case of the Prussian Allgemeines Landrecht (ALR) in 1794. However, I believe it is inappropriate to use the expression "iusrationalist codes," as such attempts at codification had little to do with the "Liberal codes"[24] that followed them. It is better to speak of "Enlightenment codes" and "Liberal codes."

Great reforms in Criminal Law took place within each of the Liberal States, as they applied the new ideas of the Enlightenment. Many of these reforms took place before codification; though a large number were later to be adopted by codification, some almost at once while others more gradually. However, the effective application of these reforms was only made possible by the success of the Liberal system, without which the critical voices of the Enlightenment thinkers would almost certainly not have been heard. Even so, most of the reforms carried out were not in response to new ideas, although certain commentators have made it seem that that was the case. In fact, centuries before, the legal doctrine of *ius commune* had proposed change,[25] although the legislation passed during the time of the Ancién Regime had preferred to attend to other interests.

3.2.2.1 The Principle of Legality

The reform of Criminal law was one of the great objectives of the French Revolution, and Voltaire had played an important role in promoting reform.[26] Among Voltaire's strongest demands was his insistence that Criminal law should be clearer and more precise, and that all arbitrary judicial decisions should be subjected to the law. The law had to express clearly both the conduct that constituted a criminal act and the designated punishment.

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[24] Caroni, *Lecciones catalanas sobre historia de la Codificación*, pp. 69 ff.

[25] On the Criminal law science in the *Ancién Regime*, *see* Pérez Marcos, Regina: "Notas sobre la génesis de la Ciencia penal España", in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maíllo, eds.). Madrid, Dykinson, 2007, pp. 19–41.

[26] Already a classic work on this question is that of Herzt, Eduard: *Voltaire und die französische Strafrechtspflege im 18. Jahrhundert. Ein Beitrag zur Geschichte des Aufklärungszeitalters*. Stuttgart, 1887 (reed. Aalen Verlag, 1972).

Voltaire was not alone in his criticisms of the Criminal law of the time, since others authors such as, Mably, Chaussard, Servan, Marat, Carrard, Risi and Vermeil, raised their voices against it and defended the need for a new system of Criminal law in which the penalty imposed by the judge could not transcend certain pre-established legal limits.[27]

The philosophy of rational natural law presented the law as the only instrument that was capable of carrying out the proposed reorganization of the legal system, and more specifically to do so through codification. The application of the principle of legality was not only to be a right of each citizen, but it was the only technical means suitable for the realization of a new system of Criminal law. It was, in fact, essential to this enterprise, as any legal code would have to respect this principle scrupulously, and it was of the greatest importance that this principle be respected above all in Criminal law, the guardian of all individual rights.

The first attempts at codification in Europe were the product of the school of natural law rather than French rationalism, and allowed judges a certain margin in which to use discretionary powers and sentence "ex aequo et bono." The Prussian *Verbessertes Landrecht* (1721), the Bavarian *Codex juris criminalis* (1751) and the *Constitutio Theresiana* (1769) are all clear examples of this.

The first European Criminal Code that embraced the principle of legality without any ambiguity, and expressly prohibited both arbitrary judicial decisions and the use of analogy was the *Allgemeine Gesetz über Verbrechen und Strafen* of Joseph II (1787). Rather more ambiguous on this point was the Prussian *Allgemeines Landrecht* (1794). Although it affirmed the principle of legality in most instances, such as by its exclusion of any possible retroactive effects of Criminal law, it contained a disposition that allowed for the possibility of punishing those acts that were committed against "natural law", even when these acts were not specifically forbidden in positive law. This disposition tainted, at least in the opinion of Schnapper, the principle of legality.[28]

The first codes incorporated the principle of legality without consistently following all its logical consequences. However, the Bavarian Code of 1813, which was written by Feuerbach, did follow the principle coherently and excluded both the use of analogy and arbitrary judicial decisions. In France, after the Criminal Code of 1791, which had established an excessively rigid system in which punishments were fixed without any possibility of reprieve,

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[27] On this matter, apart from the bibliography collected in Masferrer, *Tradición y reformismo en la Codificación penal española*. . ., pp. 60, footnote 120, and 82, footnote 178, *see* especially the study of Schnapper, Bernard: "Les peines arbitraires du XIIIe au XVIIIe siècle (doctrines savantes et usages français), *R.H.D.* 41 (1973), pp. 237–277 and 42 (1974), pp. 81–112; later reedited as a monography (Paris, 1974), which is the edition I have used.

[28] Schnapper, *Les peines arbitraires du XIIIe au XVIIIe siècle*. . .cit., pp. 67–68.

the Criminal Code of 1810 adopted a more flexible approach to the principle of legality, and judges were given the freedom to impose sentences that could vary between pre-established maximums and minimums.

It was this model that was to be followed by a number of European countries, Spain among them.

Although, as I have mentioned, it was the doctrine of *ius commune* that had developed the principle of legality much earlier, one of the great advances of nineteenth century juridical science was unquestionably the embodiment of this principle in law, and particularly its incorporation into the constitutions of Europe and the Americas.[29]

In effect, the inclusion of the principle of legality in the constitutional framework caused an almost "Copernican revolution" in the development of Criminal Law. While this principle had deep historical roots,[30] it was the success of the Liberal revolutions that enabled the principle to be integrated into the constitutions of the period and followed coherently throughout the legal system.

The first constitutions and bills of rights contained this principle. That is the case of the Declaration of the Rights of Man and Citizen of 1789 (art. 8), the French Constitution of 1791, as well as other European and American constitutions. Later on, it would be stated in the Universal Declaration Human Rights in 1948 (art. 11.2), and two years later in the European Convention for the Protection of Human Rights and Fundamental Liberties (art. 7).

In Spain, the principle of legality was written into all of the Constitutions of the nineteenth and twentieth centuries (1812, 1837, 1845, 1869, 1876, 1931 and 1978),[31] even though it was not explicitly contained in the text of 1812.[32]

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[29] Masferrer, *Tradición y reformismo en la Codificación penal española*. . .cit., pp. 75–76 and 111–113.

[30] Concerning the history of this principle, *see* the plentiful bibliography collected in Masferrer, Aniceto: "La historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas", *Rudimentos Legales* 5 (2003), footnote 199.

[31] The Constitution of 1812 was the only one that did not expressly mention this principle, though it can be deduced from the interpretation of some precepts; art. 9 Constitution 1837; art. 9 Constitution 1845; art. 10, Constitution *nonnata* (1856); art. 11, Constitution 1869; art. 16 Constitution 1876; art. 28 Constitution 1931; arts. 3 and 25.1 Constitution of 1978.

[32] Concerning the evolution of this principle in Spanish constitutionalism, *see* the study of Ruíz Robledo, Agustín: "El principio de legalidad penal en la historia constitucional española", *Revista de Derecho Político* 42 (1997), pp. 137–169.

Nowadays, an express recognition of the principle of legality is one of the most commonly found Criminal law precepts in European constitutionalism.[33]

3.2.2.2 The Principle of Proportionality Between Crime and Punishment

The lack of proportion between crime and punishment was one of the most consistent criticisms made by Enlightenment thinkers against the Ancién Regime. Montesquieu, Beccaria, Bentham, and in Spain Lardizábal promoted a new Criminal law that would observe at least a minimal sense of proportion between the crime committed and the sentence received.

Despite the protests of some jurists from the *ius commune* tradition, the principle of proportional justice was not consistently respected by the lawmakers of the Ancién Regime, and this was particularly notable in the criminal legislation issued by the absolute monarchs of eighteenth century Spain. The situation in Spain is in fact a very clear case of the neglect of this principle. The legal historian Tomás y Valiente has drawn attention to the fact that the way in which the severity of the punishment was calculated, frequently bore no relation to the gravity of the crime committed or the degree of guilt of the accused. It was instead based upon entirely different criteria, such as the number of times a certain offence had been committed by the accused, or a lack of remorse on the part of the prisoner. In the case of fines and the confiscation of property the criteria employed depended upon the economic need of the justice administration.[34]

The problem was not the lack of a juridical doctrine that expressed the desirability of the principle of proportionality, but rather that such a doctrine could only be effectively applied by changing the political system, so that it would be willing to act in accordance with that principle.

A great effort was made by a number of Enlightenment thinkers to introduce the principle of proportionality into their respective legal systems. A clear example of this is the work of Filangieri, as has been extensively recorded by a German legal historian.[35] Tarello believed that this desire to implement the principle of proportionality explains the prevalence of punishments that can be varied to suit the crime by neat acts

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[33] *See*, as an example, article 103. 2 of the current German Constitution, a precept which is in perfect accord with German constitutional history, as may be deduced from a reading of German constitutional texts, i.e., Hessen (1820), Prussia (1848–1850), as well as Weimar (1919), among others.

[34] Tomás y Valiente, Francisco: *El Derecho penal de la Monarquía absoluta (Siglos XVI, XVII y XVIII)*. Salamanca, 1969, pp. 359 ff.

[35] Seelmann, Kurt: "Gaetano Filangieri und die Proportionalität von Straftat und Strafe", *ZStW* 97 (1985) Heft 2, pp. 241–267.

of multiplication or division. These types of punishments were essentially fines and imprisonment.[36]

I think it should be pointed out, without wishing to deny the merit of Enlightenment thinkers, that jurists from the scholastic tradition had written on the need for proportionality in Criminal law many centuries before, but only the advent of the Liberal political system made its application possible.

3.2.2.3 The Principle of the Individual Attribution of Punishments

One of the most important contributions to Criminal law made by the political reforms of the Liberal States was the abolition of punishments that affected groups of people that were connected to the perpetrator (by marriage or blood ties) but who were known not to have played any part in the crime committed. This practice had been criticised for being contrary to the principle of the individual attribution of punishments since the very beginnings of the Ancién Regime and these criticisms were taken up by Enlightenment authors.

The fact that these "transcendental punishments" (in Spanish, "trascendencia de las penas," since they affected those who have not committed any offence), together with the practice of torture and the confiscation of goods, continued into the eighteenth century are clear evidence of the backward and neglected state of Criminal law in the period. One nineteenth century author commented that this situation represented "the darkest pages of contemporary history."[37]

The only class of punishments that automatically affected third parties who had committed no crime but who bore some connection to the criminal was the confiscation of property. This class of punishment was later abandoned precisely because it contravened the principle of the personal attribution of punishments.

There were, however, other specific crimes for which the law established "transcendental punishments." These punishments were only imposed for the crime of high treason, or for offences against his divine majesty,[38]

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[36] Tarello, *Cultura jurídica y política del Derecho*, p. 54.

[37] Cadafalch y Buguñá, Joaquín: *Discurso sobre el atraso y descuido del Derecho penal hasta el siglo XVIII*. Madrid, 1849, p. 23.

[38] The short statement of Tomas y Valiente, in which he remarked that «the punishment of infamy also affected third parties» was not accurate (Tomas y Valiente, *El Derecho penal de la Monarquía absoluta*…cit., p. 394). I have already had the chance of demonstrating in another place the intranscendent character of the legal sentence of infamy. I commented on that occasion that it has sometimes erroneously been ascribed this effect due to what I termed the «attractive force of the penalty of crimes against the Royal Person» which existed in the Castilian criminal law tradition of the *Ancién Regime* (Masferrer, Aniceto: *La pena de infamia en el Derecho histórico español.*

for which the direct descendents of the offender were branded with the juridical condition of "infamis" (infamous).

Even as late as the second half of the eighteenth century certain jurists that belonged to the *ius commune* tradition (such as Alfonso de Castro) argued in favour of these "transcendental punishments." However, their arguments lacked depth and coherency, and betrayed a desire to conform to the tenets of the absolutist system. Lardizábal and the other leading jurists of the time were very clear in their opposition to any punishment that could be transferred to the descendants of the perpetrator. Lardizábal wrote specifically against the practice of transmitting the juridical category of infamis to the descendants of those found guilty of the crime of high treason or offences against "his divine majesty,"[39] and his opposition was shared unanimously by all Enlightenment thinkers.

This total rejection of "transcendental punishments" can be seen in the great number of works that criticised and rejected the practice,[40] such as those of Jośe Marcos Gutiérrez[41] and Antonio de Elizondo. Elizondo wrote: "The horror of the punishment of branding people "infamis" is that it is not an individual punishment, and it is used for very serious crimes when the legislator can think of no better way to correct the lawbreaker and improve his behaviour."[42]

The personal attribution of punishments, by which the punishment for a crime is only applied to its perpetrator, was one of the most important Criminal law principles to be included in the constitutional texts, and supposed the definitive abolition of transcendent punishments.[43] In fact, the express abolition of transcendent punishments in the Constitution of Cádiz

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Contribución al estudio de la tradición penal europea en el marco del ius commune. Madrid, Dykinson, Madrid, 2001, pp. 294 and 397).

[39] Lardizábal y Uribe, *Discurso sobre las penas*, ap. IV, tít. V, 9–10.

[40] Pérez y López, Antonio Xavier, in his *Discurso sobre la honra y la deshonra legal, en que se manifiesta el verdadero mérito de la Nobleza de sangre, y se prueba que todos los oficios necesarios y utiles al Estado son honrados por las Leyes del Reyno, según las quales solamente el delito propio disfama* (Madrid, 1781), pp. 153–172, supports the idea of maintaining the imposition of the penalty of infamy on the descendants of those found guilty of crimes against the person of the Monarch, a position which, Tomás y Valiente, in *El Derecho penal de la Monarquía absoluta*…cit., p. 110, describes as "untenable from the perspective of rationalist and Enlightenment principles".

[41] Gutiérrez, José Marcos: *Práctica criminal de España*. Madrid, 1804 (I have used the 2nd edition: Madrid, 1819) vol. III, p. 141.

[42] Elizondo, Fco. Antonio de: *Práctica universal forense de los tribunales de España e Indias*. Madrid, 1784, vol IV, p. 174; this author, when criticising the validity of the transcendent effect of this punishment at the end of the eighteenth century, not only follows Lardizabal's opinion, but even reproduces it literally (*see* pp. 175–176).

[43] Masferrer, *Tradición y reformismo en la Codificación penal española*…cit., pp. 77–79.

was so definitive,[44] that no other constitutional text made reference to them again.

At the beginning of the nineteenth century, it was incontrovertible that "in a Liberal society, following the principles of individuality and rationality, the punishment for a crime has to be imposed on the person that has committed it, without affecting the members of his family."[45]

The Cortes of Cádiz decided to protect the honour of the family name still further by banning not only these transcendent punishments but by erasing the visible and latent effects of the application of these penalties in the past. This was the thinking behind the Decree of the 22nd of February 1813, which ordered that "all the pictures, paintings and inscriptions which contain the names or images of those punished by the Inquisition that are kept in Churches, cloisters and convents, or in any public place in the Kingdom shall be erased or taken down from where they hang."[46] This measure allowed the wounds to heal of those that had been affected by the punishment of branding whole families with the tag of "infamis," a punishment that had been applied to the families of those condemned by the Tribunal of the Inquisition.[47]

3.2.2.4 The Process of the Abolition of Certain Punishments

The Enlightenment thinkers saw many of their proposals incorporated into the political reforms made by the Liberal governments. In the field of Criminal law, one of the clearest signs of their success was the process of abolition of a large number of punishments, many of which had originated in Roman law, but had continued to be applied during the Ancién Regime.

Among the punishments which Enlightened authors had criticized, had been the death penalty (or at least its excessive use as a means of punishment), the confiscation of goods, the branding of the offender and his family with the juridical tag of infamis (as well as other transcendent penalties), and the use of torture as a way of obtaining evidence.

However, the most influential and decisive voices in the debate over the future of the power of the State to punish were not drawn from the writers

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[44] Art. 305 Constitution 1812: "No penalty to be given, whatever the crime, should be trascendental in any term to the suffering family, but instead it will have its effect upon who that deserved it".

[45] Babiano y Mora, J. Fernández Asperilla, A.: "Justicia y delito en el discurso liberal de las Cortes de Cádiz", *Antiguo Régimen y liberalismo. Homenaje a Miguel Artola*. 2. Economía y sociedad. Alianza Editorial, Madrid, 1995, p. 395.

[46] Decreto CCXXV, de 22-II-1813, in *Colección de Decretos*…, vol II, pp. 766–767 (collected in the work BABIANO Y MORA/ FERNÁNDEZ ASPERILLA, "Justicia y delito en el discurso liberal de las Cortes de Cádiz", ob. cit., p. 395).

[47] Masferrer, *Tradición y reformismo en la Codificación penal española*…cit., p. 79.

of Criminal law doctrine but rather from the political sphere, as can be seen by the Liberal nature of the Cortes of Cádiz.[48]

In 1776, Carlos III consulted the Consejo de Castilla through his Secretary of State "Don Manuel de la Roda." The document shows the King's concern for the same points of Criminal law that concerned the majority of writers about Criminal law doctrine at the time. The king exhibited some concern about several points such as the principle of proportionality between crime and punishment, the wisdom of maintaining, suppressing, or reducing the application of the death penalty, and the rationality of permitting torture as a means of obtaining evidence.

However, most of these intended reforms had no immediate effect but were rather the beginning of a long process that would eventually lead to change. In some cases this change would come far later than in others. There were significant differences in the Chronology of abolition in Spain of the death penalty, the confiscation of goods, the use of humiliating and degrading punishments and the use of torture as a means of securing evidence.

The Death Penalty

Despite the concerns shown by Carlos III in his correspondence with the Consejo de Castilla, the question of the death penalty was not finally settled until its abolition by the Spanish Constitution of 1978 (Article 15).[49]

A number of humanitarian ideologists had attacked the death penalty, throughout the Enlightenment, but without success.

I do not wish to enter into a discussion about why their attempts at reform failed. It is sufficient to note that not all Enlightenment thinkers were in agreement on this point as is shown by the divergence of opinion between Lardizábal and Beccaria.

The Confiscation of Goods

As it came to be accepted that the transcendent effects of punishments should be abolished, it followed naturally that there should be considerable opposition to a type of punishment that necessarily affected third parties who had taken no part in the commission of the crime, such as the confiscation of goods.[50] This type of punishment was expressly abolished by the

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[48] Babiano y Mora / Fernández Asperilla, "Justicia y delito en el discurso liberal de las Cortes de Cádiz", ob. cit., pp. 387–397.

[49] On the legal development of the death penalty in Spain, *see* Sainz Guerra, *La evolución del Derecho penal en España*, pp. 273–288.

[50] For a wide ranging history of this institution, from its origins to its abolition in nineteenth century peninsular law, *see* PINO ABAD, Miguel: *La pena de confiscación de bienes en el Derecho histórico español*. Córdoba, 1999; on the legal development of the

Constitution of Cádiz,[51] and this express prohibition was repeated in successive Spanish Constitutional texts, following the European tendency[52] to prohibit this punishment.[53] Despite a certain degree of anti–Enlightenment feeling and the existence of a minority opposed to the abolition of the confiscation of goods,[54] the Cortes of Cádiz did not hesitate to bring an end to the practice.

Their reasons for doing so have been recorded for posterity, "It is not just that punishments should be extended to affect the innocent descendant and the honourable family member."[55]

This punishment therefore did not need to be removed by the codification process as it had already been eradicated from the Spanish legal system thanks to previous political and Constitutional reforms inspired by the Enlightenment.[56]

Humiliating Punishments

The excessively humiliating and degrading nature of many punishments was criticised by contemporary thinkers, but it was not until the latter part of the nineteenth century that this rejection became widespread

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death penalty in Spain, *see* also SAINZ GUERRA, *La evolución del Derecho penal en España*, pp. 349–352.

[51] Art. 304 Constitution 1812: "Neither will the penalty of the confiscation of goods be applied".

[52] German constitutionalism is a good example of this tendency, as can be seen from a reading of Section 16 Constitution of Baden (1818), Section 105 Constitution of Hessen (1820), Section 128 Constitution of Kurhessen (1831) and the Prussian Constitution (Section 9 de la *oktroyierte Verfassung,* 1848 *and* Section 10 *revidierte Verfassung*, 1850). Although nowadays almost all Constitutions have stopped explicitly expressing this prohibition, it can still be found in that of Luxembourg (art. 17: "The penalty of confiscation cannot be applied").

[53] Art. 10 Constitution 1837; art. 10 Constitution 1845; art. 12 Constitution *nonnata* (1856); the 1869 Constitution did not contain an express prohibition of applying the punishment of the confiscation of goods, although it could be implicitly deduced from art. 13; art. 10 Constitution 1876; art. 44 in fine Constitution 1931; the current Constitution does not contain any precept which expressly prohibits the confiscation of goods. However, in the fiscal field and not in the field of criminal law-, art. 31.1 establishes that: "All people shall contribute to the payment of public expenses in accordance with their economic capabilities (. . . .) that shall not under any circumstances involve the confiscation of goods".

[54] Egido, Teófanes: "Los anti-ilustrados españoles", *La Ilustración en España y Alemania*. Barcelona, 1989; the contrary current I refer to is also referenced in Gutiérrez, *Práctica criminal de España*, volume III, chapter 6, 103.

[55] *Diario de Sesiones de las Cortes Generales y Extraordinarias. Legislatura de 1810 a 1813*. Madrid, 1870, tomo IV, 437, p. 2419; PINO ABAD, *La pena de confiscación*. . .cit., pp. 392 and 406; Alonso Romero, Mª Paz: Aproximación al estudio de las penas pecuniarias en Castilla (siglos XIII–XVIII), *AHDE* 55 (1985), p. 14.

[56] Masferrer, *Tradición y reformismo en la Codificación penal española* . . . cit., p. 81.

enough and received enough political support for measures to be taken that would prohibit punishments and forms of executing sentences that were particularly humiliating.

The Ancién Regime had frequently applied these types of humiliating punishments, but their application had varied from kingdom to kingdom across the Peninsula.[57] The *Discurso sobre las penas* by Lardizábal gives a fair indication of the diverse types of corporal punishment that were in force, mentioning both mutilations and whippings and describing the effects of physical punishments on prisoners as well as the instruments with which these punishments were carried out.[58]

While Beccaria had written about the general need to soften punishments,[59] Lardizábal expresses his opinion about each one of the penalties he describes. He expresses his total disagreement with the practice of mutilation,[60] but considers whipping to be a valid form of punishment if applied with "a great deal of prudence and discernment."[61] He supports public humiliations as long as they do not offend against standards of "shame and decency,"[62] and suggests that prisons ought to be replaced by houses of correction, except where the criminal is shown to have "an absolutely perverted will."[63]

Lardizábal appeared to be completely convinced about the "healthy effects" that these types of punishment produced; he did however recognise that an arbitrary and imprudent use of these penalties would have negative effects. He felt that in these cases, those that suffered these punishments could lose the minimum degree of self esteem and dignity that was necessary for their mental stability and the positive development of their character. Lardizábal chooses as an example of this imprudent use of penalties the punishment that the "Fuero Juzgo" (Spanish legal text of thirteenth century) imposed for the crime of sodomy, although this penalty had in fact fallen into disuse.

This was not the only example of an extremely cruel punishment that had effectively been abolished through disuse. It was not that these conducts went unpunished but rather that judges, when faced with a penalty that was disproportional to the crime it was intended to punish, chose to apply other penalties that better reflected the mentality of the times.

Together with these degrading and humiliating punishments was the penalty of branding people with the juridical category of infamis. This

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[57] For a wider ranging study of this topic, *see* Masferrer, *Tradición y reformismo en la Codificación penal española* . . . cit., pp. 81–86.

[58] Lardizábal, *Discurso sobre las penas*, cap. V, III.

[59] Beccaria, *De los delitos y de las penas*, cap. 27.

[60] Lardizábal, *Discurso sobre las penas*, cap. V, III, 1–6.

[61] Lardizábal, *Discurso sobre las penas*, cap. V, III, 10.

[62] Lardizábal, *Discurso sobre las penas*, cap. V, III, 10.

[63] Lardizábal, *Discurso sobre las penas*, cap. V, III, 16.

punishment had existed since Roman times, and it was still in use at the beginning of the Constitutional era, and was typified as a punishment in the Criminal Code of 1822.[64]

The need to soften punishments was self evident, but introducing effective measures to soften them was more complex. The philosophy of utilitarianism as expounded by Bentham and the idea of prevention by intimidation actually encouraged the humiliating effect of certain punishments and their process of execution. It has been noted that "in the field of Criminal law there was not a total break with the past. During the initial stage of Liberalism under the Cortes of Cádiz there were certain signs of continuity with respect to the Ancién Regime."[65] The idea of making an example of the accused required that punishments received a degree of publicity and was a sad continuation of the principles of the old political regime within a Liberal system guided by modern enlightenment philosophy.

There was a break with the Ancién Regime with respect to certain punishments such as whippings, which were banned by the Cortes of Cádiz in 1813,[66] but there again it has been pointed out that "the disappearance of this punishment was due more to the fact that it had fallen into disuse than to any legal dispositions."[67] Other punishments that were designed to humiliate the miscreant would be gradually phased out over the course of the codifying process.

3.2.2.5 The Abolition of Torture as a Means of Obtaining Evidence

The express abolition of torture as a means of obtaining evidence or confessions from prisoners, a centuries old practice,[68] was another clear example

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[64] Concerning the abolition of this penalty in Spanish law, *see* Masferrer, *La pena de infamia en el Derecho histórico español*. . .cit., pp. 373 ff.; and by the same author: "La pena de infamia en la Codificación penal española", *Ius fvgit. Revista interdisciplinar de estudios histórico-jurídicos* 7 (1998), pp. 123–176; on the Criminal Code of 1822, *see* Sainz Guerra, Juan: "José María Calatrava o la Codificación penal a comienzos del siglo XIX", in *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maíllo, eds.). Madrid, Dykinson, 2007, pp. 351–384.

[65] Babiano y Mora/Fernandez Asperilla, "Justicia y delito en el discurso liberal de las Cortes de Cádiz", ob. cit., p. 396.

[66] Babiano y Mora/Fernandez Asperilla, "Justicia y delito en el discurso liberal de las Cortes de Cádiz", ob. cit., p. 394; about the period of validity and the aplication of the lash in the Modern Age, as well as its definitive abolition, *see* the research of ORTEGO GIL, Pedro: "Algunas consideraciones sobre la pena de azotes durante los siglos XVI-XVIII", *Hispania*, LXII/3, nm. 212 (2002), pp. 849–906; for the first formal abolition of this penalty by Parliament (1813), *see* ORTEGO GIL, "Algunas consideraciones sobre la pena de azotes. . .cit., p. 903).

[67] ORTEGO GIL, "Algunas consideraciones sobre la pena de azotes. . .cit., p. 903.

[68] For detailed exposition and a bibliography on this matter, *see* Masferrer, *Tradición y reformismo en la Codificación penal española* . . . cit., pp. 86–89; same author: "La

of a political-criminal law reform that was carried out before the beginning of the codification process. I do not feel it is necessary to examine this point in detail as there already exists abundant literature on the subject, nor do I consider it useful to provide a summary of the opinions held by jurists both in favour of and against the practice in the years directly preceding its abolition. For this reason, I shall not reproduce here the lengthy debate between Alfonso María Acevedo and Pedro de Castro on this question.[69]

In Spain Lardizábal echoed the arguments put forward by Becarria,[70] showing his total rejection of the practice, a practice that was extremely common during the Ancién Regime. Both authors called for its abolition,[71] and this attitude towards torture was expressed in many different countries, sometimes even before the criticisms of Beccaria.[72]

The first Spanish legal text to abolish torture was the Constitution of Bayonne (1812, article 133),[73] and a few years later the Cortes of Cádiz approved a decree for the abolition of torture during a session held on the 22nd of April 1811. The essential content of this decree was reiterated rather succinctly in Article 303 of the Constitution of 1812 that stipulated that "Neither torture nor harassment shall be employed."

In the period directly before the start of the codification process, a number of reforms in Criminal law were carried out, having been both proposed and defended by Enlightenment thinkers. However, the abolition of torture and these other reforms would have been unthinkable without the triumph of the Liberal revolution. This is shown quite clearly by the fact that the

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historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas", footnote 292.

[69] Acevedo, Alfonso María: "De reorum absolutione abiecta crimina negantium apud equuleum…" (Madrid, 1770), later translated and published under the title *Ensayo acerca de la tortura o cuestión de tormento; de la absolución de los reos que niegan en el potro los delitos que se les imputan, y de la abolición del uso de la tortura, principalmente en los tribunales eclesiásticos* (Madrid, 1817); De Castro, Pedro: *Defensa de la tortura y Leyes patrias que la establecieron, e impugnación del Tratado que escribió contra ella el Dr. Alfonso María Acevedo y su autor D. Pedro de Castro* (Madrid, 1778).

[70] Lardizábal, *Discurso sobre las penas*, pp. 266–267.

[71] I do not share the opinion of Saldaña ("Historia del Derecho penal en España", *Tratado de Derecho penal*, de Franz von Liszt, Madrid, 1926, p. 412), who states that «Lardizabal also copies from Beccaria and quotes Montesquieu. It is the least interesting part of his book». Lardizabal tackled this penalty with more accuracy and depth than Beccaria.

[72] Jerouschek, Günter: "Thomasius und Beccaria als Folterkritiker. Überlegungen zum Kritikpotential im kriminalwissenschaftler Diskurs der Aufklärung", *ZStW* 110 (1998) Heft 3, pp. 658–673; in the opinion of Jerouschek, Beccaria's argumentative discourse against torture not only lacked originality, but it could possibly have been copied from the works of previous authors.

[73] «Torture is abolished; any severity or force that might be employed in the act of imprisonment or in the arrest and execution of the penalty which is not authorised by law is a crime».

protests against torture raised during the reign of Carlos III were ignored, and that the King, while having the power to abolish torture, chose not to do so, thus proving himself to be "an absolute Monarch rather than an enlightened one."[74]

These criticisms were directed against the use of torture and not against the whole system of Criminal law and trial procedure, but the fundamental reason for their lack of effect was that any criticism that did not accord with the tendencies and power structures of the Ancién Regime was ineffective.[75] As the very system and mentality of the absolutists contributed decisively to the degradation of legal guarantees in criminal proceedings,[76] it is easy to see to why these criticisms would remain ineffective until radical political reforms took place.

Only when the Liberal revolution managed to change the existing political order did it become possible to carry out reforms in Criminal law that corresponded to Enlightenment principles. The practice of torturing prisoners had fallen into disuse from the second half of the eighteenth century onwards, and for that reason the Cortes of Cádiz had no difficulty in abolishing the practice definitively.[77]

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[74] Masferrer, *Tradición y reformismo en la Codificación penal española*..., pp. 87–88; Tomás y Valiente, "La última etapa y la abolición de la tortura judicial en España", en *La tortura en España*. Second edition. Madrid, 1994, p. 135.

[75] I only partially agree with Tomas y Valiente when he says that «if the arguments against torture that were made during the sixteenth, and seventeenth centuries, and in the first half of the eighteenth century, were not able to achieve the abolition or even the simple reform of this institution, it was because they were only addressed against this institution, and not against the whole procedural system of criminal law in which torture was a basic and constitutive part» (Tomás y Valiente, "La última etapa y la abolición de la tortura judicial en España," p. 123).

[76] Ferro Pomà, Víctor: *El Dret Públic Català. Les institucions a Catalunya fins al Decret de Nova Planta*. Vic, 1987, p. 375, nota 381.

[77] Babiano y Mora/Fernández Asperilla, "Justicia y delito en el discurso liberal de las Cortes de Cádiz," ob. cit., pp. 393–394.

Chapter 4
Some Realism About Legal Certainty in the Globalization of the Rule of Law

James R. Maxeiner

An earlier version of this chapter was published in 31 Houston Journal of International Law 27 (Fall, 2008).

4.1 Introduction

Legal certainty is a central tenet of the rule of law as understood around the world.[1] For example, the Foreign Ministers of the G8[2] declared in their meeting at Potsdam in 2007 their nations' commitment to "the rule of law [as a] core principle[] on which we build our partnership and our efforts to promote lasting peace, security, democracy and human rights as well as sustainable development worldwide."[3] They stated that it is "imperative to adhere to the principle[] . . . of legal certainty."[4]

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[1] *See* Danilo Zolo, The rule of law: a critical appraisal, *The Rule of Law: History, Theory and Criticism* 3, 24 (Pietro Costa and Danilo Zolo eds., 2007). Zolo seeks a uniform rule of law common to the four principal variations he sees in the rule of law—the British, North American, German, and French. *See* id. at 7.

[2] Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. University of Toronto G8 Information Centre, *What is the G8?* http://www.g8.utoronto.ca/what_is_g8.html (last visited Oct. 26, 2008).

[3] G8 Foreign Ministers, Declaration of G8 Foreign Ministers on the Rule of Law (2007), http://www.g8.utoronto.ca/foreign/formin070530-law.pdf, [hereinafter G8 Declaration].

[4] Id.; *accord* The Rule of Law at the National and International Levels, G.A. Res. 62/70, U.N. Doc A/RES/72/70 (Dec. 6, 2007).

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_4,

While the United States is among the strongest proponents of the rule of law,[5] American jurists do not speak of legal certainty—at least, not anymore.[6] While the term "legal certainty" is English, it is not American English.[7] American academics who address certainty of law use another term, "legal indeterminacy";[8] practicing lawyers by and large do not use either of these terms.[9] Both groups of jurists seem resigned to ubiquitous uncertainty.[10]

The Secretary General of the United Nations wisely counseled that "a common understanding of key concepts is essential."[11] Common efforts to build the rule of law have been "plagued" by "the failure of many policy-makers to examine or fully understand the very concept of the "rule of law." "[12] How are we to build a partnership based on a concept on which we differ?

This chapter seeks to facilitate the international discussion of legal certainty and the rule of law. It aims: (I) to make Americans aware that skepticism of legal certainty espoused by American academics is atypical; (II) to make non-Americans aware of American skepticism of legal certainty; and (III) to help Americans and non-Americans alike understand each other better so that they may more efficiently cooperate.[13]

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[5] *See* James R. Maxeiner, "Legal Certainty: a European Alternative to American Legal Indeterminacy?" 15 *Tulane Journal of International & Comparative Law* 541, 545–546 (2007) [hereinafter Maxeiner, European alternative to American legal indeterminacy].

[6] *See* id. at 544.

[7] *See* id. at 543–45.

[8] *See id.* at 543–44.

[9] *See* id.

[10] *See* id. The term legal uncertainty has not, however, vanished from popular usage. *See*, e.g., Lisa Leff, *California Gay-Marriage Ban Creates Legal Uncertainty*, Associated Press, November 7, 2008, available at http://www.huffingtonpost.com/2008/11/07/california-gaymarriage-ba_n_142013.html

[11] The Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ¶ 5, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter Rule of Law and Transitional Justice] (stating that concepts such as the rule of law "serve both to define our goals and to determine our methods").

[12] Jane Stromseth et al., Can Might Make Rights? Building the Rule of Law after Military Interventions 69 (2006) (emphasis omitted).

[13] Since the purpose of this Article is to better inform the international discussion of the rule of law at international and domestic legal system levels, it focuses on the practical and the attainable. It has limited goals. It is not concerned with fine distinctions in academic writings. If professional philosophers happen to read it, they may find no use for it. *See* Duncan Kennedy, "Legal Formality", 2 *Journal of Legal Studies* 351, 354 (1973) ("The professional philosopher, who has no understanding of the peculiar technical interests and needs of law, can *see* nothing in formalism but . . . a clear derangement of the relationship between form and content." (quoting Rudolph von Jhering, 2 II Der Geist das römischen Recht 478–479 (1883) (A. von Mehren trans.))).

4.2 Legal Certainty is the International Basis of the Rule of Law

While at its outer bounds the rule of law may be "an essentially contested concept,"[14] at its core, it promises legal certainty.[15] According to a recent publication of the Organisation for Economic Cooperation and Development (OECD), "... the concept first and foremost seeks to emphasize the necessity of establishing a rule-based society in the interest of legal certainty and predictability."[16]

A legal system that provides legal certainty guides those subject to the law.[17] It permits those subject to the law to plan their lives with less uncertainty.[18] It protects those subject to the law from arbitrary use of state power.[19]

The centrality of legal certainty to the thinking of continental jurists is not well appreciated by American academics captivated by legal indeterminacy.[20] For the great German legal philosopher, Gustav Radbruch, legal certainty—along with justice and policy—was one of only three fundamental pillars of the very idea of law.[21] Radbruch's contemporary, Ludwig Bendix, colorfully made the point in a way that scarcely permits forgetting: "[t]he concept of legal certainty is a central concept of [our] inherited legal methods, in which all have grown up[; i]t is the air in which all jurists have

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[14] Neil MacCormick, Der Rechtsstaat und die Rule of Law, *Juristen Zeitung*, Jan. 1984, at 65, 65–66; Randall Peerenboom, *Varieties of Rule of Law, an Introduction and Provisional Conclusion*, in Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S. 1 (Randall Peerenboom ed., 2004); *see also* Ronald A. Cass, The Rule of Law in America 1 (2001) ("'the rule of law' still means very different things to different people").

[15] *See*, e.g., Gerhard Casper, Rule of Law? Whose Law?, Center on Democracy, Development, and the Rule of Law, Working Paper No. 10, (2004), *reprinted in* Festschrift für Andreas Heldrich zum 70. Geburtstag 1109 (Stephan Lorenz et al. eds., 2005); *see also* Danilo Zolo, *supra* note 4 (contending that a state must guarantee foreseeability in the law).

[16] OECD Development Assistance Committee, Issues Brief: Equal Access to Justice and the Rule of Law 2 (2005) [hereinafter OECD], http://www.oecd.org/dataoecd/26/51/35785471.pdf. Enumerations of the requirements of the rule of law typically include legal certainty. *See* G8 Declaration, *supra* note 2; Rule of Law and Transitional Justice, *supra* note 11, ¶ 5.

[17] *See* James R. Maxeiner, Legal Indeterminacy Made in America. *U.S. Legal Methods and the Rule of Law*, 41 Valparaiso University Law Review 517, 522 (2006) [hereinafter Maxeiner, *Legal Indeterminacy Made in America*].

[18] Id.

[19] Id.

[20] *See* id. at 520–23.

[21] Heather Leawoods, Gustav Radbruch. "An Extraordinary Legal philosopher", 2 *Washington University Journal of Law & Policy* 489, 493 (2000).

learned to breathe."[22] Bendix was such a believer in legal certainty that, upon his release in May 1937 from the Nazi concentration camp at Dachau, he began to prepare a lawsuit against the camp's commandant.[23] He surely would have brought the suit had his children not first hustled him out of the country to the safety of realist America.[24]

Bendix was the truest of true believers, but commitment to legal certainty such as his is characteristic of European legal systems.[25] Legal certainty is a "general principle of EC law."[26] It is one of a handful of legal concepts so recognized by the European Court of Justice and the European Court of Human Rights.[27] It is a fundamental principle of the national legal systems of Europe:[28] in Germany it is *Rechtssicherheit*,[29] in France *sécurité juridique*,[30] in Spain *la seguridad jurídica*,[31] in Italy *certezza del diritto*,[32] in the Benelux countries *rechtszekerheid*,[33] in Sweden *rättssäkerhet*,[34] in Poland *do obowiązującego prawa*,[35] and in Finland *oikeusvarmuuden periaate*.[36] *Legal certainty* has even made its way back into English through the common law systems of the United Kingdom.[37] A legal system without a modicum of legal certainty is scarcely worthy of the name.

As a general principle of European legal systems, legal certainty "requires that all law be sufficiently precise to allow the person—if need be, with

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[22] Ludwig Bendix, "Das Problem der Rechtssicherheit", *Zur Einführung des Relativismus in die Rechtsanwendungslehre* 2 (1914) (Author's translation).

[23] Reinhard Bendix, "From Berlin to Berkeley", *German-Jewish Identities* 172 (1986).

[24] Id.

[25] *See* id.; Ludwig Bendix, *supra* note 22, at 2; *see also* Juha Raitio, *The Principle of Legal Certainty in EC Law* 125–130 (2003).

[26] Raitio, *supra* note 25, at 125; *see* Andreas von Arnauld, Rechtssichterheit: Perspektivische Annäherungen an eine *Idée Directrice* des Rechts 661–662 (2006).

[27] *See* Patricia Popelier, "Legal Certainty and Principles of Proper Law Making", 2 *European Journal of Law* Reform 321, 327–28 (2000) (summarizing Patricia Popelier, Rechtszekerheid als Beginsel van Behoorlijke Regelgeving (1997)); Raitio, *supra* note 25, at 125–130; Takis Tridimas, *The General Principles of EU Law* 4 (2d ed. 2006).

[28] *See* Raitio, *supra* note 25, at 125–136.

[29] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5 at 551 n.49; *see also* von Arnauld, *supra* note 26 at 661–662 (2006).

[30] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 551 n. 48; *see also* Raitio, *supra* note 25, at 128.

[31] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 551 n. 52.

[32] Id. at 551 n. 50.

[33] Id. at 550 n. 47.

[34] Id. at 551 n. 55.

[35] Id. at 551 n. 53.

[36] Id. at 551 n. 56.

[37] *See* Raitio, *supra* note 25, at 127.

appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[38] It means that: (1) laws and decisions must be made public; (2) laws and decisions must be definite and clear; (3) decisions of courts must be binding; (4) limitations on retroactivity of laws and decisions must be imposed; and (5) legitimate expectations must be protected.[39] Elsewhere I have shown at length how legal certainty is indeed heightened in one EU country, Germany.[40]

4.3 "We Are all Realists Now" is the American Credo

While jurists elsewhere in the world talk of legal certainty, in America they do not.[41] While once American legal academics spoke of legal certainty, today they speak of *legal indeterminacy*.[42] They reject legal certainty because they know better, or so they think.[43] Their credo is, "we are all realists now."[44]

The "realists" were a loose group of mostly academic jurists in the United States in the 1920s and 1930s who critiqued what they saw as the prevailing "formalist" American legal system.[45] They thought judges judged without an accurate understanding of the way things actually were.[46] When American jurists today say "we are all realists now," they mean that contemporary American lawyers work with "a full awareness of the limitations

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[38] Korchuganova v. Russia, No. 75039/01, Judgment, ¶ 47 (Eur. Ct. H.R. June 8, 2006), available at http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=56853&sessionId=14913646&skin=hudoc-en&attachment=true.

[39] *See* Tridimas, *supra* note 27, at 242–257; von Arnauld, *supra* note 276, Ch. 7.II (citing numerous decisions of the European Court of Justice and asserting tenets of legal certainty in European law).

[40] *See* Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 553–554.

[41] *See* id. at 601 (noting a belief that "wholesale indeterminacy is an inevitable feature of modern legal systems").

[42] Id. at 543–544.

[43] Id. at 544.

[44] Stephen A. Smith, "Taking Law Seriously", 50 *University of Toronto Law Journal* 241, 247 (2000) ("The slogan 'we are all realists now' is so well-accepted in North America—in particular in the United States—that an unstated working assumption of most legal academics is that judicial explanations of a judgment tell us little if anything about why a case was decided as it was.").

[45] Karl N. Llewellyn, "Some Realism About Realism—Responding to Dean Pound", 44 *Harvard Law Review* 1222, 1223–1235 (1931).

[46] *See* id. at 1236–1237.

and flaws in the law and the complexity and openness of judicial decision making."[47]

Sophisticated American jurists today no longer believe in legal certainty as an attainable or even desirable goal.[48] According to Professors Jules Coleman and Brian Leiter, "only ordinary citizens, some jurisprudes, and first year law students have a working conception of law as determinate."[49] Many American jurists regard legal certainty as a chimera, an infantile longing, a childhood belief that one gets over, just as one gets over belief in Santa Claus or the Wizard of Oz.[50] In their assessment, they hearken back to the opinion of Judge Jerome Frank, the noted realist, who in his 1930 book *Law and the Modern Mind* challenged the idea that legal decisions are always certain.[51] Frank deprecated as a childish myth the idea that law could ever be certain.[52] His criticism was effective; by the 1960s the term "legal certainty" had fallen out of use.[53]

Ironically, most legal realists did not share Frank's extreme views of legal certainty.[54] They did not argue that judicial decisions are *always* uncertain.[55] Most did not even argue that judicial decisions are *usually* uncertain.[56] Karl Llewellyn, perhaps the best known of the legal realists, agreed that law is *not always* certain, but did not agree that law is

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[47] Smith, *supra* note 44, at 247; Brian Z. Tamanaha, "The realism of the 'formalist' age", *St. John's University School of Law Legal Studies Research Paper Series* 1, 8 (2007), available at http://ssrn.com/abstract=985083.

[48] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 543–544.

[49] Jules L. Coleman & Brian Leiter, "Determinacy, Objectivity, and Authority", 142 *University of Pennsylvania Law Review* 549, 579 n. 54 (1993). Much of the populace at large, however, clings to the idea of legal certainty. Vivian Grosswald Curran, "Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union", 7 *Columbia Journal of European Law* 63, 82 (2001). American law professors report that their first year law students must "un-learn" the idea that rules decide cases. Id.

[50] E.g., Craig M. Bradley, "The Uncertainty Principle in the Supreme Court", *Duke Law Journal* 1, 63 (1986).

[51] Julius Paul, "Jerome Frank's Attack on the 'Myth' of Legal Certainty", 36 *Nebraska Law Review*. 547, 547–549 (1957); *see* Jerome Frank, *Law and the Modern Mind* 244 (1930) (asserting that legal certainty does not exist).

[52] Id. at 547; *see also* Wilfrid R. Rumble, "American Legal Realism and the Reduction of Uncertainty", 13 *Journal of Public Law*. 45, 45–46 (1964); Wilfrid R. Rumble, "Rule-Skepticism and the Role of the Judge: A Study of American Legal Realism", 15 *Journal of Public Law*. 251, 258–260 (1966) [hereinafter Rumble II].

[53] *See* Rumble II, *supra* note 52, at 260.

[54] Brian Leiter, Naturalizing jurisprudence: essays on American legal realism and naturalism in legal philosophy 17 (2007).

[55] Id. at 19.

[56] Id. at 19–20.

necessarily uncertain.[57] Indeed, as the principal drafter of the Uniform Commercial Code, America's most European piece of legislation, Llewellyn invested heavily in bringing certainty to American law.[58]

Yet today, three quarters of a century later, legal certainty has disappeared as a concept of the American legal system and as a goal to strive for; legal indeterminacy has become the common "conceptual terrain."[59] The term "legal indeterminacy" in its present sense made its first appearances only in the 1960s and did not achieve currency until the 1980s, when a new group of legal academics, known as "crits" (from Critical Legal Studies), adopted it.[60] Some of them endorsed the more radical position espoused by Frank that legal decisions are always uncertain.[61]

Legal indeterminacy means that law does not always determine the answer to a legal question.[62] According to the strongest version of the "indeterminacy thesis," known as "radical indeterminacy," law is always indefinite and never certain, any decision is legally justifiable in any case, and law is nothing more than politics by another name.[63] Scholars quickly dispatched this point.[64]

While few American jurists accept a strong version of indeterminacy, most academics, and perhaps most lawyers, believe in a weaker version sometimes termed "underdeterminacy."[65] Underdeterminacy means that

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[57] Karl Llewellyn, "On Reading and Using the Newer Jurisprudence", 40 *Columbia Law Review* 581, 599 (1940) ("It does not show 'uncertainty' in the law . . . . What it shows is lack of 100 percent certainty, and that is all it shows.").

[58] *See* Richard E. Coulson, "Private Law Codes and the Uniform Commercial Code—Comments on History", 27 *Oklahoma City University Law Review*. 615, 627 (identifying Professor Llewellyn as the chief reporter of the Uniform Commercial Code).

[59] *Leiter*, *supra* note 54, at 9.

[60] John Hasnas, "Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument", 45 *Duke Law Journal* 84, 85 (1995).

[61] *Leiter*, *supra* note 54, at 15, 17 (speaking of "Frankification" of realism).

[62] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 543.

[63] Id.

[64] *See* Ken Kress, "Legal Indeterminacy", 77 *California Law Review* 283, 283 (1989); Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", 54 *University of Chicago Law Review* 462, 462 (1987) [hereinafter *Indeterminacy Crisis*]; Lawrence B. Solum, "Indeterminacy", *A Companion to Philosophy of Law and Legal Theory* 488 (Dennis Patterson ed., 1996) (summarizing and challenging the "radical indeterminacy" argument).

[65] *See*, e.g., Indeterminacy crisis, *supra* note 64; Lee J. Strang, "An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good", 36 *New Mexico Law Review* 419 (2006); Lawrence B. Solum, *Legal Theory Lexicon 036: Indeterminacy*, http://lsolum.typepad.com/legal_theory_lexicon/2004/05/legal_theory_le_2.html (last visited Oct. 26, 2008).

while the law constrains judicial decision, it does not uniquely determine it.[66]

This does not seem to be a particular advance on what Llewellyn and other Americans—including this Author relying on Llewellyn—said decades ago.[67] To jurists schooled in civil law methods, it is quite unremarkable. Karl Engisch, in his classic work on legal method, wrote long ago that binding to a statute "will always be a question of more or less."[68]

Legal certainty and legal indeterminacy are not complements.[69] Legal indeterminacy as a legal proposition has narrower application than does legal certainty.[70] As far as individuals are concerned, legal certainty serves two distinct functions: it guides them in complying with the law, and it protects them against arbitrary government action by controlling the use of the power to make and apply law.[71] American legal indeterminacy is concerned principally only with the latter;[72] it is interested in the former only incidentally in that it is concerned with predicting appellate decisions.[73]

Legal indeterminacy is principally a theory of appellate judicial decision making.[74] It assumes the perspective of appellate judges.[75] By focusing on

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[66] According to Lawrence B. Solum:

> [1] The law is determinate with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member. [2] The law is underdeterminate with respect to a given case if and only if the set of legally acceptable outcomes is a nonidentical subset of the set of all possible results. [3] The law is indeterminate with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results.

Solum, *supra* note 65.

[67] Llewellyn, *supra* note 57; James Maxeiner, Policy and Methods in German and American Antitrust Law: A Comparative Study 28 (1986) [hereinafter Maxeiner, Policy and Methods] (speaking of "negative" and "positive" binding).

[68] Karl Engisch, Einführung in das juristische Denken 136 (9th ed. 1997) ("Es wird sich immer nur um die Frage des mehr oder Minder der Bindung an das Gesetz handeln.") (1st ed. 1956).

[69] *See* Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 601.

[70] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 552.

[71] *See* Maxeiner, Policy and Methods, *supra* note 67, at 10–11.

[72] *See* id.

[73] *See* id.

[74] *See Leiter*, *supra* note 54, at 19–20. Leiter makes the point that the realists focused on appellate decision making. Id. Since then, many American jurists have used indeterminacy with respect to judicial decisions generally. *See* Chris Guthrie et al., "Blinking on the Bench: How Judges Decide Cases", 93 *Cornell Law Review* 1, 2 (2007). The American study of law emphasizes judicial decision making and, in particular, appellate decision making. *See* id. at 3–4.

[75] *See*, e.g., E.W. Thomas, the judicial process: realism, pragmatism, practical reasoning and principles 108-09 (2005).

whether rules require appellate judges to reach particular correct answers, the American discussion of legal indeterminacy overstates the level of uncertainty and underestimates opportunities for decreasing it.[76]

Controlling appellate decisions is only one concern of legal certainty.[77] Legal certainty is concerned more generally with controlling legal decisions of all types,[78] and more broadly still, with guiding persons subject to law.[79] Perfect precision is not essential for substantial fulfillment of the guidance function.[80] Legal certainty thus includes the perspective of law abiding subjects as well as that of law appliers.[81]

These different concerns mean that there is no inverse correlation between legal certainty and legal indeterminacy.[82] A high level of legal certainty can be consistent with a high level of legal indeterminacy.[83] For example, judicial decisions may be certain, even though they are subject to little control, if who the decision maker is, is certain and that decision maker for reasons external to legal rules decides predictably.[84] Or judicial decisions may be sufficiently certain for guidance purposes, if the grounds for their invocation or if their consequences are clearly constrained.[85]

4.4 Legal Certainty is the *Leitmotif* for Legal Methods

The importance of legal certainty transcends that of its constituent rules and principles.[86] It is, as Andreas von Arnauld has said, an "*idée-directrice*" or "*Leitgedanke*," that is, a guiding idea or leitmotif for the entire legal system.[87] The extent and the manner in which it is incorporated into positive law varies from system to system, but its realization in some form is essential to individual autonomy.[88] Its importance derives less from providing an

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[76] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 523.

[77] *See* Maxeiner, Policy and Methods, *supra* note 67, at 10–12.

[78] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 546.

[79] Id. at 11 (noting how German law distinguishes *Orientierungs* from *Realisierungssicherheit*).

[80] Id. at 11–12.

[81] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 524.

[82] *Leiter*, *supra* note 54, at 60.

[83] *See* id.

[84] Leiter speaks of decisions that may not be "rationally []determinate" but are "causally determinate." *Leiter*, *supra* note 54, at 9.

[85] *See* Maxeiner, Policy and Methods, *supra* note 67, at 26–27 (speaking of "negative binding").

[86] Von Arnauld, *supra* note 26, at 661–664.

[87] Id.

[88] Id. at 662–664, 691–692.

independent basis for reviewing legal decision (its sub-principles provide that basis) and more from being an omnipresent guiding idea protecting personal autonomy.[89] Long before individual decisions are reached, legal certainty is a consideration in *how* those decisions will be made.[90] Legal certainty is central to the creation of the legal methods by which law is made, interpreted, and applied.[91] Legal indeterminacy cannot and does not have the same guiding function that legal certainty has.[92] When indeterminacy is expected and even embraced, rules recede in importance.[93] Some American academics put in their place process.[94] Their idea is, if we are unable to guarantee a decision according to law, i.e., according to legal rules, at least we can guarantee a decision according to a lawful process.[95]

The legal indeterminacy thesis is not, however, the cause of this development. The thesis has achieved acceptance because American law is *uncertain*.[96] American legal methods function less well than do their foreign counterparts.[97]

Space does not allow more than ticking off some of the more prominent legal certainty-enhancing methods that are routine in other legal systems, but are deficient or lacking in the American. Many of these methods were once subjects of protracted and mostly unsuccessful American law reform efforts.[98]

4.4.1 Lawmaking

(1) *Legal Rules Are Syllogistic Norms; They Determine Their Consequences and Who May Invoke and Apply Them.*[99]

Legal rules guide people's actions and judges' decisions.[100] Legal norms prescribe particular outcomes when generally described states of fact are

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[89] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 523–525.

[90] *See* Maxeiner, Policy and Methods, *supra* note 67, at 11.

[91] Id. at 10–11.

[92] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 552 (explaining the differences in effect between certainty and indeterminacy).

[93] Id.

[94] Id.

[95] Id. at 525–26, 552.

[96] *See* id. at 518.

[97] *See* Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 605–606.

[98] Id. at 587.

[99] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 555, 573.

[100] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 524.

present.[101] While legal rules cannot always be precise and definite, and while they cannot always exclude judgment and discretion in their application and enforcement, they can always state who may invoke them, who may apply them, and what the consequences of application may be.[102]

(2) *Legal Rules Are Consistent and Coordinated with Other Legal Rules.*[103]

Legal rules are internally consistent.[104] They are routinely coordinated with other legal rules of the same jurisdiction and with rules of other jurisdictions.[105]

(3) Authority to Make and Apply Legal Rules Is Bestowed Guardedly.[106]

Government presents a single face to citizens on most legal questions.[107] Law abiding people need not choose which of the government's rules to comply with or which of the government's courts to petition.[108] Federal and state governments coordinate their legislation, administration, and adjudication well.[109] State governments control the limited lawmaking authority they allow local governments.[110]

(4) Legal Rules Are Impartially Prepared in a Professional Process.[111]

Formal systems for lawmaking improve legislation quality and reduce opportunities for special interest and amateur influence in legislative drafting.[112] Legislation usually originates in a government ministry having professional competence in the field.[113] It is routinely subject to intergovernmental vetting before adoption by the legislature.[114]

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[101] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 556.
[102] Id. at 559.
[103] Id.
[104] Id.
[105] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, 599.
[106] Id. at 602.
[107] Id.; Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 522.
[108] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 559–564.
[109] Id. at 574.
[110] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 599.
[111] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 532; OECD, *supra* note 16, at 2.
[112] Id.
[113] Id.
[114] Id.

4.4.2 Law Finding and Judicial Lawmaking

(5) Judges Know the Legal Rules.[115]

Judges know the law; the maxim *jura novit curia* applies.[116] Courts ordinarily spend little time determining which rules apply.[117]

(6) Judges Do Not See Their Job as Routinely Making New Legal Rules.[118]

Even in modern legal systems, not all law is statutory;[119] judge made law is necessary.[120] But in most modern legal systems, judge made law is exceptional; judges do not see making law as a routine part, let alone as the essence, of their jobs.[121]

4.4.3 Law Applying

(7) Professional Judges Apply Legal Rules to Facts.[122]

Judges are professionals.[123] They are trained to be judges.[124]

(8) *Applying Legal Rules to Facts Is the Principal Goal of Legal Procedure;*[125] *It Requires Written Justification.*[126]

There are routine methods for applying rules to facts that make it possible for others, namely participants and reviewing courts, to reproduce the

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[115] Id. at 536 (describing the way in which judges find the appropriate rules).

[116] Except in England. *See* F.A. Mann, "Fusion of the Legal Professions?" 93 *Law Quarterly Review*. 367, 369 (1977).

[117] *See* id. at 369–370 (arguing that in the English and Irish systems the law has little to do with legal decision making).

[118] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 534–335; Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 562.

[119] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 534.

[120] Id. at 535.

[121] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 534–335.

[122] James R. Maxeiner, Guiding Litigation: Applying Law to Facts in Germany (April 15, 2008). Common Good Forum, The Boundaries of Litigation: A Forum Addressing the Alignment of Civil Justice with Social Goals, Washington DC, April 15, 2008. Available at SSRN: http://ssrn.com/abstract=1230453). Maxeiner, Policy and Methods, *supra* note 67, at 83.

[123] Ric Simmons, "Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?" 82 *Boston, University Law Review* 1, 61 (2002).

[124] Id.

[125] Maxeiner, European Alternative to American Legal Indeterminacy, *supra* note 5, at 558.

[126] Maxeiner, Policy and Methods, *supra* note 67, at 86.

process of decision.[127] Participants are entitled to justified decisions that rationally relate legal decisions to substantive law.[128]

(9) Courts Take Evidence Only on Material, Disputed Facts.[129]

Rules by their nature single out certain facts as determinative (material elements) and exclude other facts from consideration.[130] Courts ordinarily take evidence only on factual questions that are both material and disputed.[131]

What most American academics overlook is that American jurists, from the adoption of the Constitution through at least the era of the realists in the 1920s, sought—largely unsuccessfully—to abandon old and uncertain common law methods and substitute more modern certainty enhancing methods along the lines just mentioned.[132]

The legal indeterminacy thesis—accepting the "we are all realists" credo—validates a collective abandonment of legal certainty as a legitimate goal of the legal system.

Ask an American legal academic what happened to legal certainty, and he or she is likely to answer, "the law has always been uncertain and it always will be uncertain."[133] Protest that this is not so on the Continent and the American academic likely will suggest—politely—that Europeans are deluding themselves.[134] Persist, and claim that there is greater legal certainty in Europe, and the American academic will express skepticism that this is so and will demand empirical proof.[135] Provide the proof and the American academic will insist that there are higher values than

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[127] Id.; Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 604.

[128] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 604; OECD, *supra* note 16, at 2.

[129] Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 604.

[130] Id.

[131] Id.

[132] For a refreshing exception, *see* Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (April 2008). St. John's Legal Studies Research Paper No. 08-0130. Available at SSRN: http://ssrn.com/abstract=1123498. *See generally* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17 (tracing the development of legal indeterminacy in American law).

[133] *See* Thomas, *supra* note 76, at 115–116. These words are actually those of a New Zealand judge, but many American legal academics might have uttered them. Id.

[134] *See* id. at 116.

[135] E.g., Robert Allen et al., "The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship", 82 *Northwestern University Law Review*. 705, 708, 761–762 (1988) (challenging the superiority of the German litigation system and calling for an empirical analysis of the respective approaches to civil procedure, experts, and qualification of judges). *But see* James R. Maxeiner, "Imagining Judges that Apply Law: How They Might Do It," 114 Penn State Law Review No. 2 (2009) (demonstrating advantages of the German system in applying law).

legal certainty and that the American legal system prefers those values.[136] Finally, question whether the American system really accomplishes those aims, and the American academic will say that it does not really matter, since the United States probably could not ever adopt legal methods that produce legal certainty.[137]

Widespread acceptance of the legal indeterminacy thesis—even in a less than radical form—has called into question in the United States the utility of rules as parts of solutions to social problems.[138] It has led to resignation.[139] According to Professor Pierre Schlag and his colleagues, "a great many leading American legal thinkers have now mostly abandoned 'doing law.'"[140] Unable to overcome a problem, they want to move on to things that they can solve.[141] Professor Michael Dorf says that there are more important things to worry about than justifying judicial lawmaking as law application.[142] Contemporary theory has reached, he says, a "dead end."[143]

4.5 Conclusion: Dealing with Each Other

The insularity of the United States would not matter much if the United States were a minor power off on its own on a small island.[144] But it is not.[145] It projects its power—and its concepts—around the globe.[146]

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[136] Cf. Samuel R. Gross, "The American Advantage: The Value of Inefficient Litigation", 85 *Michigan Law Review*. 734, 742–747 (1988) (standing for the proposition that the American legal system may sacrifice efficiency in order to attain other goals such as superior accuracy, promoting citizens' confidence, and respect for individual autonomy); *see also* Howard Bernstein, "Whose Advantage After All?", 21 *UC Davis Law Review*. 587, 599 (1988). The opponents of codification made similar arguments. *See* James Coolidge Carter, *The Proposed Codification of Our Common Law* (1884), reprinted in *The Life of the Law, Readings on the Growth of Legal Institutions* 115, 118 (John Honnold ed., 1964) (explaining that unwritten law, best described as law that embraces the rights, obligations, and duties of both person and property, cannot be sufficiently codified in a scientific system of jurisprudence).

[137] Cf. John Reitz, "Why We Probably Cannot Adopt the German Advantage in Civil Procedure", 75 *Iowa Law Review* 987, 988 (1990) (discussing the impracticability of modeling the American legal system after the German system).

[138] *See* Maxeiner, Legal Indeterminacy Made in America, *supra* note 17, at 519–520.

[139] Id.

[140] Paul E. Campos et al., *Against the Law* 1 (1996).

[141] Id.

[142] Michael Dorf, "Legal Indeterminacy and Institutional Design", 78 *New York Univrsity Law Review* 875, 878–879 (2003).

[143] Id. at 876.

[144] Adam Liptak, U.S. Court, a longtime beacon, is now guiding fewer nations, *New York Times*, Sept. 18, 2008, at A1.

[145] Id.

[146] Id.

The United States is world leader in promoting rule of law programs.[147] So if its jurists have a peculiar view of the rule of law, they may—if only inadvertently—impose their view on others.[148] In their dealings with others, and in the dealings of others with them, it behooves all to have an understanding of each others' underlying assumptions. How are we to accomplish that?

My advice to non-American jurists: do not argue with American jurists about legal certainty; do not discuss legal indeterminacy. Do not even talk about the formal rule of law. Redirect the conversation. Instead of discussing legal certainty, talk about specifics. No American jurist will debate whether laws and decisions should be made public. Most will welcome discussing how judicial decisions can be made more definite and binding. Raise questions about how courts should limit retroactivity of laws and how they should protect legitimate expectations. From there you can go on to talk about how to draft better laws that can be more easily applied.

My advice to Americans: do talk about legal certainty. For a moment stop conversing about controlling judicial decisions. Take the perspective of ordinary people seeking to abide by law. Put aside, for one moment, whether you can predict judges' decisions. Remember that the vast majority of legal questions never come close to a judge's bench. Ask, as an eminent American jurist once did, does the law make "plain to the apprehension of the people what conduct on their part is forbidden"?[149] Look to what other legal systems have to offer. The American system can learn from them.[150]

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[147] American programs include: American Bar Association Rule of Law Initiative, http://www.abanet.org/rol/; Carnegie Endowment for International Peace, Democracy & Rule of Law http://www.carnegieendowment.org/programs/global/index.cfm?fa=proj&id=101&proj=zdrl and United States Institute of Peace, Rule of Law Program, http://www.usip.org/ruleoflaw/index.html

[148] Cf. Casper, *supra* note 16.

[149] Thomas M. Cooley, "The Uncertainty of the Law", *22 American Law Review* 347, 355 (1888).

[150] *See* James R. Maxeiner, "Learning from Others: Sustaining the Internationalization and Globalization of U.S. Law School Curriculums", 32 *Fordham Journal of International Law* 501 (2008); Ernst C. Stiefel and James R. Maxeiner, "Civil Justice Reform in the United States: Opportunity for Learning from Civilized European Procedure Instead of Continued Isolation?" 42 *American Law Review* 167 (1994); James R. Maxeiner, 1992: High time for american lawyers to learn from Europe, or Roscoe Pound's 1906 address revisited, *Fordham Journal of International Law* 1, 1991.

Chapter 5
Is Goal-Based Regulation Consistent with the Rule of Law?

S.J.A. ter Borg and W.S.R. Stoter

5.1 Introduction

Legislative policy has been a subject of debate for years in the Netherlands, both with regard to the quality of legislation and to the structure of the legislative process. In the light of changing ideas about the government's role and social responsibility, alternative approaches to legislation have been developed over the recent years. One such innovation involves the use of goal-based regulation. Goal-based regulation has been promoted as providing freedom and responsibility for individuals and businesses to decide how to meet regulatory requirements, giving them the opportunity to bring their specialised knowledge to bear on problems that they understand better than anyone else.

In the government's view, the advantage of goal-based rules is that they make it possible to respond better and more rapidly to developing social changes, encouraging flexibility in the law and providing a chance for customised regulation.[1] Some, however, have suggested that the benefits of imposing target requirements and similar goal-based rules is outweighed by the damage they do to fundamental principles of the rule of law.[2]

This chapter will consider whether goal-based regulation promotes or in fact undermines the three rule of law principles of legal certainty, equality

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[1] *See*, *inter alia*: Dutch Ministry of Justice (2004).

[2] Target requirements are not only frequently used at the national level, but also at the international level. The directives of the European Union, for instance, are increasingly being based on this concept of regulation. For the European Commission's vision on forms of European regulation, *see* the document "Better Regulation—Simply Explained" (2006).

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_5,

before the law and the democratically legitimised balancing of interests. These questions will be analysed against the background of the continental interpretation of the rule of law.

The term "goal-based regulation" will be explained in more detail first, with special attention given to the various characteristics of goal-based regulation in contrast with the classical form of regulation. The supposed advantages of goal-based regulation will be evaluated, and also some of the arguments against this type of regulation.

Different possible interpretations of the rule of law and the legislative function of the rule of law in various legal systems will then be set out, in order to clarify how the term will be used here.

The second part of this chapter will address the relationship between goal-based regulation and rule of law principles. The discussion will end by setting out possible solutions to the question how rule of law values can be reconciled with goal-based legislation.

5.2 Classical Legislation and Its Disadvantages

Classical legislation is characterised by the description of specific conduct which is desired or not.[3] There are a number of disadvantages associated with this type of regulation. Problems arise when legislation is too detailed and specific.[4] But there are also difficulties that grow out of making legislation too vague, making almost every possible situation subject to the rule. Schauer refers to this as the "over-inclusiveness" or "under-inclusiveness" of rules.[5] Legislatures never really know whether compliance with the rule by those being regulated will actually lead to realisation of the legislation's underlying goals. This uncertainty becomes more of an issue as the area encompassing the subject to be regulated becomes more complex. The classical form of regulation may also be inadequate in that it does not provide enough latitude for technological developments, and the group covered by the standard does not necessarily get clear direction about the nature of its own responsibility, or an opportunity to contribute to the solution of the whatever problem the legislation seeks to cure.

These disadvantages relating to the application of classical regulation have resulted in several alternative legislative approaches, including the use of target requirements.

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[3] Cf. Van de Bunt and Huisman (1999, p. 29).

[4] *See also*: Duties of Care in Environmental Laws [*Zorgplichten in milieuwetgeving*] 2006, p. 10.

[5] Schauer (1991, pp. 31–34).

5.3 Goal-Based Regulation

Goal-based regulation may be distinguished from classical regulation in that it describes the target that must be reached. The means by which the group covered by the standard must achieve this target is not stated in the legislation.

The literature provides several definitions of goal-based regulation, which are all characterised by the fact that such regulation describes the target to be reached.[6] We will assume the following definition: *goal-based regulation is regulation that sets a specific target for those subject to the regulation, while leaving them free to choose the means by which they will achieve this target*.

The intended freedom *and* responsibility of the covered group must be consistent, though, with the group having the genuine ability to meet the target. Thus, it is extremely important that the legislature take into account the characteristics of the relevant sector when including target requirements in laws. This means, for example, considering the knowledge, expertise, financial resources and creativity which are present and available in the sector or the regulated group. Specifically, giving freedom and responsibility to a sector or to an individual that cannot handle it undermines the juridical quality of the legislation and its legitimacy.

Some of the disadvantages of classical legislation are not apparent when target requirements are used. Target requirements are not detailed, and do not include a specific prescription of the measures to be taken, so they are more flexible with respect to (for example) technological developments.[7] Because the target to be achieved has been prescribed, there is less danger that the scope of the rule will be too general. The chance that the goal of the legislation will actually be achieved also increases, because the goal is described in the rule itself, and there is no longer a risk that the relationship between the target and the measure will be missing, thereby causing the goal to be frustrated. Moreover, the effectiveness of the rule will be increased, as the covered group will be held accountable for achieving the target stated in the rule. As a result, the group will be more involved in realising the goal of the legislation, which will strengthen the rule's effectiveness.[8]

Other risks, however, may arise with the application of target requirements. The open nature of the standard may be inconsistent with the

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[6] *See*, for example: *Parliamentary Papers II* [*Kamerstukken II*] 2003/04, 29 279, No. 9, p. 19, and *Parliamentary Papers II* 2003/04, 29 279, No. 14, p. 6.

[7] *Parliamentary Papers II* 2003/04, 29 279, No. 9, p. 20.

[8] *Cf*. Duty of Care Provisions in Primary Education [*Zorgplichtbepalingen in het primair* onderwijs] (2005, p. 16).

principles of equality before the law and legal certainty, and may also lead to problems concerning enforcement of the standard. These risks need to be weighed by the legislature before a choice is made to apply target requirements in particular circumstances. Attention should also be paid to how to mitigate possible disadvantages advising from the choice to apply target requirements to a particular area or subject matter.

5.4 Rule of Law and the Function of Legislation

The rule of law[9] implies a number of requirements with respect to the organisation of the legal system. Besides the more general requirements of a democratically legitimised government, the principles of equality and legal certainty, and the existence of and exercise by individuals of basic rights, several more specific principles come into play here. If the government adopts and applies legal rules, the procedure by which such adoption and application occurs has to meet several principles and requirements, including the requirements of transparency, fairness and effectiveness. In the context of this article, it is important to note these requirements entailed by the rule of law, because the use of goal-based regulation by the legislature may cause tension with the rule of law.

The rule of law concept differs in its practical effect and application depending on the legal system within which it is applied. This also holds true for the function of legislation in these different systems. A distinction may be made here between the continental and common law systems. A central aspect of the continental system is that the law is based in principle on written texts and general rules adopted by a democratically legitimised legislature. The common law system is characterised by the more prominent role played by judges: the courts determine what the law is, and written texts play a less significant role.

The tension mentioned earlier between the application of target requirements and the requirements of the rule of law seem initially to arise primarily with legislation in continental systems, in which the law is in principle based on codified rules. Yet target requirements are applied in common law systems as well. This is the case, for example, with "regulatory agencies," which set standards for certain occupational groups or sectors. For target requirements to have optimal effect in relation to the conduct of a covered group or a sector, it is also important for these agencies to design the standards they set as well as possible, and to ensure that they satisfy the requirements of legal certainty and equality before the law.

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[9] For a comprehensive treatment of the history and development of the rule of law, *see*: B.Z. Tamanaha (2004).

These possible conflicts raise the question whether and to what extent the application of target requirements is compatible with the requirements ensuing from the rule of law, especially under the continental approach to law and government.

5.5 Opportunities and Threats

In recent years, Dutch government policy has been characterised by expediency, flexibility and efficiency.[10] It is in the application of such pragmatic, flexible principles to the legislative process that tension can arise with rule of law principles.

The consequences and risks of using target requirements with regard to such rule of law principles as legal certainty, equality before law and, finally, the democratically legitimised balancing of interests will successively be examined below. The point of departure will be the continental interpretation of the rule of law.

5.5.1 Legal Certainty

The government has to live up to high expectations, with an emphasis particularly being placed on effectiveness and efficiency. The question therefore arises as to how the expectations concerning the government relate to the robust and sometimes static requirements of the rule of law.[11]

The principle of legality pertains, on the one hand, to the idea that government conduct must be based on the law and, on the other hand, to the fact that the government must also set clear, substantive standards to promote optimal legal certainty.[12] Legislation is therefore often viewed as the most important safeguard of legal certainty.[13] Given the current social situation, it is, however, impossible and also undesirable for the law to provide legal certainty through over-detailed standards.[14] It should be noted, too, that legal certainty is not served by frequent changes in the law to meet rapidly occurring social developments and other fluctuating conditions in our society.[15]

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[10] Netherlands Scientific Council for Government Policy [*WRR*] (2002, p. 32).

[11] Netherlands Scientific Council for Government Policy (2002, p. 32); Van Gestel (2004, p. 1785).

[12] In this regard, *see*, *inter alia*: Scheltema (1989).

[13] *See* in this regard, *inter alia*: Oldenziel (1998).

[14] *See*, for example: Netherlands Scientific Council for Government Policy (2002).

[15] Scheltema (1989).

Adhering to the more classical interpretation of the legal certainty principle limits a proper division of freedoms and responsibilities between the government and society. Too rigid an application of the rule of law ideal will also interfere with the expediency and efficiency of government policy.[16]

Target requirements reduce legal certainty for the group covered by the standard in two ways: first, through the openness of the standard and second through the means of its enforcement.[17]

The open nature of the standard[18] in a target requirement does not offer the covered group any or enough legal certainty. This is caused by the fact that it is only the target that is described, not the actions or measures to be taken to reach this target.

Not every sector or covered group has at its disposal the necessary and/or sufficient knowledge, resources and expertise to develop means or measures that will achieve the stated target. The use of a target requirement without indicating clearly defined limit criteria or describing the means of achieving the target may lead to great uncertainty. To protect legal certainty, the legislature must therefore consider the specific characteristics of the relevant sector and to create a "safety net" for the covered group. Further, a covered group which is able to handle its freedom and responsibility and also has sufficient means at its disposal should be given the freedom to satisfy the target in a manner of its own choice.

When target requirements are applied, there will also be less legal certainty with respect to supervision and enforcement. In particular, target requirements deprive the supervisory authority of specific, reviewable standards to use in its work. There is a risk that the lack of standards in the legislation will be compensated for by the regulator's interpretation of how the target should be met, thus creating its own standard. One possible consequence is that individuals or businesses will be confronted *ex post facto* with these standards of the supervisory authority, which may reflect internal guidelines on how its officials should exercise their supervisory function. This further specification and this manner of supervision will, on the one hand, result in uncertainty for the covered group and, on the other

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[16] In this regard, *see* Scheltema 2(003, p. 35), and Van Gestel (2004, p. 1785); Scheltema argues that legal certainty cannot mean that businesses should be inclined to desire a certain amount of certainty for a long period, where this would cause the division of responsibility between the government and business world to be less than it could be. In addition, Van Gestel asserts that the rule of law is more than just binding the government to the law and that expediency and effective protection also play a role in this respect. Van Gestel further asserts that, when regulations are complex and ambitious, but not enforceable and practicable, the purpose of the rule of law is overlooked.

[17] The application of target requirements not only pertains to setting standards, but also supervision and enforcement; *see* in this regard Westerman (2006).

[18] The lack of a substantive standard in the law is one of the problems which has been observed regarding legislation in today's society. *See* in this regard, *inter alia*: Stout (1994).

hand, undermine the purpose and desired effect of goal-based regulation. For goal-based regulation to be effective, the covered group must enjoy both freedom and responsibility, particularly as regards the choice of the means through which to achieve regulatory compliance.

5.5.2 Democratically Legitimised Balancing of Interests

In contrast to the classical form of regulation, in which a democratically legitimised legislature balances the interests involved in a rule, target regulations shift this process to the group covered by the standard, that is, to industry. This raises the question is whether industry is equipped to carry out such a balancing exercise, as well as whether this development fits within the "rule of law" framework.

Whereas the central legislative body is democratically legitimised and, in formulating classical regulations, conducts a balancing of interests from a general perspective and with a view to the public interest,[19] there is no equivalent exercise when the crystallisation or further specification of target requirements is left in practice to the covered group itself. At the industry level, there is no guarantee of public debate about the objectives being pursued through the regulations to be drafted.[20] Actors at these lower levels may take their own interests into account at the expense of the general interests which need to be balanced. Consequently, the rules to be formulated will not as fully reflect a compromise between conflicting general interests and goals.[21] Rules drawn up in this way may be contradictory and inconsistent with each other, possibly resulting in a weakening of the law's coordinating function.[22]

5.5.3 Equality Before the Law

Target requirements provide latitude for interpretation not only for the group covered by the standard, but also for those parties responsible for supervision and enforcement, as well as other actors, such as licensing authorities. They must assess whether the target will indeed be satisfied with the means in question. Because this ultimately boils down to a subjective assessment, this entails a risk that different assessments might be made in like cases, depending on who the assessor is.

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[19] Stoter (2000).

[20] Westerman (2006, p. 137).

[21] Westerman (2006, p. 136).

[22] Westerman (2006, p. 137).

5.6 Possible Solutions

5.6.1 Legal Certainty

There are several ways to compensate for the lack of legal certainty.

The lack of legal certainty regarding the open standard in relation to safeguarding sufficient freedom and responsibility should be compensated for *outside* the standard, in order to promote freedom of choice for individuals or businesses. Further specifying or compensating for the standard *in* the law is not in accordance with the nature of a target requirement. On the contrary, this might undermine the envisaged freedom and responsibility for the covered group.

Compensation outside the standard can be accomplished by statutory delegation which enables the legislature (the government) to formulate optional means of achieving regulatory compliance in lower-level regulations. In this way, the covered group is allowed to decide how to achieve the required target with means or measures to be selected by itself. This includes the option of applying one of the prescribed means of satisfying the target stated in the standard. These statutory requirements pertaining to conduct or other matters must be optional and non-mandatory in nature, given the freedom, responsibility *and* possibilities of the covered group. This group is then free to choose whether to utilise *either* one of the prescribed optional requirements (pertaining to conduct or other matters) *or* another means or measure. In order to encourage flexibility and technological development, it is preferable to include these requirements at a lower level of regulation, in the light of the fact that lower-level regulations are effectuated through a simpler and quicker procedure, thus coping more effectively with rapid technical developments.

The Decree on General Rules for Facilities for Environmental Control (Activities Decree)[23] is one example of such optional conduct rules. The Activities Decree includes target requirements which give the owner of the facility optimal freedom of choice with respect to the measures to be utilised in regard to its operations. A disadvantage of these target requirements is that it is not always clear to the owner of a facility from the Activities Decree which measures should be taken to satisfy the stated target.[24] For this reason, recognised measures have been included at the ministerial regulation level, with these measures being linked to a qualified target requirement. An example of a recognised measure is Article 4.58 of the Activities Decree.[25]

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[23] *Bulletin of Acts and Decrees* (2007), 415.

[24] Explanatory Memorandum to the Decree on General Activities for Facilities for Environmental Control, p. 12.

[25] This example is derived from the explanation to the Regulation on General Rules for Facilities for Environmental Control, p. 37.

Article 4.58 (of the Regulation on General Rules for Facilities for Environmental Control)

1. Articles 4.44(1) and 4.45 of the Decree shall in any event be satisfied if:
   a. the extracted chemical emissions released when metals are soldered are transported through a filtering separator which is suitable for compliance with Articles 4.44(1) and 4.45 of the Decree; and
   b. this filtering separator is maintained in good condition, is checked periodically, and is cleaned and replaced as often as necessary for proper functioning.

In this way, the owner of a facility can comply with the requirement if it employs the recognised measures properly. Supervision and monitoring is limited in this instance to checking whether the selected recognised measure has been implemented properly. In order to encourage flexibility in its business operations, a business may, without the competent authority's permission, also opt for another measure (which has not been included as a recognised measure) to carry out the target requirement. In this case, the owner of a facility is responsible for ensuring that it satisfies the stated target.

With respect to ambiguity arising for both the supervising party and the party being supervised concerning compliance with the standard, it is very important that, when including target requirements, the legislature take into account the supervisory and monitoring structure in place to safeguard legal certainty. On the one hand, it is necessary that the covered group's freedom to choose means or measures be maintained to the greatest possible extent. On the other hand, it is necessary that it be clear to the covered group in which manner the supervision and monitoring will specifically occur.

If target requirements are applied, government supervision could initially be structured in such a way that the supervisory authority will only supervise the system as this has been organised by the sector itself.[26] This can be accomplished by allowing the sector itself to draw up rules to promote quality, for example, through a quality mark. The sector will therefore be the authority supervising and monitoring the system. This will ensure that the useful characteristics of the target requirements can continue to achieve their full potential. The sector's specific characteristics, such as the number of parties concerned, should, also, be taken into consideration. Devolving such duties to industry is possible only if the sector is able to handle this responsibility.[27]

If, given the characteristics of the sector, the sector itself cannot, with or without the assistance of the supervisory authority, give shape to this

[26] *See* in this regard Oude Vrielink-Van Heffen and Dorbeck-Jung 2006b, pp. 63 and 67.
[27] *See also* Van der Heijden (2005).

freedom and responsibility, legal certainty with respect to supervision and monitoring should be safeguarded by the legislature.

The legislature can safeguard certainty by imposing an obligation on the supervisory authority to draw up policy rules on the details of the supervision. The sector may be involved in one way or another when these policy rules are drawn up, so that, in this way, it can have its own input regarding the influence and responsibility of the sector with respect to the particulars of the standard. One advantage of consulting the sector is that knowledge and expertise can be exchanged between the group covered by the standard and the supervisory authority. Another advantage is that industries are more likely to support the results after consultation. The policy rules should be announced to everyone in a clear manner, in order to advance legal certainty.

In short, legal certainty can be safeguarded without impairing freedom and responsibility through compensatory measures which safeguard legal certainty, by both supplementing the formulation of the standard and structuring the supervision.

5.6.2 Balancing of Interests and Equality Before the Law

One way of eliminating the danger created by goal-based regulation for the fair balancing of interests and legal certainty might be to require the actors fleshing out the target requirements in practice to render an account to the legislature. This could occur periodically, for example, in the form of an annual report or other form of accountability. If the legislature finds that the target requirements are being shaped incorrectly, it would then have the option of providing further guidance. The legislature will in any case retain its ultimate power to replace the target requirements with a classical, detailed rule.

The risk that the application of target requirements will lead to conduct which violates the principle of equality is to be recognised and overcome as much as possible. For example, this can be achieved by making the targets as specific and unequivocal as possible by stating additional policy or other rules governing the manner in which enforcement will occur.[28] Providing good training and instruction to the enforcing and licensing authorities will also be very important.

The legislature must also make sure that any arrangement of target requirements will be so structured that small businesses or individual interested parties are able to satisfy the target requirement with reasonable

[28] This carries the risk, however, that the instruction will degenerate into rigid standards, so that the instruction will take the form of compulsory requirements specifying the means. This is in itself a problem as it distorts the legal system if the enforcement policy for a regulation effectively and indirectly contains the substantive legal requirement.

effort. Recognised measures, for example, may be formulated, as has been done in the Activities Decree. Small businesses will find it harder to adapt to new rules than larger and more established enterprises.

5.7 Conclusion

The application of target requirements gives the covered group the opportunity for greater freedom and responsibility in complying with regulations. The provision of this freedom and responsibility must, however, be consistent with the practical constraints within the relevant sector. Moreover, in including target requirements in acts and regulations, the legislature must, in the preparatory process for legislation, consider the specific characteristics of the relevant sector, the consequences for supervision and monitoring, and the safeguarding of legal certainty and equality before the law, in order to develop optimal targets.

Legal certainty can be achieved without impairing freedom and responsibility by implementing compensatory measures, which safeguard legal certainty and equality before the law, both by supplementing the formulation of the standard and by structuring the supervision.

In deciding whether to draw up target requirements or not, the legislature needs to balance the various public interests at stake against each other. If it chooses to include target requirements, the legislature must give instructions to the group covered by the standard or impose an obligation to report periodically on how public interests are being affected by the standard imposed.

Ultimately, it is important for the legislature to be aware that it maintains the final responsibility for the regulation, and the legislature should retain power to intervene to ensure that any target-based system maintains in practice a reasonable balance between freedom and flexibility on the one hand, and on the other, the democratic, and legally secure balancing of interests of all the relevant sectors in society.

List of Publications

H.G. van de Bunt and W. Huisman, “It Can Be Done Differently, Too. Considerations in Choosing between Classical or Alternative Regulation in the Environmental Area [Het kan ook anders. Overwegingen bij de keuze tussen klassiek of alternatief reguleren op milieuterrein]”, in: P.C. Gilhuis et al., *The Effectiveness of Classical and Alternative Regulation Instruments in Environmental Law Enforcement* [*De effectiviteit van klassieke en alternatieve reguleringsinstrumenten in milieurechtshandhaving*] (The Hague: Research and Documentation Centre [WODC] 1999).

R.A.J. van Gestel, "Who's Against a Workable Legal System [Wie is er tegen de bruikbare rechtsorde]?" *Netherlands Law Journal [NJB]*, 1784 (2004)et seq.

P.F. van der Heijden, "Workable Legal System or 'Someone Else's Problem" [*Bruikbare rechtsorde, of 'over de schutting'*]? 40 *Netherlands Law Journal*, 2083 (2005).

H.A. Oldenziel, *Legislation and Legal Certainty* [*Wetgeving en rechtszekerheid*] (dissertation Groningen), (Deventer: Kluwer, 1998).

M.J. Oude Vrielink-Van Heffen and B.R. Dorbeck Jung, "Open Standards and Regulatory Burden: A Workable Legislative Concept [*Open normen en regeldruk: een bruikbaar wetgevingsconcept*]?', in: B.R. Dorbeck-Jung *et al.* (eds), *Moving Towards Workable Regulation* [*Op weg naar bruikbare regulering*], (Law in Real Life [*Recht der werkelijkheid*] 2006-3, theme issue), (The Hague: Reed Business Information (Elsevier Legal [*Elsevier Juridisch*])), pp. 53–71.

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W.S.R. Stoter, *Balancing of Interests by the Legislature: A Legal Examination of the Criteria for Balancing Interests in Formal Legislation in relation to the Balancing of Interests at the Administrative Level* [*Belangenafweging door de wetgever: een juridische onderzoek naar criteria voor de belangenafweging van de formele wetgever in relatie tot de belangenafweging op bestuursniveau*], (The Hague: Boom Legal Publishers [*Boom Juridische uitgevers*] 2000).

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Parliamentary Papers II 2003/04, 29 279, No. 14	(Latitude for Duties of Care)
Parliamentary Papers II 2005/06, 29 383, No. 1	(Duties of Care in Environmental Laws)

Chapter 6
Reflections on Shakespeare and the Rule of Law

Robert W. Peterson

William Shakespeare's plays often consider fundamental questions of law and justice, and in several contexts Shakespeare floats elegant paeans to the rule of law. This is all the more striking because Shakespeare wrote when princes, such as Queen Elizabeth I and King James I, reigned with almost absolute power. This essay will touch on some of these passages.[1] The final section explores, in the context of the rule of law, Shakespeare's most famous line concerning the legal profession, in which the suggestion is made that we should kill all lawyers.

Let us first explore the broad theme of the rule of law. Prince Hal, the future Henry V, appears in Shakespeare's *Henry V* as a natural hell-raiser. On one occasion he actually struck the Chief Justice of England. The Chief Justice responding by sending the Prince to jail. Upon Henry IV's death and the ascension of Hal to the kingship as Henry V, the Chief Justice was worried for his own head. Heads had been lost for less. Yet, when the Chief Justice first meets Henry V, Shakespeare has the King extol the rule of law in this exchange:

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[1] One of the most difficult contexts to maintain the rule of law is in time of war or insurrection. The laws of war and insurrection as evidenced in Shakespeare's work can often be traced to modern attempts to bring the rule of law to this difficult area. For example, Shakespeare touches on rules of chivalry, prisoners of war, status of lawful and unlawful combatants, status of civilians, rules of combat, and much more. Some fine scholarship addresses these issues, so they will not be repeated here. *See*, e.g., Theodor Meron, *Henry's Wars and Shakespeare's Laws* (Clarendon Press 1993); Theodor Meron, *War Crimes Law Comes of Age* (Oxford University Press 1998); Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford University Press 1998); Laurie Rosensweig Blank, "Note: The Laws of War in Shakespeare: International vs. Internal Armed Conflict", 30 *New York University Journal of International Law and Politics* 251 (Fall, 1997/ Winter 1998).

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_6,

KING HENRY V: You all look strangely on me:
and you most;
You are, I think, assur'd I love you not.

LORD CHIEF-JUSTICE: I am assur'd, if I be measur'd rightly,
Your majesty hath no just cause to hate me.

KING HENRY V: No?
How might a prince of my great hopes forget
So great indignities you laid upon me?
What! rate, rebuke, and roughly send to prison
The immediate heir of England! Was this easy?
May this be wash'd in Lethe,[2] and forgotten?

LORD CHIEF-JUSTICE: I then did use the person of your father;
The image of his power lay then in me:
And, in the administration of his law,
Whiles I was busy for the commonwealth,
Your highness pleased to forget my place,
The majesty and power of law and justice,
The image of the king whom I presented,
And struck me in my very seat of judgment;
Whereon, as an offender to your father,
I gave bold way to my authority
And did commit you.
. . .
Be now the father and propose a son,
Hear your own dignity so much profan'd,
See your most dreadful laws so loosely slighted,
Behold yourself so by a son disdain'd;
And then imagine me taking your part
And in your power soft silencing your son:
After this cold considerance, sentence me;
And, as you are a king, speak in your state
What I have done that misbecame my place,
My person, or my liege's sovereignty.

KING HENRY V: You are right, justice, and you weigh this well;
Therefore still bear the balance and the sword:
And I do wish your honours may increase,
Till you do live to see a son of mine
Offend you and obey you, as I did.[3]

This exchange is an eloquent plea for the rule of law, even in the teeth of princely privilege. It is, however, an easy endorsement for the new king. After all, he is the King and must maintain order in his realm. Note, too, that he did not necessarily endorse the rule of law with respect to his own kingly prerogatives. The Chief Justice carefully pointed out that it was the king's law that lay within him, and it was the king he represented. As the king's

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[2] Lethe is the river of forgetfulness crossed by those entering Hades.

[3] *2 King Henry IV*, V, ii, 65–109. Unless otherwise noted, this essay cites to *The Yale Shakespeare* (Wilbur L. Cross & Tucker Brooke, eds, Barnes & Noble Books, 1993).

representative, he analogized himself to the role of the father of a wayward child and asked Henry, too, to imagine himself the father of a wayward child. What parent, then and now, does not aspire to exert some control over the rebellion and poor judgment of adolescence? Henry accepted the analogy, and so ended the argument.

6.1 The Rule of Law and the Prince

It is one thing for subjects to be under the rule of law, another for the source of law also to be subject to the rule of law. If Rex be lex, then "The King can do no wrong." Indeed, this doctrine underlies the necessity for federal and state tort claims acts to waive sovereign immunity. When Pericles refers to the prerogatives of King Antiochus, Shakespeare has Pericles put the doctrine in its most absolute terms:

> **PERICLES**: Kings are earth's gods; in vice their law's their will;
> And if Jove stray, who dares say Jove doth ill?[4]

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[4] *Pericles, Prince of Tyre*, I, i, 104–105. Shakespeare hardly endorses impunity for regal vice (in this case, incest with his own daughter). Later in the play Pericles refers to Antiochus as a "tyrant."

> Tis time to fear when tyrants seem to kiss. Id. at I ii, 84.

> I knew him tyrannous; and tyrants' fears
> Decrease not, but grow faster than the years. Id. at 89–90.

These words may not have been penned by Shakespeare. Some suspect Shakespeare had a hand only in act III and beyond. Others give credit for help in the first two acts. *See* The Yale Shakespeare (Cross and Brooke, eds.) at 1289.

Later in the play we see that gods, at least, may bring tyrants to book.

> **HELICANUS**: No, Escanes, know this of me,
> Antiochus from incest liv'd not free;
> For which, the most high gods not minding longer
> To withhold the vengeance that they had in store,
> Due to this heinous capital offence,
> Even in the height and pride of all his glory,
> When he was seated in a chariot
> Of an inestimable value, and his daughter with him,
> A fire from heaven came and shrivell'd up
> Their bodies, even to loathing; for they so stunk,
> That all those eyes ador'd them ere their fall
> Scorn now their hand should give them burial.
>
> **ESCANES**: 'Twas very strange.
>
> **HELICANUS**: And yet but justice; for though
> This king were great, his greatness was no guard
> To bar heaven's shaft, but sin had his reward.
>
> **ESCANES**: 'Tis very true. (Id. at II, iv, 1–17).

When Shakespeare creates a princely tyrant, one of the attributes with which he endows the tyrant is disregard for the rule of law. For example, in *Richard III*, Richard contrives, without benefit of trial or due process, to murder the Duke of Clarence in the tower. Confronting his assassins, Clarence pleads failure to adhere to the rule of law:

> **CLARENCE**: Are you drawn forth among a world of men
> To slay the innocent? What is my offence?
> Where is the evidence that doth accuse me?
> What lawful quest have given their verdict up
> Unto the frowning judge? or who pronounc'd
> The bitter sentence of poor Clarence' death?
> Before I be convict by course of law,
> To threaten me with death is most unlawful.[5]

Shakespeare knew that this charge against Richard was rubbish because the chroniclers on whom he relied for drafting his history plays clearly reflected that Clarence was charged and tried before parliament.[6] Thus, Shakespeare disregarded history in order to equate tyranny with princely disregard for the rule of law.

Divine vengeance aside, Shakespeare also notes utilitarian reasons, coupled with utilitarian hazards, for kings to obey the law. Arrogant princes who reject reason and act tyrannously often come to grief at Shakespeare's hand. When Richard II proposes to disregard the law and seize Hereford's (Bolingbroke's) lands, the Duke of York argues utilitarian reasons why Richard should refrain:

> **DUKE OF YORK**: O my liege,
> Pardon me, if you please; if not, I, pleas'd
> Not to be pardon'd, am content withal.
> Seek you to seize and gripe into your hands
> The royalties and rights of banish'd Hereford?
> . . .
> Take Hereford's rights away, and take from time
> His charters and his customary rights,
> Let not to-morrow then ensue today;
> Be not thyself; for how art thou a king
> But by fair sequence and succession?
> Now, afore God—God forbid I say true!—
> If you do wrongfully seize Hereford's rights,
> . . .
> You pluck a thousand dangers on your head,
> You lose a thousand well-disposed hearts
> And prick my tender patience, to those thoughts
> Which honour and allegiance cannot think.

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[5] *Richard III*, I, iv, 171–178.

[6] *See* T. Meron, *War Crimes* at 108–109.

KING RICHARD II: Think what you will, we seize into our hands
His plate, his goods, his money and his lands.[7]

York was right. The practical consequence of Richard's disregard for the rule of law was disastrous. The populace, and the barons who feared similar high-handed treatment, supported Bolingbroke and deposed Richard II. Bolingbroke crowned himself as Henry IV.

Richard's disregard for the rule of law was particularly egregious because it touched on the constitutional issue of succession and the legitimacy of his government. One may argue that, for similar reasons, there need be no waiver of governmental immunity to remedy constitutional wrongs—i.e., wrongs which transgress the constitution or charter of government. Government can have no immunity from the requirements of its fundamental charter.

Shakespeare was no proselytizer, and he had to tread carefully when trenching on princely prerogatives. Still, he may have intended a cautionary message to James I in *The Winter's Tale*. Upon his succession, James I had begun to undermine parliament and arrogate more power to himself. Consider this passage, written during James' reign, in which Leontes is cast as an arrogant, pig-headed king. When his advisors suggest circumspection, he dismisses them thus:

LEONTES: Why, what need we
Commune with you of this, but rather follow
Our forceful instigation? Our prerogative
Calls not your counsels, but our natural goodness
Imparts this;. . .
We need no more of your advice: the matter,
The loss, the gain, the ordering on't, is all
Properly ours.[8]

In like vein, two of Shakespeare's powerful women express similar sentiments. Shakespeare insures both come to grief because of their overreaching.

GONERIL: Say if I do, the laws are mine, not thine.
Who can arraign me for't[9]

LADY MACBETH Fie, my lord, fie!
a soldier, and afeard? What need we fear who know it,
when none can call our power to account?[10]

Apparently Lady Macbeth is troubled by this expansive notion of absolute power, as she mutters this line during her famous sleepwalking descent

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[7] *Richard II*, II, I, 189–213.

[8] The *Winter's Tale*, II, i, 194–203.

[9] *King Lear*, V, iii, 186–87.

[10] *Macbeth*, V, i, 32–34.

into madness. Goneril commits suicide when it becomes clear that it will be discovered that she had poisoned her sister, Regan.[11]

6.2 The Bar

Shakespeare appears to have had very positive views on the rule of law, but what of lawyers? Lawyers warrant mention quite often in his plays. Some argue that Shakespeare believed lawyers cause more trouble than they are worth. Consider this passage from Timon of Athens:

> Timon: Crack the lawyer's voice,
> That he may never more false title plead
> Nor sound his quillets shrilly:[12]

This passage suggests a cynical view of the profession, but move up the page only a few lines and see what Timon has to say about others.

> Timon: [L]et not the sword skip one.
> Pity not honour'd age for his white beard;
> . . .
> Let not the virgin's cheek
> Make soft thy trenchant sword;
> . . .
> Spare not the babe,
> Whose dimpled smiles from fools exhaust their mercy;
> Think it a bastard whom the oracle
> Hath doubtfully pronounced thy throat shall cut,
> And mince it sans remorse. Swear against objects.
> Put armour on thine ears and on thine eyes,
> Whose proof nor yells of mothers, maids, nor babes,
> Nor sights of priests in holy vestments bleeding,
> Shall pierce a jot.[13]

Timon can abide no one—nor babes, nor virgins, nor maids, nor priests, nor old folks. Indeed, he wishes on lawyers only cracked voices, while visiting death on all others. One may argue that in this context lawyers fare reasonably well.

Turn now to Shakespeare's best known line about lawyers: "The first thing we do, let's kill all the lawyers."

"Kill all the lawyers" is generally marshaled by critics as condemnation of the legal profession from the very pen of the Bard of Avon.[14] Many

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[11] *King Lear*, V, iii, 23–27.

[12] *Timon of Athens*, IV, iii, 164–166.

[13] Id. at IV, iii, 119–135.

[14] A more current drama boldly suggested that eliminating lawyers would eliminate crime! The opening scene in the 1939 movie *Disbarred* (Paramount Pictures) screens this quote, attributed to J. Edgar Hoover:

who know the line may not know its provenance. It is from Shakespeare's *Henry VI, Part 2*, act IV, sc. ii, 74. Pundits and the public alike chant this famous line. It is even stenciled on t-shirts, and sells in great numbers in the gift shop of the Folger Shakespeare Library, located just behind the U.S. Supreme Court Building in Washington, DC.

This gloss is a gross calumny on the profession.

To put this line into proper historical and dramatic context, it is helpful to imagine the time of the Wars of the Roses—about 1455. Henry VI was on the throne. Crowned, according to the play, at the tender age of 9 months, he became a weak, bookish king, given more to prayer and contemplation then to governance.

In Shakespeare's play the Duke of York, sensing a power vacuum, laid claim to the crown. To foment rebellion and instability, York hired an ex-convict, soldier of fortune, and general troublemaker to march into London, set fire to London Bridge (which was covered with houses like the Ponte Vecchio in Florence), and instigate looting, burning and general havoc.

Shakespeare's character is named Jack Cade. In the play, the Duke of York instructed Jack Cade falsely to claim that he, Cade, was rightful heir to the crown because he was the long lost child of a noble family—a complete fabrication. Backed, he thought, by this powerful patron, Jack Cade rode into London with a bunch of ruffians in tow, claimed the crown, and set up a rump court surrounded by his rag-tag followers.

To whip the crowd into a frenzy of support, Jack Cade used a familiar device. He, like politicians today, knew that entitlements are popular and taxes are not. So he offered, if crowned, to pursue these timeless policies.

> There shall be no money;
> all shall eat and drink on my score.[15]

> [S]even halfpenny loaves" shall be "sold for a penny.[16]

Since there is to be no money, it is unclear how one is to pay the penny. This is the "voodoo economics" for which politicians have always been such well-known practitioners.

> All the realm shall be in common[17]

In the background of almost every crime is a crooked lawyer. The records of the Federal Bureau of Investigation show that the lawyer-criminal is the friend of the hold-up man—the confidant of bank robbers and the hub of bribery activities. He is the brains by which the underworld manages to thrive and to outwit law enforcement. This type of man deserves to be behind prison bars with his clients.

[15] Id. at IV, ii, at 64–66.

[16] Id. at IV, ii, 58–59.

[17] Id. at IV, ii, 60–61.

That is, he suggested that there would be no private property; just take what you want.

> and I will apparel them
> All in one livery, that they may agree like brothers, and
> worship me their lord.[18]

A bit later in the play Cade also promises, at the city's cost, free wine to all for the first year of his reign. Out of delicacy, the public utility through which he proposes to deliver the wine will not be mentioned. The passage does contain one of the seven naughty words that can, at this writing, still not be uttered on daytime broadcasts in the United States.[19]

Predictably, this political platform resonated with the crowd. It was during a recital of this shopping list that a member of the crowd, Dick the Butcher, shouted enthusiastically, "The first thing we do, let's kill all the lawyers."

There it is—the phrase so frequently cited to damn the legal profession, shouted by Dick the Butcher in support of a sheep stealer[20] and confidence man,[21] who was sent to London to foment anarchy, burn the city, and loot the Commonwealth. In the following scene Dick chimes in with another helpful suggestion: "If we mean to thrive and do good, break open the jails and let out the prisoners."[22]

Was Shakespeare endorsing Jack Cade's and Dick the Butcher's sentiment? The evidence suggests not.

First, Shakespeare seems to have enjoyed a profitable relationship with lawyers. His troupe, the Lord Chamberlain's Players (later the King's Men), often performed in the Inns of Court, to which all barristers must belong—roughly the equivalent to performing at the state bar headquarters. The first known performance of the Comedy of Errors was at Gray's Inn, one of the Inns of Court, during the Christmas revels on December 28, 1594. Gray's Inn celebrated the 400th anniversary of this event with a repeat performance at Gray's Inn on December 28, 1994. Loves Labours Lost was

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[18] Id. at IV, ii, 65–67.

[19] Robert W. Peterson, "The Bard and the Bench: An Opinion and Brief Writer's Guide to Shakespeare", 39 *Santa Clara Law Review* 789, 797, fn 33, 34 (1999).

[20] Dick the Butcher notes that Cade had been "burnt i' the hand for stealing of sheep." Id. at IV, ii, 56. It was the custom of the time, when a first offender was not executed, to brand the offender on the thumb. Prisoners before the bar were required to raise their right hand in order for the judge to see whether they were a first or subsequent offender. Dick also mentions that he has seen Cade "whipped three market-days together," although he does not mention the offence(s) prompting this chastisement. Id. at IV, ii, 51.

[21] With respect to Cade's claim to royal lineage, Dick the Butcher notes that Cade's father was not a lord, but a bricklayer, and his mother was not a Plantagenet, but a midwife and daughter of a peddler. Id. at IV, ii, 34, 37, 39.

[22] Id. at IV, iii,14–15.

also performed at Gray's Inn the same year, and 12th Night, one of his most popular comedies, played Middle Temple in February, 1602. This does not bespeak one at odds with the legal profession.

Second, one of Shakespeare's first patrons, Henry Wriothesley (pronounced "Rizley"), Earl of Southampton, was himself a member of Gray's Inn. So were the Earl of Oxford and Francis Bacon, both of whom some suggest may have been the true authors of Shakespeare's plays. Wriothesley, a remarkably beautiful man, may also have been intended as the addressee of one of Shakespeare's most beautiful lines: "Shall I compare thee to a summer's day."[23] Shakespeare also dedicated two of his poems, "Venus and Adonis" and the "Rape of Lucrece," to the Earl. This indicates Shakespeare's great affection for at least one lawyer.[24]

Third, he drew his characters for the attack on London by conflating the worst excesses of two uprisings—Cade's Rebellion (1450, in the run up to the Wars of the Roses) and the Peasants' Revolt of 1381 (also known as Tyler's Rebellion after Wat Tyler, in the time of Richard II, another weak king). In both cases thousands swarmed into London burning, looting, and demanding the overthrow of the government.

If one turns to the real Jack Cade, his rebellion, which began in Kent, initially enjoyed some appeal even to London residents. England was badly governed: judges were corrupt; many nobles were extortionists; Henry VI had lost most of the French lands and cities that his father, Henry V, had fought so hard to win. Indeed, Henry VI, like his maternal grandfather, Charles VI of France, suffered serious mental instability—something like catatonic schizophrenia or depressive stupor.

In this context, it would have been easy for Shakespeare to script Cade with some sympathy and give some weight to his calls for reform. But Shakespeare did not. Rather, he scripted a buffoon and petty tyrant. Cade's governance, and that of his predecessor in rebellion, Wat Tyler, would have been seen by Shakespeare's London audience as a close call with anarchy, death, and the demise of civilization as they knew it. It would have been the antithesis of the rule of law.

Here is a quote from a contemporary chronicle, written in 1381 by Jean Froissart. He is quoting the real rebel, John Ball of Tyler's Rebellion, whose rhetoric closely mimics Jack Cade in Shakespeare's play.

> "[G]ood people", he would say, "nothing can go well in England, nor ever will do, until all goods are held in common, until there is neither villain nor nobleman, until we are all one."[25]

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[23] Sonnet 18, ln. 1.

[24] At this writing, the Earl's portrait still hangs behind the High Table in Gray's Inn Hall. He is indeed much better looking than many lawyers in this subsequent era.

[25] *The Chronicles of the Wars of the Roses* (1996 Bramley Books, Elizabeth Hallam, ed.), p. 34.

This passage reads like part of Jack Cade's script written 200 years before Shakespeare repenned the lines.

If there were any doubt about Shakespeare's sentiments, Shakespeare's Jack Cade shows us what his world would be like without lawyers and the rule of law lawyers foster. Immediately after Dick the Butcher mouths his famous line, a clerk enters. Someone accuses the clerk of being able to write and read. Jack Cade orders, "hang him with his pen and inkhorn about his neck."[26] It is unimaginable that the idea of killing all literate people could have any appeal to the playwright Shakespeare.

Jack Cade, much like some modern politicians, was hesitant to appear "elite." In his somewhat comical indictment of Lord Say, he continues his campaign against the literate. Cade's grievances against Lord Say were perfectly legitimate. Lord Say was the rapacious treasurer of England and was loved by few. Nevertheless, Cade's indictment exaggerates Lord Say's offences:

> Cade: "Thou hast most traitorously corrupted the youth of the realm in erecting a grammar school; and whereas, before, our forefathers had no other books but the score and the tally, thou hast caused printing to be used . . . It will be proved to thy face that thou hast men about thee that usually talk of a noun and a verb . . ."[27]

He also accuses Lord Say of treason because he can speak French and Latin (although the rebels mistake it for Dutch or Italian).[28]

One can hardly argue that founding a grammar school, printing, using nouns and verbs, or speaking French or Latin, were "crimes" usually likely to shock an Elizabethan audience.

Jack Cade then decrees that henceforward, "It shall be treason for any that calls me other than Lord Mortimer."[29] At this moment a soldier, who, has not yet heard this new decree, rushes in with a message and shouts "Jack Cade, Jack Cade." Jack Cade orders him summarily executed for violating the new decree.

He tells his followers to burn all the records of the realm: "My mouth shall be the parliament of England."[30] One of Cade's followers remarks in an aside, "It will be stinking law; for his breath stinks with eating toasted cheese."[31]

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[26] *Henry VI, pt. 2*, IV, ii, 95–96. Here Cade turns benefit of clergy on its head. Even in Shakespeare's day, for some first offences those who could read could claim "benefit of clergy" and were usually spared the rope. Cade is justified when he complains to Lord Say that "because they could not read, thou hast hanged them . . .." Id. at IV, vii, 37–38. But Cade, in his new order, apparently makes it a capital offense merely to read and write.

[27] Id. at IV, vii, 27–35.

[28] Id. at IV, vii, 54–56.

[29] Id. at IV, vi, 4–5.

[30] Id. at IV, vii, 12–13.

[31] Id. at IV, vii, 11–13.

The self-appointed Mouth of Parliament continues:

> [T]here shall not a maid be married, but she shall pay to me her maidenhead.[32]

When Lord Say delivers an eloquent plea for his life, Jack Cade condemns him to death for his eloquence.

> He shall die, an it be but for pleading so well for his life. Away with him![33]

While they are at it, he also orders his gang to break into Lord Say's house and cut off the victim's son-in-law's head.[34]

If one accepts that Shakespeare approved of his characters' desire to rid the world of lawyers, then one must also conclude that Shakespeare, one of the greatest writers of all time, also approved the summary execution of any person who reads or writes, founds a grammar school, knows a noun from a verb, speaks more than one language (that language being English), speaks with eloquence, or does not call this charlatan anything but "Lord." One must also conclude that Shakespeare advocated the rape of virgins on the eve of their weddings. Oddly enough, though, one finds none of these sentiments stenciled on t-shirts!

Nor did Shakespeare provide Jack Cade with a happy end. His head was separated from his body and paraded through London. What remained was left behind for "crows to feed upon."[35]

We do not know for certain, but Jack Cade's last words on earth might appropriately have been: "a lawyer! a lawyer! my kingdom for a lawyer."[36]

More than five centuries have passed since life's curtain descended on Jack Cade and his enthusiastic side-kick, Dick the Butcher. Nevertheless, their ghosts still walk abroad, and they still chant "Kill all the lawyers."

Henry VIII, though predating Shakespeare, did it quite literally by lopping off the head of Thomas More and giving the legal profession its patron saint of lawyers.

Only a few decades after Shakespeare's death, one encounters another lawyer who might have an equal claim to sainthood, had he been a Catholic. Some of the remarkable things this lawyer proposed are now commonplace; others still dwell in the realm of aspiration.

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[32] Id. at IV, vii, 109–110.

[33] Id. at IV, vii, 95–96.

[34] Id. at IV, vii, 98–100.

[35] Id. at IV, x, 79. In fact, the real Jack Cade's body was quartered and distributed to various locations and displayed to encourage moral betterment and civic spirit.

[36] "A horse! A horse! my kingdom for a horse!" Richard III's desperate cry when something once taken for granted (a horse), rivals the value of his kingdom in the appropriate exigency. *Richard III*, V, iv, 7, 13.

– He proposed a national health service.[37]
– He proposed the independence of the judiciary.[38]
– He argued that heads of state were subject to the law of the land and did not deserve immunity or (and he was the first to use the word in the context of human rights violations) "impunity."[39]
– He advocated, for the first time outside an ordinance of war, and for the first time for a head of state, what has become known as command responsibility for torture and war crimes—the so-called Yamashita doctrine after the trial of Gen. Yamashita and others following WWW II.[40]
– He abhorred the law's delay and advocated the merger of law and equity to avoid delay and costs.[41] Indeed, he argued that a case should usually be decided within 1 month.[42]
– He argued that successful advocates should devote 10 percent of their practice to pro bono work—an unpopular proposal among his lawyer friends.[43]
– He argued for a cap on lifetime earning for lawyers (around $1,000,000 in today's money), after which lawyers should work for free.[44]
– He argued that those accused of crimes should have counsel and should be able to call witnesses in their defense under oath.[45] (Compare the compulsory process clause in the U.S. constitution).
– He was no bleeding heart—he thought that "benefit of clergy" for those who could read should not go to those who, by dint of their education, should know better than to offend.[46]

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[37] *See* Robertson, *The Tyrannicide Brief* (Pantheon Books 2005) pp. 1, 104, 107, 388 n. 2 (John Cooke, *The Poor Man's Case, an expedient to make provision for all poor people in the Kingdom* (London, 1648)).

[38] *See* Robertson, *The Tyrannicide Brief* at 123. Cooke faulted Charles I for manipulation of the judiciary in John Cooke, *King Charls his Case: Or, an Appeal to all Rational Men, concerning his Tryal at the high court of Justice. Being for the most part that which was intended to have been delivered at the Bar, if the King had Pleaded to the Charge, and put himself upon a fair Tryal. With an additional Opinion concerning The Death of King James, The los of Rochel, and, The Blood of Ireland* (printed by Peter Cole for Giles Calvert, 1649).

[39] *See* Robertson, *The Tyrannicide Brief* at 11, 12, 15.

[40] Id. at 15.

[41] *See* Robertson, *The Tyrannicide Brief* at 104; John Cooke, *The Vindication of the Professors and Profession of the Law* (London, 1646).

[42] *See* Robertson, *The Tyrannicide Brief* at 81.

[43] Id. at 104–105, 388 n. 2 (John Cooke, *Unum necessarium or Poor Man's Case, an expedient to make provision for all poor people in the Kingdom* (London, 1648)).

[44] Id. at 80. Like Shakespeare, he knew well that poverty and injustice were joined. "Here's a fish hangs in the net,/like a poor man's right in the law; 'twill hardly come out." *Pericles, Prince of Tyre,* II, i, 107–108.

[45] Ibid.

[46] *See* Robertson, *The Tyrannicide Brief* at 81.

– He established that the crime of "tyranny" by a head of state was comparable to treason.[47]
– He advocated the right for criminal defendants to remain silent.[48]
– Although deeply religious, he argued for freedom of worship, and reasoned that worship forced on people by a state religion only created hypocrites.[49]
– When one would be hanged for theft of goods valued at a shilling or more, he advocated that poverty created necessity, and necessity caused much crime.[50] He argued that judges, in mitigation, should, therefore, be able to inquire into whether the theft was "for want or for wantonness."[51]
– He argued that debtors prison was counter productive, much abused, and also unfairly impoverished the families of those imprisoned.[52]

Who was this modern reformer? He was John Cooke, a barrister of middling stature and middling practice before the English Bar. He was a Puritan and probably little fun in the pub. His largely ignored place in history began on 10 January, 1649 when a messenger knocked on his chamber door at Gray's Inn, London, with a message from Parliament. Would he accept the role of prosecutor in the trial of Charles I?[53]

Applying what has become known as the "cab rank" principle (that a barrister should accept any case for which he is competent and the client will pay the fee), he accepted. And, as history teaches, he was successful.[54] In the course of that success, he probably did more to establish the rule of law than any other advocate—especially in the areas of the law of war and human rights. Command responsibility was established, impunity for heads of state abolished, tyranny criminalized, and judges freed from obedience to the whims of the king. Rex was no longer lex.

When the whirligig of time restored Charles II to the throne 11 years later, Charles invoked the mantra of Dick the Butcher. With a handpicked court and handpicked jurors, he had John Cooke, and some of the judges, tried, hanged, disemboweled alive and cut into pieces for display in prominent places around London. This was done with the approval of John

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[47] Id. at 112.

[48] Id. at 87.

[49] Id. at 93, 387 n. 9 (*John Cooke: What the Independents would have, or a character declaring some of their tenets, and their desires to disabuse those who speak ill of that they know not* (London, 1647)).

[50] *See* Robertson, *The Tyrannicide Brief* at 105.

[51] Id. at 106.

[52] Id. at 105.

[53] Id. at 142, 144.

[54] For an account of the trial of Charles I, *see* Robertson, *The Tyrannicide Brief*, *supra* at 151; Sean Kelsey, *Politics and Procedure in the Trial of Charles I*, 22 Law and History Review 1 (2004).

Cooke's former client, Parliament! Put not your trust in clients![55] John Cooke suffered martyrdom for the rule of law, but, alas, he earned no sainthood.[56]

As England sank back into tyranny, John Cooke lamented in a letter from his prison cell that

> We fought for the public good and would have enfranchised the people and secured the welfare of the whole groaning creation, if the nation had not more delighted in servitude than freedom.[57]

Fast forward to times touching many in Central and Eastern Europe. Hitler, like Dick the Butcher, knew well that if tyranny were to succeed, it would be necessary to destroy the independent legal profession.[58] Lawyers are the midwives of ordered liberty and, like Jack Cade and Dick the Butcher, the Nazis knew that lawyers would be inconvenient to the excesses of the Third Reich.

In 1942 Hitler said that "Every lawyer must be regarded as a man deficient by nature or else deformed by usage."[59] He aspired "to make every German realize that it is a disgrace to be a lawyer."[60] Jews, women and communists were forbidden to be lawyers. If they were already members of the bar, they were disbarred. Lawyers who mounted vigorous defenses for their clients could be disbarred or even sent to concentration camps for correction.[61] Hitler and his propaganda machine continuously denigrated the profession. He referred to lawyers as "traitors," "idiots" and "absolute cretins."[62] He nationalized the Bar and made lawyers no more than civil servants of the Third Reich. Lawyers fell into such low estate that law school enrollment plummeted (conscription also contributed to this decline).[63] There is no need to kill lawyers if there are none.

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[55] The aphorism, "Put not your trust in princes" is attributed to the Earl of Strafford upon finding that, for political expedience, his close friend, Charles I, had reneged on his promise to assure a pardon of the Earl should the Earl suffer conviction for treason by parliament. *See* Robertson, *The Tyrannicide Brief* at 57–58. The Earl was executed.

[56] Joining John Cooke on the scaffold that cold Tuesday morning of 16 October, 1660 was another worthy, Hugh Peters. Hugh Peters was a leading founder and first overseer of Harvard College. He was accused, in effect, of being a "terrorist" who had traveled to England to seek the death of Charles I.

[57] Id. at 287.

[58] Kenneth C.H. Willig, *The Bar in the Third Reich*, 20 American Journal of Legal History 1 (1976).

[59] Id. at 1.

[60] Id. at 13.

[61] Id. at 11.

[62] Id. at 11.

[63] Id. at 13.

With the role of defense attorneys subjugated, and with a compliant bench, the legal system became a system of legal terrorism.[64] Foot-faults by attorneys could result in disbarment. One attorney, who criticized the State, was disbarred on the grounds that "an attorney has to refuse a case if it is contrary to the interest of the State and the national community."[65] In a 5 year period, 30 percent of the German bar had been expelled.[66]

Between 1942 and 1945 German Courts, special courts in occupied territories of Poland and the USSR, and military courts pronounced at least 30,000 death sentences.[67] This number does not include de facto death sentences. De facto death sentences included custodial sentences for Jews (served in concentration camps) and sentences to public tutelage for the feeble-minded.[68] By contrast, Italian courts pronounced fewer that 100 death sentences during the entire period of fascist rule.[69]

Not surprisingly, when an American business man used the "kill all the lawyers" line as an opening joke in a speech he made to an Eastern European audience, the reaction was very different from what one might expect in a country where lawyers are relatively free.

> A young Ukrainian lawyer immediately stood up and spoke. He said that he read and enjoyed Shakespeare, but doubted that this fragment of Henry VI, Part II was a suitable prescription for Ukraine. To explain, the lawyer recounted the context of the line. The famed proposal is uttered by Dick the Butcher during the gathering of a gang that wants to impose tyrannical rule by its leader, John Cade. The gang seeks to seize wealth by force and redistribute it, to have the state sell goods at a fraction of their cost, and to hang those who can read and write. Killing all the lawyers is only the first step toward liquidating anyone whose obsession with rules and reason might block the gang's ascent. After recreating the literary setting, the Ukrainian posed a question. 'In this century,' he said, 'the Soviet Union did what Dick the Butcher wanted. We killed many lawyers. We killed laws that disperse power. We destroyed people with independent ideas. We elevated tyrants. Why do Americans ridicule institutions that have helped protect personal freedom and create economic prosperity?' The businessman watched silently, swamped by waves of nodding heads.[70]

Recent events in Pakistan were even less subtle. The usurping President Musharraf attempted to dismiss the chief justice of Pakistan's Supreme Court. If a ruler expects to receive an inconvenient judgment, simply dismiss the judiciary. This tactic is nothing new—Charles I sacked his Chief Justice, Sir Randall Crewe, after the Justice expressed some doubts about

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[64] Udo Reifner, *The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy*, 32 McGill Law Journal 96, 100 (1986–1987).

[65] Id. at 113.

[66] Id. at 119.

[67] Id. at 103.

[68] Id at 103.

[69] Id. at 104.

[70] As reported in *U.S. v. Reid*, 214 F. Supp. 2d 84, 95–96 (D. Mass. 2002).

one of Charles' royal prerogatives.[71] Doing Charles I one better, why not also arrest thousands of lawyers for good measure, as was done in Pakistan?

China recently took a step down the same path. It was reported that China denied renewal of the bar license for two lawyers who offered their services to Tibetans arrested in the recent disturbances in Tibet. The two had joined with 16 other Chinese lawyers involved in human rights in an open letter offering their services to Tibetans. Beijing's Judicial Bureau gave as their reason the lawyers' willingness to take on "sensitive" cases.[72] This echos the excuse given for disbarring the German attorney by the Reich noted above—"[A]n attorney has to refuse a case if it is contrary to the interest of the State and the national community."

Sadly, even politicians in democracies sometimes find lawyers (at least other people's lawyers) inconvenient. For example, the United States incurred world-wide criticism by establishing Guantanamo Bay as a lawyer-free zone?[73]

Similarly, President George W. Bush referred to lawyers who were defending the public's right not to have their phones tapped and their emails read by the government without a warrant as "class action" lawyers who were merely looking for a "gravy train."

More recently, presidential hopeful John McCain opposed amendments to Title VII protecting equal pay for women on the basis that it would "only serve to fatten the pockets of trial lawyers."[74] He repeated this argument to a 14-year-old girl at a town hall meeting.[75] The bill, overruling a legally doubtful and patently impractical interpretation of the law by the conservative members of the U.S. Supreme Court,[76] passed and was, indeed, the first bill signed into law by President Obama.[77]

This cynical carping aimed at the role of lawyers would be enough to make the quartered corpse of John Cooke weep.

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[71] *See* Robertson, *The Tyrannicide Brief* at 33.

[72] *San Francisco Chronicle*, June 4, 2008, p. A2.

[73] The deputy assistant secretary of defense for detainee affairs, Charles "Cullly" Stimson, tried to insure the continued absence of lawyers by suggesting that corporate clients boycott firms whose lawyers were volunteering their services to Guantanamo detainees. The Pentagon disavowed the remarks. As reported by CBS News, Jan 13, 2007, http://www.cbsnews.com/stories/2007/01/13/terror/main2358883.shtml (Last visited, August 1, 2008).

[74] Quoted in http://voices.washingtonpost.com/fact-checker/2008/07/mccain_on_equal_pay.html (Last visited, January 29, 2009).

[75] "I don't think you're doing anything to help the rights of women, except maybe help trial lawyers and others in that profession." Quoted in http://thinkprogress.org/2008/05/07/mccain-equal-pay-girl/ (Last visited January 29, 2009).

[76] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618; 127 S. Ct. 2162; 167 L. Ed. 2d 982 (2007).

[77] H.R. 2831, the Lilly Ledbetter Fair Pay Act of 2007. Signed into law January 28, 2009.

When respect for lawyers wanes, so does respect for the rule of law. Tyranny, like predators, always lurks in the shadows beyond the campfire. Perhaps surprisingly, part of the Bench and Bar's image problem lies within itself. Civility among lawyers, between lawyers and the bench, and even among members of the bench,[78] has become a sad casualty of recent times. Perhaps lawyers identify, or allow the public to identify them, too closely with the faults of their individual clients and their clients' causes rather than with their common profession. American lawyers in particular suffer. Perhaps the British "cab rank" rule would be helpful. Despite John Cooke's unfortunate experience, it is more difficult to tar lawyers with their clients, many of whom are, indeed, unsavory, if it is clear to the public that the relationship is a purely professional one.

When lawers, and even judges, do not maintain respect and civility among themselves, one can hardly expect the public or politicians to value the profession at more than it appears to value itself. As with Jack Cade, one tends to suffer the fate one wishes on others. Perhaps we have met the enemy, and he is us.[79]

One might suggest that the Bar take a page from the Bard. In this situation as in so many others, William Shakespeare said it first and said it best—let us.

> do as adversaries do in law,—
> Strive mightily but eat and drink as friends.[80]

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[78] Compare the elegant and respectful language with which Lord Goff concludes his dissent in *Queen v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97 ("For these reasons I am, with great respect, unable to accompany the reasoning of my noble and learned friend on these particular points") with Justice Scalia's derision for the apparently ignoble and unlearned majority in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2817 (2006)("[A]t least the court shows some semblance of seemly shame ...."). Shame? Indeed!

Derisory and dismissive references towards colleagues who disagree with him frequently embellish Justice Scalia's opinions. For example, his colleagues' positions "cannot be taken seriously," *Webster v. Reproductive Health Services*, 492 U.S. 490, 432 (1989), are "irrational," Id. at 537, are "really more than one should have to bear," *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 985 (1992), are a "verbal shell game," Id. at 987, evidence "almost czarist arrogance," Id. at 999, or a "Nietzschean" vision, Id. at 996. Justice Musmanno of the Pennsylvania Supreme Court could also turn a colorful phrase with respect to other members of the bench. In his view, the trial judge's ruling was an "incredible indulgence of a despotic whimsicality." *Jedwabny v. Philadelphia Transp. Co.*, 390 Pa. 231, 238–239, 135 A.2d 252, 256 (1957).

[79] "We have met the enemy and he is us," is the most famous line of American cartoonist Walt Kelly. It is spoken by his comic strip character Pogo, a possum who lives in the Okefenokee swamp.

[80] *The Taming of the Shrew*, I, iv, 285–286.

Chapter 7
America's Constitutional Rule of Law: Structure and Symbol

Robin Charlow

7.1 Introduction

American Constitutional Law would seem to be closely related to the principle of the rule of law, although it is not at first clear whether that is because our Constitution exemplifies the rule of law or, instead, its antithesis. Ordinary Americans would likely consider themselves as living under a rule of law regime, though some academics might dispute that claim.[1] To most of us, the United States Constitution serves as the archetype of a rule of law, in what we believe is more generally our rule of law state. We seem to believe this even though our Constitution exemplifies the uniquely American notion of an indeterminate rule, as contrasted with the European paradigm of a very clear and circumscribed, positive law rule.

This chapter will attempt to explain the ways in which the United States Constitution maintains a rule of law, despite its indeterminacy. Our constitutional rule of law is atypical, in that it constrains discretion and operates fairly and universally, even while it admits of a degree of interpretive openness.[2] These attributes arise from two features of our Constitution:

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[1] *See*, e.g., James R. Maxeiner, "Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law", 41 *Valparaiso University Law Review* 517, 518–19 (2006)(quoting Professors Coleman and Leiter's observation that "[o]nly ordinary citizens, some jurisprudes, and first-year law students have a working conception of law as determinate.").

[2] I use here Maxeiner's definition of the rule of law "in a formal sense." *See* id. at 522. He describes this formal rule of law as requiring "that laws be: validly made and publicly promulgated, of general application, stable, clear in meaning and consistent, and ordinarily prospective." (footnotes omitted). Maxeiner adds that such rules help law "fulfill an ordering function," in allowing legal subjects to be guided by and act in compliance with law, while being protected from arbitrary lawmaking or law application. Id. The U.S.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_7,

it's structural and procedural aspects, and it's symbolic role in our lives.

In the United States, where the very idea that we live under the rule of law could be viewed as actually a significant substantive component of our rule of law itself, the federal Constitution stands as that ultimate law which, in a sense, governs all other legal rules. All positive law must conform to any applicable constitutional rules, and the Constitution trumps any ordinary law or treaty to the contrary.[3]

Paraphrasing a famous early United States Supreme Court opinion, our Constitution tells us not what the law is, but rather what is law–what other laws will or will not count as the rule of law to which we must all adhere.[4] The Constitution embodies the bedrock principles of our structural and substantive governance, and just as important, it entrenches these principles, guarding them against easy revision, and permitting their enforcement even against prevailing public sentiment to the contrary.[5]

Our Constitution also serves as a universal rule of law. We all agree that the Constitution governs everyone and that no one, not even our highest and mightiest officials, is exempt from its dictates. Every federal official, every state and state official, indeed, every citizen and even every non-citizen present within our borders, is bound by what the Constitution says, will enjoy the privileges it affords them, and will be held accountable to its commands. We seem universally to accept this, and we seem to believe that our obligation to follow these common, abiding principles in our Constitution is also somehow constitutionally prescribed, thus creating a strong rule of law state both under as well as according to our Constitution.

Yet, in a fashion quite perplexing to Continentals, our constitutional rule of law is incredibly indeterminate. The sparse and often enigmatic words in the text of our Constitution permit many and diverse interpretations. As citizens, as politicians, as lawyers, we argue endlessly about what is and isn't there.[6] To make matters worse, our Supreme Court, widely accepted as the final arbiter of such disputes, has famously been known to

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Constitution may essentially accomplish these goals, even while maintaining a certain degree of indeterminacy.

[3] *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause); Reid v. Covert, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

[4] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . . [Thus,] a legislative act contrary to the constitution is not law" and courts are not obliged to give it effect.).

[5] *See* id. ("[T]he legislature may not alter the constitution by an ordinary act.").

[6] For one recent example, consider the majority versus dissenting opinions in *District of Columbia v. Heller*, 554 U.S.___ , 128 S.Ct. 2783, 171 L.Ed.2d 637, 76 USLW 4631

change its mind about constitutional meaning, even on the most basic and fundamental issues that arise.[7]

This state of affairs would seem to be the very antithesis of a rule of law, in the European sense. Europeans tend to conceive of the rule of law as an exceptionally particular and determinate construct.[8] After all, how can something be a binding and nonarbitrary rule in any meaningful sense if its interpretation is so slippery, so open to revision, or to nonuniform or inconsistent application?

In addition to indeterminacy in this sense, there is another strange indeterminacy at work with regard to the United States Constitution. While Americans venerate their Constitution, they vehemently disagree about what it actually says.[9] In a sense, then, the Constitution that I admire is not the same document that my neighbor believes in. As a result, when we glorify the Constitution as the embodiment of our ultimate rule of law, we are actually referring to many, sometimes dramatically different, rules of law. We all consider ourselves bound, but by effectively diverse rules.

Yet somehow, in the midst of all this uncertainty and inconsistency, Americans have managed to live in what at least most of us would consider a strong rule of law state. And at the center of our rule of law regime is our rather indefinite Constitution. This chapter will consider how the vague and general United States Constitution manages to act as a universally applicable, reasonably consistent, power-constraining force, even as it permits a rather high degree of indeterminacy.

(2008), parsing the text of the Second Amendment and disagreeing markedly about its meaning.

[7] As an example, consider the nature of protection afforded by the Constitution for states' rights in our federalist system. The Supreme Court first found that states were not immune from federal regulation enacted pursuant to Commerce Clause authority. *See* Maryland v. Wirtz, 392 U.S. 183 (1968). Eight years later, it found that states were immune with regard to their "integral operations in areas of traditional governmental functions." National League of Cities v. Usery, 426 U.S. 833 (1976). But nine years afterward, it reversed itself again, finding that it was beyond the Court's authority to police federal overreaching into state sovereignty in this regard. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Nevertheless, seven years later, in *New York v. United States*, 505 U.S. 144 (1992), the Court once again struck down federal law on the ground that it interfered with state sovereignty. *Accord* Printz v. United States, 521 U.S. 898 (1997).

[8] *See generally* James R. Maxeiner, "Legal Certainty: A European Alternative to American Legal Indeterminacy?" 15 *Tulane Journal of International & Comparative Law* 541 (2007). "Legal certainty–not legal indeterminacy–is a guiding principle of European legal systems." Id. at 543.

[9] Moreover, as a general population, we are fairly ignorant of what is even in our Constitution. *See* Eric Lane, America 101: How We Let Civic Education Slide-and Why We Need a Crash Course in the Constitution Today, *Democracy Journal*, Fall 2008, at 53, 54, http://www.democracyjournal.org/article.php?ID=6643.

7.2 Structure and Procedure

Our American Constitution does some very important things that contribute to our adherence to a rule of law, and it does them remarkably well. To summarize, it sets forth structural and procedural formats for the basic three-part organization of our federal government and the operation of federal lawmaking.[10] These surprisingly effective and resilient structures and procedures successfully accomplish most of what they were intended to accomplish, and serve as a model for state and local governance as well. They keep our government running relatively smoothly and efficiently, without, for the most part, permitting the over-concentration of power in any single body or individual. They permit orderly government even during crises. In their specifications for the procedural development of positive law, they ensure that any law adopted at the national level will have strong, often effectively super-majority, support.[11] And they have allowed for legal and governmental growth and change, rather dramatic change if viewed over the more than two-hundred years since the Constitution entered into force. These features have a lot to do with our adherence to specific legal norms and, consequently, our perception of ourselves as living in a rule of law state.

Structurally, the United States Constitution acts as a constitutive instrument, setting forth some basic rules for the design of our government and governance. It delineates three branches of our federal government (legislative, executive, and judicial) and, in a rather abbreviated form, it states the powers and duties, or at least the province, of each.[12] It also describes and ordains the most basic procedural rules for lawmaking.

On a first-order level, these structural features permit the efficient and authoritative operation of our system of governance by the people, through their elected representatives. On a second-order level, they create a political and social climate within which our open, rights-loving society continues to thrive. They do this by establishing a government that will necessarily operate in a power-controlled fashion, and by ordaining as

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[10] Much of the structure of government and the procedure for lawmaking is now also contained in ordinary law, *see* Ernest A. Young, "The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda", 10 *University of Pennsylvania Journal of Constitutional Law* 399, 403 (2008). Nevertheless, the outline for these structures and procedures, enshrined in our Constitution, established the basic plan that our Framers believed would produce all the rule of law-related benefits which in fact appear to have accrued.

[11] *See*, e.g., Bradford R. Clark, "Constitutional Compromise and the Supremacy Clause", 83 *Notre Dame Law Review* 1421, 1424 (2008) ("Federal lawmaking procedures are designed to prevent any individual, group, or faction from becoming too powerful and capturing the legislative process.").

[12] U.S. Const. art. I, Section 1 (legislative branch); id. at art. II, Section 1, cl. 1 (executive branch); id. at art. III, Section 1 (judicial branch).

(potentially liberty-compromising) law only that which is able to survive a series of daunting obstacles to enactment.[13]

While one does not often hear Americans lauding their Constitution because of these structural and procedural features, they are, in fact, considered by some to be the essence of rights-protection. These attributes permit our government and our extremely diverse society to get together as one unit and function. They provide for a system of lawmaking and governance that is stable, relatively efficient, and relatively fair. At the same time, they prevent that extraordinarily effective government from becoming too powerful, so that the voice of the people is neither lost nor quashed. The Framers of our Constitution made a deliberate effort to design a system that could harness our great potential to create and develop, but at the same time prevent both the usurpation of power and the dissipation of energy by factions.[14] They seem to have done a remarkably good job, considering the diversity and increasing heterogeneity of the American people.

The result is not just a secure system of government, but also a fairly stable yet open society. Our constitutionally constituted government, and the open society that it permits and encourages, together strengthen and protect the rights we actually enjoy, at least as much as, if not more than, our specific rights-naming constitutional provisions.[15] Thus, these structural and procedural aspects of our constitutional life, more so than the rights and liberties actually guaranteed in our Constitution, may ultimately be the essence of our American constitutional rule of law. In other words, Americans enjoy a rule of law society by virtue of the powerfully constraining force of the strong and stable legal order we have constructed beginning with and continuing under our Constitution, rather than by virtue of adherence to a set of very specific, restrictive rules of positive law, including those in our Constitution's rights-conferring provisions.

There may also be other factors, not explicit in the Constitution itself even in its structural aspects, that support the stability and flexibility of our government, and more important, our willing and universal adherence to the structural and procedural portions of our Constitution's text. Americans

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[13] *See* Robin Charlow, "Judicial Review, Equal Protection and the Problem with Plebiscites", 79 *Cornell Law Review* 527, 534–541 (1994) (describing the exceedingly "filtered" system of lawmaking extant under the United States Constitution and laws).

[14] *See* id.; The Federalist Nos. 9 (Alexander Hamilton), 10 (James Madison).

[15] The thesis that it is not the enshrining of rights in our Constitutional text that appears to result in our actual enjoyment of them, is the subject of a separate essay. Robin Charlow, Our Puzzling Constitutional Reverence (unpublished, incomplete article, on file with author). For a similar point, *see* Antonin Scalia, "Foreword: The Importance of Structure in Constitutional Interpretation", 83 *Notre Dame Law Review* 1417, 1418 (2008) (noting that foreign constitutions guarantee rights that their countries' citizens do not actually experience, and claiming instead that "[s]tructure is everything"–meaning that various structural features of the U.S. Constitution are what operate to safeguard liberty and provide security to the rights of the people).

have fairly faithfully respected the Constitution's structural and procedural requirements, but this tendency may not be solely due to the fact that we see them entrenched in our Constitution. There may be something else about the American polity that generates compliance.

Recent events in Russia illustrate the point. Although the Russian Constitution similarly established a presidency with specific powers and attributes (in more explicit terms than the American presidency), the supposed transfer of power from President Putin to President Medvedev in recent days has called into question the willingness of that government to follow the previously constitutionally prescribed rules governing the office of the President. First, Putin conveniently effected constitutional changes that conveyed power from the Russian President to the Russian Prime Minister, the historically much less significant post he was about to assume.[16] Now that the change in office holders has actually taken place, it has been noted that Putin continues to exercise some of the functions that remain constitutionally assigned to the Russian President, apparently in open defiance of Russia's constitutional text.[17]

Such a turn of events seems essentially unimaginable in the United States. Consider, for example, the recent controversy over President Bush's exercise of questionable presidential authority to conduct domestic surveillance.[18] His alleged abuse of power, once it came to light, was followed in

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[16] *See*, e.g., *Will Putin Pull Medvedev's Strings?* (NPR Radio Broadcast May 7, 2008), available at http://www.npr.org/templates/story/story.php?storyID=90223700&sc-emaf; *Russia's Putin Clings to Power after Presidency Ends* (NPR Radio Broadcast April 16, 2008), available at http://www.npr.org/templates/story/story.php?sstoryID=89676050.

[17] *See*, e.g, Alexander Osipovich, *Medvedev-Putin Duo Set to Buck a Trend*, *St. Petersburg Times*, March 7, 2008, available at http://www.sptimesrussia.com/index.php?action_id=2&story_id=25236 (explaining that the Russian Constitution gives President Medvedev broad control over foreign affairs and national defense, but that Prime Minister Putin would apparently continue to exert much influence over foreign policy); Bridget Kendall, *Will Power Shift from the Kremlin?*, BBC NEWS, May 5, 2008, available at http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/7273637.stm (observing that Putin wants to redefine the constitutional relationship between the president and prime minister, as evidenced by Putin's attending the NATO summit (a foreign affairs presidential role) while Medvedev stayed home to address the domestic economy, and Putin's statements conflating the president's constitutional duties with the prime minister's); *See* also, *Putin Still Holds Power in Russia* (NPR Radio Broadcast Aug. 13, 2008), available at http://www.npr.org/templates/story/story.php?storyId=93575223 (reporting that Putin remains in control of Russian foreign affairs, as demonstrated by his far more visible and vocal role in the Russia-Georgia conflict than that of his presidential successor, Medvedev).

[18] James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts", N.Y. Times.com, December 16, 2005, available at http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=print (revealing news of the controversial surveillance by the National Security Agency); Dan Eggen, Bush Authorized Domestic Spying, *Washington Post*, December 16, 2005, at A1 (same); David E. Sanger, "Bush Says He Ordered Domestic Spying", *New York Times* December 18, 2005 available at http://www.

short order by a strong and effective public outcry, and a resultant end to the charged usurpation.[19]

Americans adhere to this particular rule of law, concerning presidential authority, not only because it has been constitutionalized, but also because they have a strong cultural predisposition to respect the rule of law in general. Maybe these two notions are closely related in this instance. Historically, the outlines of our constitutional government might have contributed to our current compliant culture. That is, perhaps we have evolved into a society in which open, notorious defiance of prescribed, democratically-achieved governmental structures is unthinkable precisely because we have adapted to a rule of law that was first established in our Constitution in 1789. We may no longer be able to ascertain whether the Constitution in this case created or simply reflects the essentially law-abiding nature of American society. Perhaps the structural provisions of the U.S. Constitution provide Americans with a stable government and society that then insures our rights, as well as insuring our character of compliance with common rules of law. Or, alternatively, maybe Americans otherwise enjoy a stable society that reveres such rights and rules, and similarly venerates compliance with the structural provisions of our Constitution that dictate this track.

In short, it may be that Americans adhere to their intended structural framework, as they enjoy individual rights, not so much because these are enshrined in our Constitution, but rather because we are a law-abiding and rights-respecting culture. The actual terms of our Constitution's structural provisions may, like those of its rights provisions, ultimately not make all that much difference. What fundamentally does seem to matter, however, is our style as a people, not necessarily the style of our

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nytimes.com/2005/12/18/politics/18bush.html?scp=11&sq=President+Bush%2C+war+on+terror%2C+eavesdropping&st=nyt (detailing President Bush's initial defense of the legality of the program).

[19] Jason Leopold, Five Year-old Report Warned White House Domestic Spying Unlawful, *The Public Record*, May 20, 2008, http://www.pubrecord.org/law/54-five-year-old-report-warned-white-house-domestic-spying-unlawful.html (describing the history of President Bush's efforts to conduct the surveillance, indicia of illegality in the operation, and the backlash that followed it); Peter Baker and Charles Babington, Bush Addresses Uproar Over Spying, *Washington Post*, December 20, 2005, A1 (describing the uproar that followed the revelation); Timothy Casey, "Electronic Surveillance and the Right to Be Secure, 41 *UC Davis Law Review* 977, 980 (2008) (recounting lawsuits initiated based on the allegedly illegal surveillance); letter from Alberto R. Gonzales, Attorney Gen., U.S. Department of Justice, to Arlen Specter, Ranking Minority Member, Comm. on the Judiciary U.S. Senate and Patrick Leahy, Chairman, Comm. on the Judiciary U.S. Senate (Jan. 17, 2007) (on file with the *New York Times*) available at http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf (advising that, although continuing to defend the legality of the program, the Bush Administration would not attempt to reauthorize the surveillance and instead thereafter seek court approval for such activities under the Foreign Intelligence Surveillance Act).

constitutionally-prescribed government or rights, although the former may have strengthened the latter, and vice versa.

7.3 Symbol

The United States Constitution has an additional rule of law value, in its ability to hold our very diverse population together as one nation. It does so by serving as a symbol of the very general concepts we all like to think that our country stands for–peace, freedom, tolerance, equality, and so on. As such, the Constitution provides a banner behind which we all can rally, even though we might see wholly distinct and contradictory features in that banner were we to examine it up close.

In this symbolic way, our Constitution procures reverence for itself and for our country.[20] As it does so, it cements our very disparate social elements. Our common belief that we all are obligated, by this single document, to follow the dictates of the powers established within it, seems in itself to operate sufficiently to bind us to whatever those powers determine to be our common, governing rule of law at any given time. This remains true even when those powers alter previous understandings of the applicable rule of law.

Thus, although our rule of law, particularly as stated in our Constitution, is a distinctly indeterminate one, our Constitution symbolically operates to bind us to it nonetheless. In addition to any structural value, this emblematic aspect of our American Constitution acts to promote and ensure the rule of law.

The force of this argument might appear to be undermined by our disparate understandings of what our Constitution says, but in fact interpretive diversity seems to have precisely the opposite effect. The United States Constitution is written in relatively broad, general language. It contains many ambiguous, encompassing terms, such as "equal protection of the law"[21] or "due process of law,"[22] which leave much open for debate. Whole libraries full of scholarly and judicial writings are devoted to their interpretation, sometimes including totally contradictory ideas concerning the same portion of constitutional text.

The number of opinions about the content of our Constitution is multiplied almost exponentially when popular understanding is added to this mix. Americans with no particular legal expertise, some of whom have

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[20] *See* Henry Monaghan, "Our Perfect Constitution", 56 *New York University Law Review*. 353, 356 (1981) ("The practice of 'constitution worship' has been quite solidly ingrained in our political culture from the beginning of our constitutional history.").

[21] U.S. Const. amend. XIV, Section 1, c. 2.

[22] Id.; U.S. Const. amend. V.

never even read our Constitution, have additional, and dramatically different, individual notions of what the Constitution contains. Some of these opinions stem from basic unfamiliarity with the actual words of the document or their possible meanings,[23] some may be attributed to variances in interpretive philosophies, and some may result from different substantive conclusions about where an interpretation leads. Many, maybe even most, Americans simply assume that our Constitution actually protects whatever they believe that it fundamentally must or should protect, whatever is most vital to our essence as a free people.[24] Americans like to think, and tend to think, that our Constitution contains all that is right and good, and excludes all injustice, even as our various individual conceptions of goodness and justice remain completely at odds.

For whatever reason, Americans generally strongly support their Constitution despite this interpretive diversity. So when we all stand up and proclaim the virtues of our amazing Constitution, we seem to be paying fealty to an endless array of markedly different constitutional ideals.

This creates a rather odd situation. American society purports to be bound by a common rule of law, contained in and constrained by our Constitution, while our readings of the Constitution advance widely divergent rules of law. We adhere in fact to different "Constitutions," even as we seem to respect a single determinate text.

This confused state of affairs works out in practice largely because the homage we pay to this seemingly indefinite Constitution itself is an important part of what binds us together as a nation, under the rule of law. We are an enormously diverse citizenry, measured along almost any set of indices. We started out that way, and we seem to get only more so with every passing year. It was initially very difficult to hold us together as one nation as we embarked on the American adventure. Our first stab at it, under the ill-fated Articles of Confederation, was about to fail when the present Constitution was first proposed. Sometimes struggle against a common external enemy has helped us to coalesce, as during World War II. At other times, we did not do such a good job of holding together, as during our Civil War era. But ultimately, we have remained one nation, under a common rule of law.

A constant throughout all this history has been our Constitution. It is remarkably resilient, as has been the government to which it gave birth. While the indeterminancy of American constitutional standards might seem to depart from European conceptions of the rule of law, the continuity and stability of American constitutional institutions has been

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[23] *See* Lane, *supra* note 9, at 54.

[24] *See*, e.g., Monaghan, *supra* note 21, at 358 (asserting that numerous legal academics find our Constitution "perfect" in the sense that it guarantees whatever set of rights each of them believes a modern Western liberal democracy ought to guarantee to its citizens).

striking.[25] Our Constitution and the government it established has remained since its adoption a uniquely unifying force in American life. The Constitution has changed, to be sure, with twenty-nine official Amendments and, some would argue, several more that were unofficially effectuated through interpretive innovations or popular consensus.[26] But these changes have been relatively few, and, more important, they have followed the original Constitution's self-prescribed rules for change,[27] and its permissible standards for judicial interpretation. For the most part, then, Americans have not wavered from their constitutional rule of law, indefinite though it may be, since its adoption over 200 years ago.

Even though Americans do not always seem to agree about what exactly our constitutional rule of law is, we nevertheless appear to consider ourselves inexorably bound by *whatever* it is. This enables us to adhere to pronouncements of our Supreme Court (or any court), even when individuals among us might believe them to be wrong. We do this because we accept, at some level, that our Constitution gives the Court the authority to determine what the governing rule of law is. As a nation, we believe that it confers that authority even in cases in which we, as individuals, are sure that the Court's interpretation of the rule of law is inaccurate.

Thus, we see ourselves as a people who live by the rule of law, and we see our ultimate rule of law as embedded in our Constitution, and we see our courts, right or wrong, as the official constitutional rule-of-law arbiters of last resort. This serves to explain the fact that we adhere to our constitutional rule of law even though we have different actual rules in mind. Our Constitution symbolically unites us, and in doing so leads us to comply with the determinations of our leaders concerning the actual content of our governing rules of law, including those in our Constitution itself. This occurs even when those leaders change their minds about what the specific rule is. The necessary consistency comes not from an unwavering assessment of which specific strictures the rule of law contains, but rather, it lies in our consistent and universally-binding system of law interpretation and application, and our common acceptance that we are obliged to conform to the outcomes of that system.

In other words, we follow our constitutional rule of law even when we individually believe we are bound by different rules. This is because, at a minimum, we all agree that we must adhere to "the" rule, whatever that is, as determined by our constitutionally-formulated government. We seem

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[25] *See* Bruce Ackerman, We the People: Foundations 34 (1991) (contrasting American and modern European experiences in this regard).

[26] *See*, e.g., id. at 34–57, 315–316 (advancing the thesis of constitutional change through a form of popular acceptance of non-Article V amendment).

[27] U.S. Const. art. V (governing the amendment process).

willing to suspend our own personal interpretations of constitutional content in our common understanding that the rule of law requires that we follow the rules as set forth, interpreted, and applied by our duly elected and appointed leaders. Americans seem to believe that our Constitution requires this of us, whatever it actually says.

7.4 Conclusion

Americans' venerate our Constitution primarily because we see its designation of rights and liberties as setting forth a rule of law we are happy to call our own, one to which we all must adhere, that describes us as we would wish to be. However, what matters most in practice is not the Constitution's specific substantive provisions. The essence of the American constitutional rule of law rests primarily on that document's structural components, and not so much in its delineation of rights or its exposition of specific rules of law. Moreover, ultimately the essence of our American constitutional rule of law may not depend upon the document at all. Rather, it may stem from our "style" as a law-defined and -confined people, a character that may have either molded or been molded by our Constitution.

The fact that Americans adhere to our constitutional rule of law at all is somewhat surprising, given the broad diversity of rival constitutional interpretations among the American people. Maybe we do so because our Constitution serves, in a symbolic way, to unite us to follow whatever our constitutionally-adopted leaders tell us is the rule of law that the text contains. When we are tested from without or within, we turn to that Constitution, as interpreted by our Court, to be the definitive source of our rules and our rights. And though we may see different visions of heaven when we gaze into its depths, it nevertheless serves as the symbolic–and consequently also the actual–basis of our unified national identity. This unity and the common obligations we understand it to require of us are themselves exemplars of our constitutional rule of law.

Thus, Americans are a rule of law people, and our Constitution is our ultimate rule of law. But it is a rule of law largely dependent on its delineation of structure and its role as symbol, rather than on particular substantive guarantees or rights. The United States Constitution is well-suited to the people that it rules–establishing an indeterminate, interpretively inconsistent, yet common and binding rule of law.

Acknowledgment Thanks to Meggan Johnson for her superb assistance with research, and to the Hofstra University School of Law for its research support and participation in EACLE.

Chapter 8
Constitutions Without Constitutionalism: The Failure of Constitutionalism in Brazil

Augusto Zimmermann

> *If the world were destroyed today, and archaeologists of the future were to discover only the constitutions of the United States and the Latin American Republics, they would probably conclude that constitutionalism was far more developed in Latin America than in the United States… Compared to Latin American constitutions generally, and particularly when compared to the 1988 Brazilian Constitution… the U.S. Constitution appears undeniably underdeveloped. Yet this brief, frequently omissive charter has worked extraordinarily well in the United States, while the more elaborate and detailed charters found in Latin America have generally worked poorly.*[1]

8.1 First Considerations

Altogether, Brazil has had eight constitutions since the country separated from Portugal in 1822.[2] Most of these constitutions were, in theory, based on liberal-democratic models of constitutionalism by virtue of establishing a bill of rights and a threefold separation of state powers. In

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[1] Keith S. Rosenn, 'The Success of Constitutionalism in the United States and Its Failure in Latin America' (1990) 22 *University of Miami Inter-American Law Review* 1, at 1.

[2] Whether Brazil has seven or eight constitutions is still an unresolved issue among Brazilian constitutional lawyers. In 1969, a military junta which replaced President Costa e Silva, an army officer, when he suffered a stroke, issued an amendment that rewrote and renumbered the entire text of the 1967 Constitution. Because this amendment resulted in an entirely new document, many have therefore concluded that it ended up creating a new constitution for Brazil.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_8,

following this long, rights-based tradition, which began with the Imperial Constitution of 1823, the current Constituição da República Federativa do Brasil (Constitution of the Federal Republic of Brazil) lists a vast number of human rights, and describes procedural guarantees that ensure that these rights will be fully protected.

However, a critical analysis of Brazil's constitutional history reveals the existence of extra-legal factors that have prevented the country from establishing an authentic system of constitutional government. Indeed, the constitutional history of Brazil does not support the more optimistic assumption that a rights-based democratic constitution alone is sufficient to bring about necessary socio-political environment required for the proper realization of the rule of law.[3]

8.2 Constitution without Constitutionalism

A constitution is the basic law of a nation, determining, as Lord Bryce observed, "the form of its government and the respective rights and duties of the government towards the citizens and of the citizens towards the government."[4] Although every nation has a constitution, not all of them have what would properly be described as constitutional government; i.e., a system of government where constitutional law provides "restraints on the exercise of political power for the purpose of protecting basic human rights and privileges," thereby "shielding the citizen against any assumption of arbitrary power."[5]

Unfortunately, the number of constitutional governments in the world is not yet as great as one might expect. In the absence of what one may regard as a "culture of constitutionalism," even "good" constitutions do not necessarily generate truly constitutional governments. As Suri Ratnapala points out:

> Constitutional government needs much more than a well-written constitution. *The best constitution is to no avail if it does not command the respect of officials and citizens*. Hence this form of government is unsustainable without a proper culture

[3] For an analysis of the socio-political context of the rule of law, *see* Augusto Zimmermann, 'The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law' (2007), 14 *Murdoch University E-Law Journal* 10, at https://elaw.murdoch.edu.au/issues/2007/1/eLaw_rule_law_culture_legality.pdf.

[4] James Bryce, *The American Commonwealth* (1888) (Indianapolis: Liberty Fund, 1995), at 43.

[5] Thomas M. Cooley, *The General Principles of Constitutional Law* (Boston: Little Brown, 1898), at 22.

> of constitutionalism. Such culture depends in part on favorable historical, social and economic conditions. An inquiry about these conditions will lead us into fields of social science.[6]

At this point, it is important to consider that positive law is not always the primary source of political power.[7] Sociologists have observed that there are other ways in which society recognize power other than through a written constitution. Charismatic leadership, for example, as Max Weber explains, conveys political power when socially endorsed by means of "devotion to the exceptional sanctity, heroism, or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him".[8] This development results in a reality in which "charisma" is more relevant than constitutional law, and the rule of law is, therefore, not seen by society as the most acceptable element of power recognition. Sir Ivor Jennings suggested that:

> If it is believed that the individual finds his greatest happiness, or best develops his soul, in a strong and powerful State, and that government implies... the unity of the nation behind a wise and beneficent leader, the rule of law is a pernicious doctrine.[9]

In this sense, it seems that in certain countries of Latin America political stability rests less upon "impersonal constitutions" and more upon certain "personal pacts" established by political rulers. These pacts are often extra-legal in nature, although they "provide order by relying on personal loyalty, rather than law, to glue society together."[10] Although such Latin American countries have adopted the U.S. presidential system, with considerable variations, their "founding fathers" were in fact rural oligarchs (caudillos) who adopted this system, not to guarantee personal freedom, but rather to establish a strong executive power for the purposes of preventing the disintegration of their newly independent states. As Rett R. Ludwiskowski explains:

> While the North Americans wanted to have the executive well-balanced, and therefore unable to turn to dictatorship, the Latin Americans wanted their presidents to be strong, but non-dictatorial. The focus was clearly different; for drafters of

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[6] Suri Ratnapala et al., *Australian Constitutional Law: Commentary and Cases* (Melbourne: Oxford University Press, 2007), at 4.

[7] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), at 140.

[8] Max Weber, *Theory of Social and Economic Organization* (New York: MacMillan, 1948) at 215.

[9] Sir Ivor Jennings, *The Law and the Constitution* (London: University of London Press, 1959) at 46.

[10] Miguel Schor, 'Constitutionalism Through the Looking Glass of Latin America', (2006) 41 *Texas International Law Journal* 1, at 20.

> the U.S. Constitution the presidential system meant, first of all, the development of checks and balances; *for Latin Americans it meant the model of governance concentrated around the executive power*.[11]

Unfortunately, the experience of "presidentialism" in Latin America has not been very successful.[12] Its substantial failure in generating the rule of law is amplified when one considers the great number of revolutions, coups d'état, instances of authoritarianism, and factional strife that have so often characterized the political life of the region.[13] The presidential systems of Latin America, can ultimately be said to, "have been in perennial, unsteady oscillation between power abuse and power deficiency."[14] Owing to the authoritarian tradition inherited from the Spanish and Portuguese colonizers, notes Keith S. Rosenn:

> [Latin American] Presidents are often granted incredibly broad powers to make policy and laws and to suspend constitutional guarantees by invocation of a state of emergency or a state of siege, one of the most abused legal institutions in Latin America. Thus, *built into almost all Latin American constitutions are provisions that permit both democracy and dictatorship.*[15]

If compliance with legal norm does not rest on a firm element of public morality, then the rule of law might become "an impracticable and even undesirable ideal, and … society will quickly relapse into a state of arbitrary tyranny."[16] In Latin America, however, Miguel Schor explains, "constitutions are not entrenched because political leaders do not fear citizen mobilization when fundamental rules of the game are violated."[17] In the context of Latin America, Paola Cesarine and Katherine Hite observe that:

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[11] Rett R. Ludwikowski, 'Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot' (2003) 21 *Boston University International Law Journal* 29, at 51.

[12] *See* Augusto Zimmermann, 'American-Style Presidentialism Has Been a Recipe for Disaster in Brazil', *HACER* (The Hispanic American Center for Economic Research), 15 July 2006, at: http://www.hacer.org/current/Brazil110.phphttp://www.hacer.org/current/Brazil110.php.

[13] Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State* (London: Methuen, 1954), at 210.

[14] Giovanni Sartori, *Comparative Constitutional Engineering: An Enquiry into Structures, Incentives and Outcomes* (New York: New York University Press, 1997), at 93.

[15] Keith S. Rosenn, 'The Success of Constitutionalism in the United States and Its Failure in Latin America', (1990) 22 *University of Miami Inter-American Law Review* 1, at 33.

[16] Friederich A. von Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) at 206.

[17] Schor, *supra* note 9, at 7.

> The persistence of authoritarian legacies in post-authoritarian democracies may be explained in terms of a combination of socially, culturally, and institutionally induced sets of attitudes, perceptions, motivations, and constraints – that is, *from traditions or institutions of the past as well as from present struggles within formally democratic arrangements… As a result, democracy in much of Latin America belongs to the realm of constitutions and code books rather than reality.*[18]

This seems to be one of the main barriers for the rule of law in Brazil. Indeed, the constitutional history of Brazil provides strong evidence that rights-based constitutions by themselves are insufficient for this realization. This might be so because extra-legal actors of a socio-political nature can seriously jeopardize the satisfactory implementation of any constitutional framework. *In other words, it is not enough to write "good" constitutions. It is important also to have in place a proper culture of constitutionalism, otherwise, one might say, "the principles and institutions of constitutional government [are]… little more than words on paper."*[19]

8.3 Periods of Brazilian Constitutional History

The constitutional history of Brazil can be divided into seven distinguishable periods.[20] These divisions occurred within the context of institutional ruptures, ultimately producing a new constitutional order. While most of the Brazilian constitutions were regarded as "progressive" for their time, the history of constitutionalism in Brazil can be described as problematic and shifting in nature.[21] In fact, the experience of Brazil shows that "simply adopting a constitution—no matter how well-crafted—does not ensure that the political practices needed for constitutions to limit political power will emerge."[22] *Instead, the constitutional history of Brazil seems to confirm the less optimistic assumption that rights-based constitutional documents "are worth little if not accompanied by the appropriate political culture of liberty."*[23]

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[18] Paola Cesarine and Katherine Hite, 'Introducing the Concept of Authoritarian Legacies', in K. Hite and P. Cesarini (eds.), *Authoritarian Legacies and Democracy in Latin America and Southern Europe* (University of Notre Dame Press, 2004), at 7.

[19] Jason Mazzone, 'The Creation of a Constitutional Culture' (2005) 40 *Tula Law Review* 671, at 672.

[20] Brazil had two constitutions during the period of military government (1964–85). *See supra* note 1.

[21] *See* Vamireh Chacon, *Vida e Morte das Constituições Brasileiras* (Rio de Janeiro: Forense, 1987).

[22] Schor, *supra* note 9, p.14.

[23] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), at 84.

8.3.1 The First Constitutional Period

8.3.1.1 The Brazilian Empire (1822–1889)

Brazil's first constitutional period was its longest. It began with Brazil's independence from Portugal in September 1822, and ended in the 1891 military coup that established the republican system.

In reality, Brazil had not been a colony since 1808, the year the Portuguese Court, taking flight from French troops who had invaded Portugal that year, arrived in Rio de Janeiro. The arrival of the Portuguese King, Dom John VI, made Rio de Janeiro the new capital of the United Kingdom of Portugal, Brazil and Algarve.

In 1822, however, Dom John VI was compelled by the Portuguese Cortes (Parliament) to leave Brazil. At the same time, aiming to restore the old colonial system, the Cortes also abolished the United Kingdom. The King's eldest son, Dom Pedro I, knew that re-colonization would certainly not be accepted by Brazilians, and so refused to return to Portugal. He then declared the country's independence, thereby becoming the first monarch of the new Empire of Brazil.

Dom Pedro I was crowned Emperor on 1st December 1822. He subsequently convoked an Assembléia Constituinte (Constituent Assembly) in order to draft the first Brazilian Constitution. But this was later dissolved on the pretext that its members were concentrating too much power in the legislature. He then promised, in his act of dissolution, to enact a constitution that would be twice as liberal as that designed by the dissolved assembly. Indeed, promulgated on 25 March 1824, the "Political Constitution of the Empire of Brazil" allowed Brazilians to enjoy the benefits of a stable society. The Brazilian Monarchy was far less turbulent than its neighboring republics, affording levels of social peace that allowed the country to enjoy a well-structured parliamentary system.[24]

Comprising 179 articles, the Imperial Constitution of 1824 initiated the Brazilian tradition of lengthy constitutions.[25] It was, however, a progressive document for its time, containing a "bill of rights" inspired by the French Declaration of Rights (1789). It abolished the privileges of the nobility and also declared that all laws should manifest the sovereign will of the people. On the other hand, the 1824 Constitution was silent on the system of black slavery. It was drafted as if the slavery system did not exist in the country. The constitution simply declared in Article 179 that every citizen was equal before the law. It also abolished all forms of torture and cruel

[24] C.H. Haring, *Empire of Brazil: A New World Experiment with Monarchy* (Cambridge/MA: Harvard University Press, 1958), at 162.

[25] *See* Chacon, *supra* note 20, at 69.

punishment; despite the fact that, where slaves were concerned, the use of the lash remained commonplace.[26]

Slaves were not regarded as citizens, because the 1824 Constitution stipulated that citizens could not be in a condition of servitude. Not being citizens, therefore, they were either aliens or had no country. This situation was further compounded as the laws authorized neither enslavement nor slaveholding, and, in addition, the codification of civil laws, the Consolidação das Leis Civis (Compendium of Civil Laws), contained no reference to the issue of slavery. As a result, the illegality of black slavery was beyond remedy, even when observed in the light of the formal dispositions of Brazilian law.[27]

"Exceptional laws," therefore, governed the system of slavery. One such law was a statute dated 10 June 1835, which provided that the legal system would disregard any constitutional limitations that might have been applied to slaves concerning both criminal imputation and proportionality between the gravity of a crime and its resulting penalty. As a consequence, no consideration was given to aggravating and extenuating circumstances for any crime committed by a slave. The only penalty for any serious crime committed by an enslaved person was death.

The average life expectancy for slaves was only 15 years.[28] They were individuals with no rights over their physical bodies and their masters could dispose of and inherit them as they would any other property.[29] Freed slaves could also be re-enslaved whenever their former masters divined any sign of "ingratitude" on their part. In brief, enslaved people were nothing but "tools" to be preserved at the lowest cost and replaced at the cheapest price. As the American historian Robert Conrad explains:

> The slave was a beast of burden, an object of investment and commerce, an item on a balance sheet. The slave represented wealth, transferable property, mortgage collateral, to be traded, auctioned, bargained for, listed as merchandise for sale or rental in the daily press, shut up like cattle at night, shipped as perishable merchandise at the lowest cost, beaten into submissiveness or into action like a mule or an ox.[30]

Though the trafficking of Africans was outlawed on 7 November 1831, the slave trade to Brazil continued, unabated, in spite of legal prohibition. Under article 179 of the Criminal Code, punishment for anyone trying to

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[26] Emília Viotti da Costa, 'Why Slavery was Abolished', in L. Hanke (ed.), *History of Latin American Civilization*, Vol.2 (Irvine: University of California, 1967), at 198.

[27] Joaquim Nabuco, *Abolitionism: The Brazilian Antislavery Struggle* (1883) (Chicago: University of Illinois Press, 1977), at 83.

[28] José Honório Rodrigues, *The Brazilians: Their Character and Aspirations* (Austin: University of Texas Press, 1967), at 24.

[29] Robert Conrad, 'The Brazilian Slave', in L. Hanke (ed.), *supra* note 23, at 209.

[30] Id. at 207.

enslave a freeperson was 9 years detention.[31] Yet, around 1 million Africans were illegally brought into Brazil as slaves between 1831 and 1852.[32] This number would be higher had not many of the slaves died of disease and malnutrition during the long voyage across the Atlantic. In 1881, A Portuguese author gave the following description of "slave cargo" arriving in Brazil.

> When the ship arrived at its destination—a remote and deserted beach—the cargo was put ashore, and into the bright light of the tropical sun emerged a column of skeletons covered with pustules, their bellies swollen, their knee joints ulcerated, their skin torn, consumed by insects, with the stupid and sickly air of idiots. Many could not even stand, but stumbled and fell and were transported like sacks on the shoulders of men.[33]

Whereas the 1871 "Law of the Free Womb" declared children of slaves born after 1871 free, most of the slave-owners did not comply with it. In practice, this law "had few repercussions" because "slave owners continued to use children's services."[34] Slavery in Brazil only ended in May 1888 with the Lei Áurea ("Golden Law"). This was the consequence of pressure exerted by Great Britain which forced Brazilian elites gradually to abandon slavery and pursue other ventures. Subsequently, with British capital and technology, Brazil built its first railways and established its first textile manufacturing industry, based on free labor.

The Constitution of 1824 was somewhat unusal in that it created four rather than three branches of government. These were the executive, legislative, judicial, and moderating branches. This separation, under Article 9, was designed to protect the basic rights of the citizen. The fourth, "moderating" branch of government was inspired by the work of Benjamin Constant, a French political philosopher and constitutionalist.[35] For Constant, a fourth and "neutral" branch could moderate the overarching disputes between the other three branches of government. A "moderating power" could, in this sense, "restore them to their proper place," because this additional branch would "be external to the other three, and it must be in some sense neutral, so that its action might be necessarily applied whenever it is genuinely needed, and so that it may preserve and restore without being hostile."[36]

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[31] Id. at 208.

[32] Lewis Hanke, 'Negro Slavery in Brazil', in L. Hanke (ed.), *supra* note 25, at 155.

[33] J.P. Oliveira Martins, *O Brazil e as Colônias Portuguezas* (Lisbon, 1881), at 57.

[34] Boris Fausto, *A Concise History of Brazil* (Cambridge: Cambridge University Press, 1999), at 128.

[35] *See* Christian Edward Cyril Lynch, 'O Discurso Político Monarquiano e a Recepção do Conceito de Poder Moderador no Brazil (1822–1824)' (2005) 48 Dados – Revista de Ciências Sociais 654.

[36] Benjamin Constant, *Political Writings* (Cambridge: Cambridge University Press, 1988), at 184.

In Brazil, moderating power belonged to the person of the Emperor, himself. He exercised this sort of prerogative, although he was obliged to do so assisted by a Conselho de Estado (Council of State) which comprised respected citizens of "knowledge, ability, and virtue" appointed by the Emperor with life tenure. This council deliberated on "serious matters" related to issues of public administration and declaration of war.[37] At the same time, the Emperor could veto legislative bills proposed in the Parliament, and also dissolve the Chamber of Deputies by calling for new elections of its members. An electoral college elected by citizens appointed members of the Chamber of Deputies (Lower House) for a 3-year mandate, while the Emperor himself was charged with appointing members of the Senate (Upper House) from a list comprising the names of the three highest-vote winners in each province. These members of the Senate were given life tenure.

The judiciary was constitutionally divided into a Supreme Tribunal of Justice, Provincial Tribunals, municipal and district judges, and elected judges of the peace with powers limited to the area of municipalities. There were also lay jurors who analyzed the facts contained in the lawsuits, although only professional judges were authorized to pass final judgment. Under nomination by the Emperor and protected with life tenure, judges could only be dismissed if they were found guilty on formal charges by the higher courts. In contrast, municipal judges were nominated to a fixed term of 4 years. Over all, the court system was quite well structured, although "the corruption of the justice was a notorious fact, bitterly condemned by many contemporaries."[38]

An important organ in that period was the Guarda Nacional (National Guard), created on 18 August 1831 under the inspiration of a French correlate created a few years earlier. The Guarda consisted of an armed corps of trustworthy citizens charged with upholding the law and preserving public order in the municipalities. It was also aimed at guaranteeing the integrity of the national territory by protecting its borders under the army's command.[39] In exceptional circumstances, however, a division of the Guarda could be called to suppress a rebellion outside its local jurisdiction.

Whereas the Guarda Nacional could, in its two first decades, mobilize around 200,000 people, the professional army comprised a regular force of only 5,000 personnel. Landlords were appointed as coronéis (colonels) to

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[37] For an analysis of the Council of State, *see* Christian Edward Cyril Lynch, *A Idéia de um Conselho de Estado Brasileiro: Uma Análise Histórico-Constitutional* (2005) 42 Revista de Informação Legislativa 45. *See* Maurício Assuf, *O Conselho de Estado* (Rio de Janeiro: Guavira, 1979).

[38] Victor Nunes Leal, *Coronelismo: The Municipality and Representative Government in Brazil* (Cambridge: Cambridge University Press, 1977), at 106.

[39] Fernando Uricoechea, *The Patrimonial Foundations of the Brazilian Bureacratic State*, (Berkeley: University of California Press, 1980), at 65.

local divisions of the Guarda Nacional. This led to the consolidation of a phenomenon to be known as coronelismo, a system of political bosses, big landowners and their representatives who controlled the political conduct of rural workers from above.[40] And since one of the Guarda's functions was to protect the social order, it naturally gave to coronéis (landlords) "a powerful hand for the annihilation of any group contesting authorities and their monopoly of legitimate coercion."[41]

Another issue was the right to vote. The right to vote was restricted to free adult males who were subject to certain conditions of income. Further restriction in this regard was placed on anyone wishing to become a parliamentarian. The amount required to vote, however, was quite small and almost every non-slave male could vote. Indeed, even illiterates were able to vote until 1881, after which a more restrictive electoral reform forbade them from doing so. However, this reform positively established direct suffrage for the Lower House as well as the right to vote to the naturalized and freed slaves.

A time of great turbulence and unsuccessful republican experimentation followed the forced resignation of the first Emperor of Brazil, Dom Pedro I, on 7 April 1831, as the result of republican-inspired uprisings and nationalist resentments over his Portuguese connections. This turbulent period, known as the Regency, spanned the 9 years from the time of the abdication till Dom Pedro I's son, Dom Pedro II, reached his majority in 1840. The Regency, or a series of regents, worked very badly and many armed revolts broke out throughout Brazil. Uprisings occurred in the provinces of Pará (1835–1840), Bahia (1837–1838), and Maranhão (1838–1840), though the most serious of all took place in Rio Grande do Sul, where its 1836 Farroupilha Revolution kept this region in southern Brazil virtually separated from the rest of Brazil for approximately 10 years.

It had been expected by the Republicans that the period of Regency would demonstrate that the constitutional monarchy was unnecessary, even anachronistic. However, the failure of the Regency reinforced the prestige of monarchical institutions. Therefore, to avoid national fragmentation into several independent republics, as occurred with Spanish America, the Parliament brought forward the majority of Pedro II to his 15th birthday. Thus, on 22 July 1840, the young Emperor took the oath to uphold the constitutional order, which he ironically was at that very moment in the process of violating, because, technically speaking, Article 121 of the Imperial Constitution required that the heir had to be at least 18 years of age.

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[40] A.E. van Niekerk, *Populism and Political Development in Latin America* (Rotterdam: Rotterdam University Press, 1974), at 48.

[41] Uricoechea, *supra* note 38, at 66.

Nevertheless, Pedro II was a symbol of peace and unity for the country, and, as the center of gravity of the monarchical system was concentrated in the figure of the monarch, his early accession was deemed fundamental to saving national unity.[42] As the historian José Honório Rodrigues noted, "the imperial monarchy represented a continuation of the paternal government of the kings of colonial days. Personal authority rather than the law was what mattered."[43] This situation worked well, as the people of Brazil had a sense of loyalty toward the figure of the monarch whose personal attributes and supposed generosity were admired. These feelings of personal loyalty and admiration sustained the entire edifice of the constitutional monarchy. As the sociologist Oliveira Vianna explains:

> *Amongst the popular masses, feelings [of loyalty] involved only the person of the monarch, not the monarchy itself. In truth, people were neither monarchist nor republican*. They were utterly indifferent to forms of government. Amongst the political elites, apart from their personal admiration to the person of the emperor, there were no feelings about the moral superiority of monarchical institutions.[44]

After the coronation of Pedro II, the country experienced more than four decades of political stability. Between 1841 and 1888, Brazilians enjoyed full freedom of the press, no military coups occurred, no political prisoners were taken, and there were no armed insurrections.[45] In the 1880s, however, when the monarchy lost the crucial support of the landed oligarchy over the issue of slavery, things started to change. While Dom Pedro II was on a visit to Europe for medical treatment, his daughter, Princess Isabel, signed, in May 1888, a legislative bill, the Lei Áurea (Golden Law), which ended slavery and freed all the slaves without any financial compensation to their slave-owners. This led many of the slave-owners to support the abolition of the Monarchy.[46]

The principal leaders of the coup of November 1888 were army officers backed by disgruntled former slave-owners. Neither of these groups had any concern for the welfare of the freed black population, and consequently, with the establishment of the Republic, freed slaves were left to their own devices. The many difficulties they experienced in adjusting to the new conditions were taken as evidence of their supposed racial inferiority. Many saw the slaves as being incapable of making independent decisions on moral

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[42] Haring, *supra* note 23, at 55.

[43] Rodrigues, *supra* note 27, at 25.

[44] Francisco de Oliveira Vianna, *Evolução do PovoBrasileiro*(Rio de Janeiro:Companhia EditoraNacional,1938),at310–311.

[45] Antonio Paim, *História do Liberalismo Brasileiro* (São Paulo: Mandarim, 1998), at 119.

[46] *See* Jordan M. Young, *The Brazilian Revolution of 1930 and the Aftermath* (New Brunswick: Rutgers University Press, 1967), at 15.

issues or of living their own lives independently.[47] Some argued that black people were happier as slaves than as free citizens.

The army emerged as a major political force in Brazil, at the time of the Triple Alliance War (1865–1870) declared by the ruthless dictator Solano Lopez of Paraguay against Brazil, Argentina, and Uruguay.[48] Following the war, army officers, who had been refused legal privileges such as higher wages and special retirement by the civilian elites of the Empire, became highly political.[49] On 15th November 1888, the decision was made to carry out a coup that interrupted the country's longest period of constitutionalism.[50]

A few days after the army coup, the London daily, *The Times*, in an article explaining the motivation behind the fall of the Brazilian monarchy, quite accurately observed that the declaration of the Republic occurred because Dom Pedro II was "more liberal… than his subjects".[51] Indeed, traditional republicans often accused him of lacking the necessary will to impose social reforms. Then, as the historian John J. Johnson asserts, "Republicans took advantage of the personal and political freedoms that Pedro's idealism had guaranteed and began to promote their own interests and to downgrade both the monarchical system and the Emperor."[52]

The majority of republicans in Brazil embraced a concept of "enlightened authoritarianism" which denigrated parliamentary institutions as being inefficient and an archaic, waste of time and energy. They subscribed rather to the idea of positivism, a nineteenth-century philosophical school conceived by Auguste Comte, a French philosopher, which despised metaphysics and propounded the belief that empirical science would lead humanity to its higher levels of social order and economic progress.[53]

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[47] Costa, *supra* note 25, at 205.

[48] Riordan Roett, *Brazil: Politics in a Patrimonial Society* (New York: Praeger, 1984), at 80.

[49] Antonio Paim, *Momentos Decisivos da História do Brasil* (São Paulo: Martins Fontes, 2000), at 219.

[50] *See* Ubiratan Borges de Macedo, *A Liberdade no Império: O Pensamento sobre a Liberdade no Império Brasileiro* (São Paulo: Convívio, 1977).

[51] *See* Gilberto Freire, *Order and Progress: From Monarchy to Republic* (New York: Alfred A. Knopf, 1970), at 40.

[52] John J. Johnson, *The Military and Society in Latin America* (Stanford: Stanford University Press, 1964), at 185.

[53] After Comte's death, in 1857, positivists established the Religion of Humanity, with a panoply of "saints" drawn from so-called "benefactors of mankind" such as Rousseau and Voltaire. Positivists exalted the republic in the image of the Virgin Mary, in exaltation of the feminine image as a representation of the ideal of purity to every republican government. According to Claudio Véliz, "The Religion of Humanity… was the result of Auguste Comte's later years when, though rejecting the traditional religions based on dogma and revelation, he constructed a positivist one which humanity occupying the place of the deity and with an organization and ritual patterned after that

In Brazil, the disciples of Comte were involved, decisively, in the overthrow of the monarchy in the hope that this would be succeeded by a dictatorial republic. Comte's positivism, which, according to history professor Claudio Véliz, gave the military in Brazil "a scientific justification, almost a mandate, to intervene in politics, ... helped to rationalize and make respectable the idea of an enlightened dictatorship aimed at the attainment of the common good."[54] In addition, as Véliz also explains:

> The positive leaders... detected 'a great need for political unity' and concluded this could only be achieved under a centralist dictatorship that was for Brazilians 'as inevitable as the air we breathe'. These were the opinion of [the positivist leaders] Lemos, Teixeira Mendes, and their friends who were convinced that 'only the adoption without delay, of the dictatorial policy counseled by Auguste Comte... could forestall the terrible social struggles in store.[55]

Comte's positivism inspired republicans to coin the phrase "Order and Progress" which still emblazons the Brazilian flag.[56] The progress here desired was towards a "socially responsible authoritarianism" which could then provide "scientific solutions" for the problems of society. Positivists argued that only such a "scientific" government could generate high levels of national development, thereby supporting the "moral" superiority of dictatorship over constitutional democracy. According to the late sociologist Gilberto Freyre:

> One of the most persistent criticisms of the Positivists against the Brazilian monarchy was that the Emperor was lacking in 'energy' and 'spirit'... Brazilian disciples of Comte wished to see the monarchy replaced not by parliamentary or democratic republicanism, but, rather, dictatorship.[57]

8.3.2 The Second Constitutional Period

8.3.2.1 The First Republic (1889–1930)

Brazil's second constitutional period lasted from the fall of the constitutional monarchy to the military coup of 1930. During this period, Brazil was governed as a military dictatorship. The first president, Marshal Deodoro da Fonseca, harshly persecuted monarchists and nominated army generals for the administration of the old provinces. He also instituted severe

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of the Catholic Church'. —Claudio Véliz, *The Centralist Tradition of Latin America* (Princeton: Princeton University Press, 1980), at 195.

[54] Id. at 197–198.

[55] Id., at 199.

[56] *See* Fausto, *supra* note 33, at 138.

[57] Freire, *supra* note 50, at 17.

restrictions on free speech, forbidding the press to criticise the military government.

But pressure from foreign countries such as Great Britain, which were reluctant to recognize the new government, forced the military leaders to look for institutional ways to obtain international recognition and, as a result, foreign credit. In the search for greater legitimacy, the Government then decided to convoke an Assembléia Constituinte (Constitutional Assembly). Ruy Barbosa, a renowned lawyer and statesmen, was invited to prepare the first draft of a new Constitution to be used as a model by members of the Assembly.

Ruy Barbosa was a liberal who favoured individual rights, the separation of powers, and free public education.[58] As a result, in 1891, Brazil produced an advanced constitution for its time. The Constitution explicitly mentioned numerous human rights such as freedom of expression, natural justice, habeas corpus, due process of law, and trial by jury.

The federal legislature was divided into two chambers, the Chamber of Deputies and the Senate, as is commonly the case with federations. Citizens elected senators to a 9-year mandate to represent the new states (former provinces of the old Empire). The country was the first federation in the world where citizens were able to vote directly for their senators. At that time, senators in the United States were still appointed by state legislatures.[59] However, the right to vote was limited to literate male adults over the age of 21.

The Constitution of 1891 introduced a presidential system in which voters could elect the chief executive directly to a 4-year term. The president was free to appoint the ministers of state, and his main function was to protect the constitutional order. In doing so, he could refuse to ratify a bill of contestable constitutionality. The bill would then return to the legislative chamber from whence it originated, to be enacted only if a two-thirds majority of both legislative houses overruled the president's decision. Moreover, the chief executive also had the power to issue reprieves and pardons and to appoint ambassadors as well as judges to the Supreme Court. He was not allowed, however, to dissolve the National Congress. The president could be impeached by the Senate after approval of such proceedings by the Chamber of Deputies.

The 1891 Constitution also introduced a dual-court system made up of federal and state judiciaries. In addition, it provided a general description of the federal judiciary, including procedure and jurisdiction. Federal judges were appointed to life tenure, and only the Senate could impeach them

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[58] *See* Jordan Young, 'Brazil', in B.G. Burnett and K.F. Johnson (eds.), *Political Forces in Latin America: Decisions of the Quest for Stability* (Belmont: Wadsworth, 1968), at 456.

[59] Only in 1913, with the 17th Amendment to the U.S. Constitution, the people in the United States obtained the same right as Brazilians to directly elect their senators.

on the grounds of poor behavior. These judges were also protected against reductions in their salary.

The federal judiciary comprised the Supreme Court (Supremo Tribunal Federal—STF), first-level courts, sectional judges, puisne judges, and deputies of the puisne judges. The Procurador Geral (Attorney-General), chosen from amongst STF judges, was charged with exercising control over sectional prosecutors, assistant prosecutors, and solicitors.

The highest or Supreme Court (STF), was made up of 15 justices appointed by the president following their approval by the Senate. STF judges had powers to annul laws and administrative acts of an unconstitutional nature. In fact, at the behest of any litigating party, any judge could exercise a review of legislation on grounds of unconstitutionality.

Each state had its own court system regulated by state laws and constitutions. Although the 1891 Constitution was silent on the state judiciaries, their organization often comprised an appeal-level Court of Justice, district judges, jury courts, and justices of the peace elected in the districts. Since the federal constitution was placed above the state constitutions, state judges had formal guarantees of life tenure and irreducibility of salary. These guarantees were reinforced by the 1926 amendment to the 1891 Constitution.

However, temporary judges who assisted permanent judges, in both civil and criminal proceedings, did not receive guarantees of life tenure, though they could produce final decisions if permanent judges were prevented from serving. The rationale was that such judges still needed to be tested before obtaining definitive entry into the judicial career. In practice, however, they would remain a category of judges "at the mercy of the exigencies and seductions of ruling groups and less mindful of the independence and dignity of the judiciary."[60] Moreover, as the late jurist Victor Nunes Leal indicated:

> There were various measures taken by state governments to keep the magistrates in a state of submission, such as allocating, altering the boundaries of, or abolishing, judicial territories, withholding salaries, etc. As for the local legal officers, they were generally nominated to their posts and as easily dismissed, so that the prosecutors and their assistants habitually became agents of party politics. Through these large doors the judiciary passed to collaborate unscrupulously in the party politics of the states. . .[61]

Another problem facing the rule of law lay in the "special powers" granted to the president to enact an *estado de sítio* (martial law) when faced with external aggression or domestic insurrection. This measure, which had to be requested of the Congress, by the president, was often abused, serving as a means of retaliation against local elites opposed to the federal

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[60] Leal, *supra* note 37, at 109.

[61] Id.

government. Arthur Bernardes (1922–1926) spent almost his entire mandate governing under martial law, instituting in the process an extremely harsh, repressive regime.

The great weakness of the 1891 Constitution, which had been heavily influenced by clauses and ideas from the U.S. Constitution, was that it had no real basis in the structure of Brazilian society.[62] In contrast to the socio-political reality in the United States, *Brazil was a country with no tradition of self-government. Its politics were deeply personalistic and functioned on a client-based scheme of "exchange of jobs and favors for votes, with large doses of petty and gross corruption and considerable organized violence*."[63]

Ruy Barbosa expected to see the "progressive" constitution change this political culture. However, he was confronted by the behavior of the elites, consisting mainly of landowners, politicians and army officers, who often acted in violation of both the letter and the spirit of the 1891 Constitution. It would seem that Ruy Barbosa and other liberal constitutionalists believed that a beautifully drafted liberal constitution would function as a sort of panacea, healing Brazil of all social diseases. And, despite the fact that Brazil lacked the socio-political context to properly implement the constitutional framework that was imported from the United States, "the hope was that the Brazilian society would evolve sufficiently to convert the constitutional theory into practice."[64]

The reality of what happened with the 1891 Constitution seems to enforce the argument that "what gives constitutional law its efficacy is a legal and political culture that cannot be transplanted."[65] In the case of Brazil, institutions mirroring those of the U.S. Constitution did not work effectively when transported to a society remarkably different from that of the United States. As a result, the liberal virtues of the 1891 Constitution were soon obscured by factions competing among themselves for undue privileges both inside and outside the constitutional order.[66]

As a result of these political disputes, army uprisings against the central government occurred in 1922 and 1924, when ultra-nationalist junior officers, the tenentes (lieutenants), carried out unsuccessful rebellions in Rio de Janeiro and São Paulo, respectively. Daniel Zirker, a political-science professor, gives the following account of the São Paulo uprising of 1924:

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[62] Francisco de Oliveira Vianna, *O Idealismo da Constituição* (São Paulo: Companhia Editora Nacional, 1939), at 93.

[63] Lincoln Gordon, *Brazil's Second Chance: En Route Toward the First World* (Washington/DC: Brookings Institution Press, 2001), at 28.

[64] Keith S. Rosenn, *'The Jeito: Brazil's Institutional Bypass of the Formal Legal system and Its Developmental Implications'*, 19 *American Journal of Comparative Law*, 1971), at 533.

[65] Schor, *supra* note 9, at 11.

[66] Peter Flynn, *Brazil: A Political Analysis* (London: Ernest Benn, 1978), at 39.

> Beginning on the second anniversary of the 1922 uprising, it pitched five thousand rebels under the leadership of General Isidro Diaz Lopez against a federal force of over twenty thousand men. This time the tenentes enjoyed enough popular support in São Paulo to resist the vastly superior federal force for several weeks. When they finally did retreat, it was to the interior, where they met with rebel forces from Rio Grande do Sul, forming a joint force that subsequently made a quixotic fourteen-thousand-mile trek through the Brazilian sertão, or savannah backlands, ending with the survivors' exile in Bolivia. This adventure deeply influenced a generation of junior army officers; their perceptions. . . of the role the military as that of a political proponent of national development.[67]

Although these army rebellions in the 1920s were easily suppressed, another coup in 1930 was more successfully organized. In 1930, a presidential election, held during a worldwide economic depression, was the final blow to the already fragile condition of the 1891 Constitution. In that year, another military coup sought to appoint a caudillo (rural oligarch) from Rio Grande do Sul, Getúlio Vargas, as Brazil's provisional president. But Vargas, as it soon became apparent, was not satisfied with being merely a provisional leader.

8.3.3 The Third Constitutional Period

8.3.3.1 The 1930 "Revolution" and the Constitution of 1934 (1930–1937)

In 1929, the then President Washington Luís unwisely decided to support the candidature of Júlio Prestes, a politician from his own state of São Paulo. The mineira (from the state of Minas Gerais) political oligarchy protested against this, feeling that the tacit agreement, whereby these oligarchies were to promote a constant alternation in power, had been betrayed.

As a result, the mineira oligarchy supported the candidature of Getúlio Vargas, a caudillo who was the then governor of Rio Grande do Sul. Vargas was also backed by oligarchic groups from Rio de Janeiro and Paraíba, although he ended up by being defeated in the ballot. Nevertheless, the economic crisis of 1929 paved the way for a military coup organized by army tenentes, with the powerful coffee growers supporting the manoeuvre because the central government had refused to supply more money for the purchase of their surplus stock.

Vargas entered Rio de Janeiro under military protection in November 1930, receiving the presidency from a military junta that had only a few days earlier deposed President Washington Luís. Ruling as provisional leader, he managed to dissolve the federal legislature, the state assemblies, and even the city councils. A few days after the coup, the new Justice

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[67] Daniel Zirker, 'Brazil', in C.P. Danopoulos and C. Watson (eds.) *The Political Role of the Military: An International Handbook* (Westport: Greenwood Press, 1996), at 23.

Minister, Oswaldo Aranha, informed Brazilians that their "revolutionary" government did not recognize any legal right derived from the previous constitutional order.

The group which accompanied Getúlio Vargas into power included numerous politicians from Rio Grande do Sul. Most of these people were authoritarians who deeply disliked the whole idea of constitutional democracy. In fact, Rio Grande do Sul was the only state of the Brazilian federation to be ruled during the First Republic by a positivist dictatorship in which its state governor could freely enact all its laws.[68]

Predictably, Vargas was deeply influenced by his own region's tradition of centralized, authoritarian government. This led to a reaction against him in São Paulo, which developed into the famous *Revolução Constitucionalista* (Constitutionalist Revolution) of 1934. This was an armed revolt that turned into a military disaster because Vargas wisely accused its leaders of attempting to separate their state from the rest of the Federation. The insurgents lost all support from the other states, making it easy for the central power to suppress the uprising.

Soon Vargas began to feel pressure from political allies to re-constitutionalise Brazil. Though some of his allies were tenentes, opposed to any constitutionalization, he was compelled by others to announce, in May 1933, the advent of general elections for an Assembléia Constituinte (Constitutional Assembly) to draft a new constitution. Workers and business unions selected one-third of this assembly's members[69]. The idea for this stemmed from fascist Italy, where Benito Mussolini had adopted this model of political representation for the Italian Parliament.[70]

Promulgated on 16 July 1934, the second republican constitution can be described as a hybrid document reflecting the ideological conflicts of those troubled days. Full of ambiguities, some of its articles were inspired by fascism and communism while others came from the social-democratic constitution of pre-Nazi, Weimar Germany.

The 1934 Constitution provided autonomy to the courts and introduced electoral judges to supervise the polls during elections. The main characteristics of this lengthy and convoluted document were: (1) inclusion of traditionally non-constitutional matters of administrative law, civil law, and social rights, in the body of the constitution; (2) political centralization; (3) a threefold separation of powers; (4) universal suffrage, including the right of women over 18 years of age to vote and be voted for; (5) institution of the writ of security (mandado de segurança) to protect rights not covered by habeas corpus against illegality or abuse of power and (6) establishment

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[68] Paim, *supra* note 48, at 243.

[69] *See* Ana Lúcia de Lyra Tavares, *A Constituinte de 1934 e a Representação Profissional* (Rio de Janeiro: Forense, 1988), at 120.

[70] Paulo Bonavides, *Política e Constituição: Os Caminhos da Democracia* (Rio de Janeiro: Forense, 1985), at 422.

of an economic order containing norms related to matters of family law, public education, culture, public services, and national security.

But Vargas had no intention of respecting this legal document. He preferred instead to implement a welfare state under his own sole paternal direction. Vargas found the excuse that he needed to suppress civil rights and liberties in a November 1935 communist uprising (which recently released documents reveal was planned, financed, and directed from Moscow). Though the extreme left believed the so-called "oppressed masses" would support their uprising, most people stood firmly on the side of the government. On the other hand, the communist uprising gave Vargas the pretext he wanted to persecute political adversaries, whether they were communists or not. A decree of "national emergency" then established the Estado Novo ("New State") as an authoritarian regime which suppressed all political parties and cancelled popular elections.

8.3.4 The Fourth Constitutional Period

8.3.4.1 President Vargas' "Estado Novo" (1937–1945)

Brazil's fourth constitutional period lasted from Vargas' 1937 self-coup up until the end of World War II in 1945. To give legitimacy to his new regime, Vargas invited Francisco Campos, a respected lawyer, to write the constitution of the Estado Novo ("New State"). The result of this work was promulgated on 15 November 1937.

The Charter of 1937 represented a total eclipse of civil liberties. Now Vargas, could declare, as he did in a 1938 speech, that liberal democracy was a thing of the past.[71] Likewise, he observed in another speech, that the Estado Novo did not recognize any right of the individual against the collective, because (in his words) "individuals do not have rights; they only have duties. Rights belong to the collective."[72]

This denial of individual rights did not prevent Vargas from receiving the enthusiastic support of the working people, which was in fact quite remarkable.[73] While the period of Estado Novo was marked by the repression of the opposition, the paternal dictator began developing populist programmes aimed at improving working-class standards. Thus Vargas' authoritarian regime could be described as a paternalistic dictatorship, in which people accorded the populist dictator all the attributes of benevolent charismatic leadership. A foreigner who visited Brazil during this time would realize that

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[71] Id. at 453.

[72] *See* E. Bradford Burns, *A History of Brazil* (New York: Columbia University Press, 1970), at 298.

[73] Karl Lowenstein, 'Brazil made Tremendous Advances', in Hanke (ed.), *supra* note 25, at 444–445.

the President of the Republic could easily manipulate any law, including the Constitution, according to his own personal will.[74]

The Charter of 1937 expanded presidential powers and outlawed state ensigns, banners, and flags. State constitutions were abolished and state governors were replaced by federal interveners. *In short, the Charter of 1937: (1) invested the president with arbitrary legislative powers; (2) extended the presidential mandate to 6 years (but Vargas ignored it); (3) allowed the president to freely declare an estado de sítio (martial law); (4) required a plebiscite for ratification of the constitution (which never happened); (5) restricted privileges of congressmen (in fact, Congress was kept closed); (6) created a "Council of National Economy" to control the national economy and financial system; (7) regulated the functioning of trade unions and labor relations and (8) nationalized banks, mines, insurance, and several other industries*.

Playing the role of "father of the poor," Vargas established labor legislation based on Mussolini's Carta del Lavoro. For this act of generosity from above, he expected the maximum loyalty of working people for his dictatorial regime.[75] Though he also suppressed their civil rights, his propaganda apparatus was quite efficient, to the extent that it attracted the loyalty of many workers who often verged on veneration of their "good" dictator.

With no elections, no judicial independence, and not even a functioning legislature, Vargas, who was strongly supported by the military leadership, was free to do whatever he wished in the country. There was no individual or group able to compete with him for power and popularity. Workers admired the dictator, and in fact were not too bothered if the government killed, arrested, tortured, or exiled Vargas' political adversaries.[76]

The collaboration between Vargas and the army leaders was sustained by the belief that the country needed to be governed by authoritarian means. Upon taking office, Vargas placed them at the centre of political decision-making. In fact, Vargas' Estado Novo was a form of "paternal dictatorship" that enjoyed the support of the military to the extent that it was "a military regime in essence, despite the civilian status of the president and many of his ministers."[77]

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[74] Id.

[75] Fausto, *supra* note 33, at 224.

[76] Jordan Young, *Brazil 1954-64: End of a Civilian Cycle* (New York: Facts on File, 1972), at 7.

[77] Zirker, *supra* note 64, at 23.

8.3.5 The Fifth Constitutional Period

8.3.5.1 The Democratic Experiment (1945–1964)

Vargas, during World War II, sent an expeditionary force of 20,000 soldiers to fight against the Nazi-fascist forces in Europe. Although he admired totalitarian regimes,[78] the United States, the main consumer of Brazil's national products, offered many economic benefits in exchange for support during the war. As a result, an expeditionary force was sent to Europe, with around 600 Brazilians losing their lives during the Italian campaign.

Brazil's participation in the war brought about demands for democratization. The Vargas regime shared many attributes with the Italian and German dictatorships just defeated in Europe. Many started questioning why Brazilian soldiers had gone to Europe to fight against fascism when Brazil itself still had a quasi-fascist government. An October 1943 manifesto, signed by ninety personalities of Minas Gerais, declared:

> If we are fighting against fascism on the side of the United Nations, so that liberty and democracy may be restored to all people, certainly we are not asking too much in demanding for ourselves such rights and guarantees.[79]

Under growing pressure, Vargas attached, in February 1945, an amendment to the Charter of 1937. In doing so, he also signaled his intention to relinquish power by announcing elections for president and members of Congress. He also announced the advent of state elections for state governors and state assemblies, and later, in April 1945, he freed political prisoners.

Meanwhile, however, Vargas approached the communists, who subsequently organized the pro-Vargas Queremista movement, which literally meant "we want" (queremos), as in, "we want Vargas." The motto of the queremistas was, "A Constituent Assembly with Vargas." But their real

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[78] Vargas and many of his ministers during the *Estado Novo* were openly sympathetic to National Socialism. In April 1940, Vargas' Minister of War, General Eurico Gaspar Dutra, Dutra was decorated by Adolf Hitler's Ambassador to Brazil with the Order of the Great Cross of the Eagle. The ambassador revealed during the decoration ceremony that the medal constituted the highest honour a foreigner could receive from the Nazi government. In fact, Vargas appreciated Nazi-fascism so much that a 1941 letter sent to Germany by its ambassador to Brazil commented: "President Vargas requested me to call him unofficially today… The President began our conversation by stating that he very much regretted the deterioration in economic relations with [Nazi] Germany… The President then emphasised his intention to maintain neutrality towards [Nazi] Germany and, also, his personal sympathy for our authoritarian state, referring at the same time to the speech delivered by him recently. He openly expressed his aversion of England and the democratic system as a whole" – *Documents on German Foreign Policy, 1918–1945.* Vol. 9, Section D. *From* José Fernando Carneiro, 'Nazismo e Estado Novo na Zona Colonial', in J.F. Carneiro, *Psicologia do Brasil e Outros Estudos* (Rio de Janeiro: Agir, 1971).

[79] *See* Burns, *supra* note 71, at 298.

intention was to have Vargas remain in power and rule as a populist dictator. It was later found that Vargas had been financing the Queremista movement.[80]

In June 1945, when U.S. ambassador Aldolph A. Berle Jr. expressed his optimism that Brazil could live democratically, many denounced this benign statement as constituting undue foreign "intervention" in local political affairs. To be sure, the nationalists started suggesting that free elections constituted manipulation by "reactionaries" at the service of "agents of international finance."[81]

Vargas ended up being ousted from the presidency on 29 October 1945 in a military maneuver carried out without bloodshed or social reaction. The action took place 4 days after he nominated his bad-tempered brother Benjamin Vargas as Chief-Police of the Federal District (Rio de Janeiro). The strategy did not work as he had hoped, and Vargas was subsequently forced to resign by his own minister of war, General Góes Monteiro. Ironically, the general who ousted him was one of the military leaders who had placed him in power 15 years earlier.

Even though Vargas was ousted by nationalist military officers, he shrewdly attributed his fall to liberal constitutionalists in the service of international capitalism. In a December 1946 interview, the dictator described himself as a poor victim of "foreign finance groups" who had conspired with liberal constitutionalists to restore "old liberal capitalist democracy."[82] But in reality, as the American historian Thomas Skidmore explains:

> The dictator was sent from office not by the power of the civilian opposition, but by decision of the Army command. It was not, therefore, a victory earned by the political influence of the liberal constitutionalists.[83]

With the end of Vargas' Estado Novo, special legislation approved in November 1945 conferred on both houses of Congress the power to meet jointly as an Assembléia Constituinte (Constituent Assembly). Elections for this assembly were held in December 1945, and its elected members started the draft of the new constitution in February 1946.

Their work renewed the hopes of liberal constitutionalists for a written constitution based on the principles of liberal democracy. These were partially realized in the 1946 Constitution which provided for free elections, protection of basic human rights, judicial independence, and restriction of federal intervention in state affairs. Moreover, the legislative recovered its legal supremacy over the executive, and the right to vote was granted to

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[80] Young, *supra* note 75, at 8.

[81] *See* Thomas E. Skidmore, *Politics in Brazil, 1930–1964: An Experiment in Democracy* (New York: Oxford University Press, 1967), at 51.

[82] Burns, *supra* note 71, at 320.

[83] Skidmore, *supra* note 80, at 53.

all Brazilians of both sexes from the age of 18, with the exception of the illiterate or those enlisted in the armed forces.

Because the 1946 Constitution prohibited the functioning of undemocratic parties, a May 1947 decision of the Supreme Court (STF) outlawed the Communist Party of Brazil (Partido Comunista do Brasil—PCB). The Communist party leader, Luiz Carlos Prestes, had publicly described the constitutional order as illegitimate and as the corrupt product of "bourgeois democracy." The communist leader also frankly stated that his political party would support the Soviet Union in the advent of war against Brazil. At the time of the judicial ruling against it, the PCB constituted the country's fourth-largest party, with more than 200,000 affiliated members.

The suicide of Vargas in 1954 was a hard test for the stability of democratic legal institutions in Brazil. Elected by the people in 1950 as their new president, the former dictator lacked the necessary ability to govern under the rule of law. He soon entered into conflict with legislators, who weren't always keen to obey his every word. On at least one occasion, the President lost his patience and warned congressmen about the day in which the workers would "take the law into their own hands."[84]

Vargas' administration was accused of corruption, public graft, embezzlement, illicit gains, and indefensible financing by the Banco do Brasil (the country's federal bank).[85] His end was imminent following the failed attempt of his cronies, on 5 August 1954, to kill the Governor of Rio de Janeiro, the outspoken journalist Carlos Lacerda. The Governor was only slightly wounded in the attempt, but Air Force Major Rubens Vaz, who was walking with him, was killed. The police soon found that Climério E. de Almeida, Vargas' bodyguard, was responsible for the crime. He confessed under interrogation that federal deputy Lutero Vargas, the son of President Vargas, had ordered the assassination attempt. It was further revealed that Almeida had been paid by the chief of the presidential guard, Gregório Fortunato.

After that, the editorials of all major newspapers were in agreement that the preservation of democratic legal institutions depended, at that moment, on the removal of Vargas from the presidency.[86] Under the circumstances, Vargas seemed to have no option other than to offer a letter of resignation. But he did so in a most unexpected way, committing suicide by shooting himself in the heart on 24 August 1954. He left behind a letter describing himself as "a victim of a subterranean campaign of international groups

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[84] George Pendle, 'Perón and Vargas in 1951', in Hanke (ed.), *supra* note 25, at 471.

[85] José Maria Bello, 'Crisis and Corruption', in Hanke, *supra* note 25, at 475.

[86] *See* Alfred Stepan, *The Military in Politics: Changing Patters in Brazil* (Princeton: Princeton University Press, 1971), at 90.

joined with national interests, revolting against the regime of workers' guarantees."[87] The suicide provoked a great wave of violent actions against his political adversaries and on foreign properties. It also transformed Vargas into a patriotic martyr in the eyes of many Brazilian nationalists of the era.[88]

The election in 1960 of Jânio Quadros was seen as constituting a possible rupture with the Vargas era. However, Quadros, despite his lack of direct association with Vargas, turned out to be a typical, populist leader, who regarded the rule of law as an undesirable obstruction to his exercise of power. Consequently, the Constitution's formal separation of powers provoked a conflict between the authoritarian Quadros and the federal legislative. Unfortunately, the presidential system provided no institutionally available, impasse-breaking device to settle such conflicts between the different branches of government.[89]

On 25 August 1961, President Quadros stunned Brazilians by offering his letter of resignation. He did so in order to provoke an institutional crisis which he calculated would cause people to demand his immediate return to office; this time as a populist dictator. Quadros believed his fellow Brazilians needed a "stronger" government, and that the legislative was not conducive to achieving such an objective. His artifice, however, proved a complete failure, and he never returned to power.

When President Quadros offered his resignation, his vice-president, João Goulart, was serving in a diplomatic mission in communist China. Goulart had been Vargas' labor minister in 1953, and was a close friend of Argentina's populist leader Juan Domingo Perón, whose authoritarian regime relied heavily on trade-union support.[90] Elected as vice-president with no more than 34 percent of valid votes, Goulart was disliked by many politicians and military leaders. Congressmen then decided, on 3 September 1961, that it would be better for the maintenance of democratic institutions to establish a parliamentary system by amending the 1946 Constitution.

Goulart resisted this initiative, and ultimately secured a five-to-one margin in favour of presidentalism in a 1963 plebiscite on the question. At this time, Goulart began to develop very close diplomatic ties with communist countries, particularly China, Cuba, and the Soviet Union.

President Goulart told the U.S. ambassador Lincoln Gordon in 1962, that he thought the National Congress had lost its "social prestige" and, in such

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[87] Getúlio Vargas, 'Suicide Letter', in R.M. Levine and J.J. Crocitti (eds.), *The Brazil Reader: History, Culture and Politics* (Durham: Duke University Press, 1999), at 222.

[88] *See* Ronald Schneider, *Brazil: Culture and Politics in a New Industrial Powerhouse* (Colorado: Westview Press, 1996), at 73.

[89] Alfred Stepan and Cindy Skach, 'Constitutional Frameworks and Democratic Consolidation: Parliamentarianism Versus Presidentialism'(1993)46*WorldPolitics*1,at8.

[90] *See* Joseph A. Page, *The Brazilians* (Reading, MA: Addison-Wesley, 1995), at 208.

a circumstance, that he could easily "arouse people overnight to shut it down."[91] But he also informed the Ambassador that he had no intention of doing so at that moment, although Gordon had his own reasons for being doubtful of this. After all, Goulart, a left-wing politician, had once asked him why the U.S. government didn't "just blow up" Cuba with a nuclear weapon. Reminded by the Ambassador that a nuclear attack would certainly cost the lives of millions, Goulart retorted: "Well, what do you care? They are not Americans."[92]

Goulart began openly to support the Ligas Camponesas, a Pro-Castro agrarian movement in the north-eastern region of Brazil. This movement distributed millions of booklets containing Mao Tse-Tung's essays on guerrilla tactics.[93] It was found, that two farms belonging to members of this organization, bought with money sent by Fidel Castro, were being used as training centers for guerrilla warfare.[94]

In 1963, an American communist visiting Brazil reported to his comrades that "potential Fidel Castros'" were seizing the lands and, with conditions getting worse, he predicted that the final result would "be a dictatorship of the Left, as in Cuba."[95] The great sociologist Gilberto Freyre thought likewise, announcing in 1963 that Brazil was experiencing a "state of revolutionary ferment, on the verge of becoming the new China of the West."[96] Indeed, Alfred Stepan, professor of government at Columbia University, observed that the 1959 communist revolution in Cuba had the undesirable effect of reinforcing the undemocratic belief of the Left in the use of violence as a valid political means. "In the already turbulent Brazilian situation," Professor Stepan explains:

> [T]he effect of the Cuban revolution on the civilian left was to increase their belief in the efficacy of the tactics of violence. At the least, it helped sweep up the radical nationalists in the rhetoric of a Cuban-style revolution. Catholic student activists (Ação Popular) entered into electoral coalitions with Communist students after 1959, and looked to Cuba as a revolutionary model. Peasants' leagues invaded the land in the northeast, and President Goulart's brother-in-law, Leonel Brizola, urged the formation of revolutionary cell of eleven armed men (the grupos de onze).[97]

In February 1964, Premier Nikita Kruschev summoned the communist leader Luis Carlos Prestes for an official meeting at the Kremlin. Prestes informed him of the "great prestige"enjoyed by communists in the Brazilian

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[91] Phyllis R. Parker, *Brazil and the Quiet Intervention, 1964* (Austin/London: University of Texas Press, 1979), at 24.

[92] Id. at 29.

[93] Irving Louis Horowitz, *Revolution in Brazil* (New York: E. P. Dutton, 1964), at 17.

[94] Robert Levine, *The History of Brazil* (London: Greenwood Press, 1999), at 128.

[95] Leo Huberman and Paul Sweezy, *Whither Latin America?* (New York: MR Press, 1963), at 46.

[96] Horowitz, *supra* note 92, at 11.

[97] Stepan, *supra* note 85, at 156.

government. Kruschev was quite surprised to hear that two prominent generals from the Alto Comando do Exército (Army's High Command) were members of the communist party. Invited to speak at the Soviet Supreme, the communist leader boldly proclaimed that anyone who dared to resist communism would have his head cut off.[98] He was so confident of the communist future of Brazil that his political party's printshop in São Paulo was already printing large supplies of postage stamps, pamphlets, and bank notes displaying the portraits of Lenin and Stalin as well as of Prestes himself.[99]

On 3 October 1963, Goulart requested the approval of congress for the enactment of martial law in order to combat alleged subversion. Had it been granted, the measure would have allowed the President to confiscate properties and nationalize companies. The decision was delayed and, knowing it would be rejected, Goulart, himself, withdrew the request a few days later. By the end of that year, parliamentarians remained in extraordinary session over the Christmas break, fearing that the President could decree martial law while the legislature was in recess. Meanwhile, the President's brother-in-law Leonel Brizola was demanding the arbitrary dissolution of the National Congress, to be replaced by a "popular assembly" consisting of workers and peasants.[100] In September 1963, he declared to law students of the University of Brazil in Rio de Janeiro:

> If the democracy we enjoy continues to be used as a screen for laws concealing the plunder of our people, we solemnly declare: We reject such a [democratic] system as an instrument of oppression and domination of our native land, and we shall use the methods of struggle at our disposal.[101]

Relying on the advice of military staff, especially the head of the Military Household, General Assis Brazil, the President then started to promise social and economic reforms which could not be put into practice without parliamentary consent. In his January 1964 Annual Address to the National Congress, the President explicitly warned congress of a "bloody convulsion" that would take place if they did not approve all reforms proposed by the executive branch.[102]

On 13 March 1964, President Goulart promised to 120,000 supporters at a rally at the Central Railroad Station of Rio de Janeiro that he would carry out the confiscation of land and the nationalization of private companies. But he could not promote any of these measures because both required constitutional amendment and the majority in both legislative houses were

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[98] Elio Gaspari, *A Ditadura Envergonhada.* (São Paulo: Companhia das Letras, 2002), at 77.

[99] Levine, *supra* note 93, at 128.

[100] Id. at 126.

[101] Horowitz, *supra* note 92, at 12.

[102] Young, *supra* note 75, at 177.

against them. Goulart then proposed to modify "institutional methods" and, speaking on behalf of his government, Leonel Brizola proclaimed that the Goulart administration would no longer recognize Congress as the nation's representative body.[103] As Phyllis R. Parker pointed out:

> His inflammatory discourse dramatically called for throwing out the Congress and for holding a plebiscite to install a Constitutional Assembly with a view to creating a popular congress made up of laborers, peasants, sergeants, and nationalist officers, and (sic) authentic men of the people.[104]

The rally of March 13 broached such prospects as abolishing the Constitution and closing down the National Congress. The military remained supportive of Goulart even after these statements were made but eventually the officers began to fear where his appeal to the "power of the masses" might lead and that he might soon suppress the Congress.[105] Even the army faction that was sympathetic to his government now also believed that Goulart planned to remain in power as a populist dictator.[106] In that rally of March 13, Rollie E. Poppino observed:

> Goulart reiterated his demand for a new constitution, insisted that a sweeping program of social and economic reforms be enacted, and defied the Congress by announcing presidential decrees nationalizing foreign-owned oil refineries and instituting a partial agrarian reform.

His performance seemed to solidify labor-nationalist support for the government, but its impact on the rest of the population was not what he had anticipated. The civilian and military opposition was now certain that he sought to establish a left-wing dictatorship.[107]

Surveys carried out in the first months of 1964 indicated that only 15 percent of the population supported the President.[108] On 19 March 1964, for instance, women from the city of São Paulo held a massive rally, the Marcha da Família com Deus pela Liberdade (March of the Family with God for Freedom) involving around one million people. Organizers described the huge demonstration of opposition to the Goulart administration as an effort to protect Brazilian women "from the fate and suffering of the martyred women of Cuba, Poland, Hungary and other enslaved nations."[109] A few days later, a second anti-Goulart rally brought 150,000 people to the streets

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[103] Id.

[104] Parker, *supra* note 90, at 60.

[105] Stepan, *supra* note 85, at 192.

[106] *See* Jarbas Passarinho, '31 de Março de 1964', *Jornal do Brasil*, 15 February 2004, at A5.

[107] Rollie E. Poppino, 'Brazil Since 1954', in J.M. Bello (ed.), *A History of Modern Brazil: 1889–1964* (Stanford: Stanford University Press, 1966), at 350.

[108] Robert Wesson and David Fleischer, *Brazil in Transition* (New York: Praeger, 1983), at 21.

[109] Levine, *supra* note 93, at 126.

of Santos, an important city in São Paulo state. According to philosophy Professor Denis Rosenfield:

> When the military coup took place, in the end of March 1964, there was an ongoing attempt to install a communist-like regime in Brazil. Although communist actions were taking undue advantage of democratic institutions, it is no less true that their real intent was to abolish these institutions.
>
> In those days the society was much disturbed by the subversive activities of a vast range of left-wing radicals who followed uncompromising communist models; from the Soviet to the Maoist, passing through other and equally radical versions of communism, such as the Trotskyite, the Guevarist, the Castrist, the Albanian, and so forth.
>
> The ideological context was nothing but dramatic, above all for the fact that heinous crimes were committed during the process of radicalization. It is important to bear in mind here that the vast majority of Brazilians supported the military intervention, as reflected by the open support for such intervention which came from leading newspapers, churchmen, and the civil society as a whole.[110]

In September 1963, President Goulart refused to condemn a mutiny of sergeants, believing that the government could neutralize army officers who were opposed to the Government. Instead, the President encouraged the political aspirations of sergeants, even though they were barred by law from public office. After this, he also refused, on 26 March 1964 to punish another mutiny carried out by marines who refused to cease political activities and return to their duties. In fact, the President even went so far as to dismiss the Navy Minister, who attempted to quell these acts of insubordination and revolt. The editorial of the daily Jornal do Brasil stated:

> The rule of law has submerged in Brazil. . . Only those who retain power of acting to re-establish the rule of law remain effectively legitimate. . . The armed forces were all – we repeat, all – wounded in what is most essential to them: the fundamentals of authority, hierarchy, and discipline. . . This is not the hour for indifference, especially on the part of the army, which has the power to prevent worse ills. . . The hour of resistance by all has now arrived.[111]

The naval mutiny brought about a general agreement between the otherwise ideologically divided army officers that now Goulart had indeed gone too far. Those who had initially supported his government changed their minds after the second mutiny. Many of those army leaders were initially opposed to any radical step, but it was the President's sanctioning of military indiscipline that forced them to change their minds. They came to conclude that obedience to the chief executive was only justified within the limits of the law, and it now seemed to them that President Goulart

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[110] Denis Rosenfield, *Os Combatentes da Liberdade*, Defesanet.com, 18 November 2004, at: http://www.defesanet.com.br/intel/denis/

[111] Stepan, *supra* note 85, at 105–106.

had decided to operate outside the constitution.[112] A popular newspaper expressed a similar feeling:

> If the supreme executive authority is opposed to the Constitution, condemns the regime, and refuses to obey the laws, he automatically loses the right to be obeyed... because his right emanates from the Constitution. The armed forces are charged by Article 177 of the Brazilian Constitution to defend the country and to guarantee the constitutional powers, law, and order... If the Constitution is 'useless' how can the President still command the armed forces?[113]

Eventually, on 20 March 1964, Magalhães Pinto, the governor of Minas Gerais, went on television to declare that his state would resist any "revolution coming from above." He vowed to organize a "state of belligerency" against the central government if Goulart tried to close the Congress. Similarly, Adhemar de Barros, the governor of São Paulo, also appeared on television during that time to declare that his state would follow Minas Gerais and also resist any "auto-coup" from the Goulart administration. He warned that his state militia was twice as large as the federal army garrisoned in the region.[114]

The army coup that deposed Goulart began with a radio proclamation. On 31 March 1964, General Olimpio Mourão, the commander of the 4th Military Region in Minas Gerais, accused Goulart of providing the communists with "the power to hire and fire ministers, generals, and high officials, seeking this way to undermine true democratic institutions."[115]

The "masses," in whose name the Government spoke, were not disposed to offer even token protest. Instead, when Goulart was sent into exile to Uruguay on 1 April 1964, one million people packed the streets of Rio de Janeiro to celebrate his overthrow. Brazil has never seen a rally of such magnitude to support a new government. This clearly reflected widespread support for the military's action.[116] Even the Brazilian Bar Association supported the military coup by acknowledging the failure of Goulart to comply with constitutional order as well as basic principles of the rule of law.

Although left-wing radicals have consoled themselves by blaming the United States, the overthrow of Goulart required no outside aid, because popular support for the military coup was much bigger than the scattered efforts to save a demoralized president.[117] For those who lived in Brazil at that time, it seemed that the only possible alternatives presented to them were those of military rule, totalitarianism, or anarchy.[118]

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[112] Id. at 207.

[113] Id. at 199.

[114] Id, at 201.

[115] Young, *supra* note 75, at 181.

[116] Roberta Widger, *Brazil Rediscovered* (Philadelphia: Dorrance, 1977), at 352.

[117] Schneider, *supra* note 87, at 87.

[118] Poppino, *supra* note 106, at 353.

8.3.6 The Sixth Constitutional Period

8.3.6.1 The Military Regime (1964–1985)

On 11 April 1964, the National Congress nominated General Humberto Castelo Branco as Brazil's president to replace Goulart. The majority of people in Brazil believed the military would soon restore constitutional order.[119] Little by little, however, the military rulers began to build up an authoritarian regime, which in the end, persisted for 21 years.

The military regime can be divided into three phases. The first phase, lasting from 1964 to 1968, was a time in which the influence of politicians steadily declined. The second phase, from 1969 to 1978, can be described as the worst in terms of political repression. The final phase, from 1979 to 1985, was a period of transition towards full restoration of democratic legal institutions.

Though the 1945 Constitution would, in theory, remain in force until 1967, the democratic spirit of this document would gradually be undermined through a series of Atos Institucionais (Institutional Acts—AIs). These were normative rulings enacted by the military high command that transformed the 1946 Constitution into "a juridical statement of intent, not a political document of relevance to the governance of the Brazilian state."[120]

Enacted a few days after the military coup, the first AI served to institutionalize the new regime. A second AI, however, went on to declare that AIs were not subject to judicial review. The second AI also established the indirect election of the President by an electoral college. The military rulers also dissolved all parties, replacing them with a two-party system that comprised a pro-military party, the ARENA (National Alliance for Renewal), and an anti-military party, the MDB (Brazilian Democratic Movement).

The second AI also increased the number of judges of the Supreme Court (STF) from eleven to sixteen. But when the activism of STF judges started to result in several court decisions going against the government, a later AI (sixth) was enacted in 1968 to reverse them and reduce the number of judges from sixteen to eleven, forcing some STF judges to be compulsorily retired. While three were indeed forced into retirement, two others decided to resign in protest against the measure.[121]

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[119] *See* Parker, *supra* note 90, at xxii.

[120] Roett, *supra* note 47, at 127.

[121] *See* Brian Turner, 'Judicial Protection of Human Rights in Latin America: Heroism and Pragmatism', in M. Gibney and S. Frankowski (eds.), *Judicial Protection of Human Rights: Myth or Reality?* (Westport: Praeger, 1999), at 92–93.

Issued on 5 February 1966, a third AI advanced the gradual process of authoritarianism by substituting the direct elections of state governors with their selection through state legislatives. Likewise, mayors of the capital cities were no longer to be elected by citizens but rather appointed by state governors.

A fourth AI, on 24 August 1967, convoked the Congress for an extraordinary session in order to enact a new federal constitution. The 1967 Constitution, surprisingly, guaranteed many human rights, including the rights of assembly and association, freedom of expression, habeas corpus, inviolability of a person's home, due process, jury trial, and so forth. In its very first Article, the constitutional text described Brazil as a federal republic based on the system of representative democracy in which "all power emanates from the people and is exercised in their name." This document also declared that the government should respect the principles of democratic representation, including limited tenure for elected positions, the prohibition of immediate re-election for governors and mayors, a threefold separation of powers, judicial independence, municipal autonomy, and so on.

The 1967 Constitution even allowed the Senate to impeach the president, and, in similar situations, his ministers of state. Moreover, the Senate could try STF judges and the attorney general. Senators could also suspend in whole or in part the execution of legislation declared by STF judges to be unconstitutional. The STF, and any other judicial branch, could, in theory, exercise judicial review and did receive from the Constitution formal guarantees of life tenure, non-reducibility of payment, and irremovability.

The president was directed to exercise power with the assistance of the ministers of the state. He would be chosen by an Electoral College comprising members from both legislative houses of National Congress as well as delegates appointed by the state Legislative Assemblies. In practice, however, everybody knew that the president had to be an army general, for the military would not accept the election of civilians. In addition, the president was authorized to issue "decree laws" on matters of "national security" and public finance, and also the sanction, veto, and promulgate the bills approved in Congress.

The promulgation of the 1967 Constitution was, nonetheless, followed by a turbulent period of political agitation. In response to the left-wing radicals who decided to engage in guerrilla warfare, the Government enacted, on 13 December 1967, a draconian fifth AI. This new AI completely destroyed all the rights-based dispositions of the relatively democratic 1967 Constitution. It conferred on the chief executive the power arbitrarily to remove or retire judges. It also gave him the power to suspend the political rights of any individual for a period of 10 years. Finally, it allowed the president to declare, at will, federal intervention over any state or municipal authority.

With the fifth AI, army rulers built an authoritarian system designed to allow them to stay in power for many years.[122] Military and police censors were allowed to control the media, the movie industry, and popular music. Guarantees of habeas corpus were also suspended for crimes related to matters of national security and economic order. It is no wonder that historian Boris Fausto described the fifth AI as "the tool of a revolution within a revolution, or of a counterrevolution within a counterrevolution."[123]

The fifth AI was enacted at a time in which the extreme left initiated a long series of bank robberies and kidnappings for the purpose of generating funds for a communist uprising.[124] Some terrorist actions were carried out by the PC do B (Communist Party of Brazil), which then followed a hardline doctrine that was directed by Albania's communist regime. According to Denis Rosenfield, "when the radical Left took weapons against the military government, it did so not on grounds of freedom and democracy, but rather for its replacement by a totalitarian regime."[125] As one guerrilla group explained: "Our major objective in the fight against the military dictatorship is not democracy but its replacement by a revolutionary government based on popular dictatorship."[126]

In 1967, a dissident faction of the Brazilian Communist Party (PCB) decided to create the ALN (National Liberating Alliance). In 1969, ALN members failed to activate a bomb that would have completely destroyed the U.S. consulate in São Paulo. They were successful, however, in their attempts to kidnap members of the foreign diplomatic corps in exchange for political prisoners, including, in 1969, the U.S. ambassador.[127] Such radical actions did not weaken the regime.[128] On the contrary, the communist leader Luis Carlos Prestes later admitted that the strength of the military regime actually grew in response to the guerrilla tactics.[129]

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[122] *See* Marcello Ciotola, *Os Atos Institucionais e o Regime Autoritário no Brasil* (Rio de Janeiro: Lumen Juris, 1997), at 129.

[123] Fausto, *supra* note 33, at 289–290.

[124] Id. at 292.

[125] Rosenfield, *supra* note 109.

[126] *See* Elio Gaspari, *A Ditadura Escancarada* (São Paulo: Companhia das Letras, 2002), at 193.

[127] These prisoners were sent to Mexico and some went afterwards to live in Fidel Castro's Cuba.

[128] The process of radicalization involved even the Catholic Church. In that time Church buildings such as the *Cristo Rei*, a Jesuit seminary in southern Brazil, provided accommodation for "armed groups" involved with terrorist actions. In October 1969, the police discovered that a Catholic orphanage was being used by a terrorist organization called *Forças Armadas de Libertação Nacional—FALN* (National Liberation Armed Forces) to store chemical products used in the manufacture of explosives – *See* Gaspari, *supra* note 125, at 264–265.

[129] *See* Passarinho, *supra* note 105.

The military leaders who organized the 1964 intervention were divided between linha dura (hard-line) and moderada (soft-line) factions. While soft-liners wished for a quick restoration of democracy and the rule of law, hard-liners were instead planning a more permanent, authoritarian military regime. The hard-line faction prevailed over the moderates, particularly after those left-wing radical groups initiated their rural and urban guerrilla warfare in 1968. Such radical actions, which included bank robberies and the kidnapping of innocent civilians, ended up strengthening the position of the hardliners, who used the violence to justify a "strong" government, powerful enough to re-establish "order" in the nation.[130]

In 1969, a military junta, which replaced General Artur da Costa e Silva after he suffered a stroke, renumbered all articles of the 1967 Constitution. In doing so, it curtailed rights in the name of "national security," and limited habeas corpus rights for political prisoners. It added to the original text the new penalties of death, perpetual imprisonment, banishment, and confiscation of the property of those found guilty of subversion.

These changes produced an almost entirely new constitutional document. From then on, the president could enact executive decrees not only on matters of "national security" but also on taxation, public jobs, and public salaries. The Congress would have 60 days to reject such decrees, though without powers to amend them. It was understood by the executive that while congressmen may not necessarily openly approve of the decrees, they would nevertheless give their tacit consent. The presidential term was also extended from four to 5 years.

While it is fair to say that the level of repression in Brazil was not as severe as in neighboring Argentina, Brazilian army rulers were no different in their willingness to deal with "subversives" through the extra-legal means of torture and political assassination. Indeed, "torture became the main weapon employed by security forces to subdue those thought to be subversive."[131] This was particularly true during the administration of General Emiliano G. Médici (1969–1974).[132]

Under the government of General Médici, military rulers combined the services of the intelligence service with methods of torture against political suspects. Some important legal guarantees were suspended, and a public agency called the DOPS (Department of Political and Social Order) was charged with deciding whether or not "subversives" could be "more efficiently dealt with by assassination than through the judicial process."[133]

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[130] *See* Ronald H. Chilcote, *Brazil and Its Radical Left: An Annotated Bibliography* (New York: Kraus International, 1980), at xi.

[131] Jean Pinner, *The Skeletons in Brazil's Closet*. Brazzil, 23 March 2006, at: http://www.brazzil.com/content/view/9550/78/

[132] *See* Gaspari, *supra* note 125, at 17.

[133] Levine, *supra* note 93, at 135.

In 1972, the Government also created the notorious DOI-CODI (Operations and Intelligence Detachment for Internal Defense), a department that might fairly be described as constituting the centre of torture for the military regime.[134]

In the "war" against the radical left, agents of the Second Army's OBAN (Operation Bandeirantes) and São Paulo's DOI/CODI conducted acts of torture in which "most victims died or were permanently impaired."[135] These agents could decide whether a "subversive" should be dealt with according to the judicial process or by means of torture and assassination.[136] And, in addition to government agencies such as OBAN and the DOI/CODI, there were also heavily armed, quick-response assault teams to fight the subversives. The most notorious of these was the ROTA, a specialist squad consisting of a few hundred policemen from São Paulo state. According to law professor Paul Chavigny:

> In the first nine months of 1981, near the end of the dictatorship, the ROTA shot 136 people and killed 129 of them. Civil policemen were recruited to torture political suspects; under the impunity of the dictatorship, they formed a death squad to eliminate suspects, criminal as well as political. It proved to be so murderous and corrupt that it was gradually eliminated, at least in its original form, before the dictatorship ended.[137]

In the early 1970s, the army rulers also decided to launch a strident nationalist campaign which urged the civilian population to remain completely loyal to the military government. Under the slogan "Brasil: Ame-o ou Deixe-o" (Brazil: Love it or Leave it) the campaign communicated to the population that their basic rights as individuals were utterly subject to certain matters of segurança nacional (national security). A 1970 booklet from this campaign, distributed to primary schools, informed children that subjection of civil rights to the military understanding of "national security" was "the maximum norm of the exercise of liberty in the social order."[138]

As a central feature of the military training and indoctrination, the concept of "national security" was developed during the 1950s by the War College (ESG). Founded in 1949, the ESG defined "national security" as "the relative degree of guarantee which the State, through political, economic, military, psychosocial actions, can provide… to the Nation over

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[134] Fausto, *supra* note 25, at 291.

[135] *See* Levine, *The History of Brazil*, *supra* note 93, at 130.

[136] Id. at 135.

[137] Paul Chevigny, *Edge of the Knife: Police Violence in the Americas.* (New York: New Press, 1995), at 152.

[138] Grupo de Educação Moral e Cívica, 'The Maximum Norm of the Exercise of Liberty', in R. Lavine and Crocitti (eds.), *supra* note 86, at 258–259.

which it has jurisdiction for the pursuit and safeguarding of national objectives in spite of existing antagonisms."[139] As can be seen, the concept of "national security" expressed by military officers rests upon the undemocratic premise that they know better than elected politicians what is best for the Brazilian people.[140]

In April 1977, Geisel enacted the "April Package," a regressive set of political reforms that cancelled free elections for state governors and extended his presidential term to 6 years. The package also excluded the use of radio and television stations for electoral campaigns. It soon became evident, however, that, when it came to the economy, the Geisel administration was proving itself to be a total disaster. Brazil's GNP fell by half, and inflation more than doubled during his government. The resulting social pressure forced the army rulers to initiate a gradual process of democratization. This led in July 1978 to measures to end of institutional acts and restore the right of habeas corpus.

The economic crisis gave rise to widespread discontent with the military regime. The crisis would come to weaken the social prestige of the generals, which forced the military to initiate the gradual process of abertura democrática ("democratic opening"). But Geisel accepted this "democratic opening" only so long as he himself controlled the process of democratization. It has been suggested that Geisel brought about a greater concentration of power in order to "open" the regime for democracy than did Médici when he sought to keep it "closed."[141] In a January 1975 meeting with other high-ranking officers at the High Command of the Armed Forces, he declared:

> One of the main criticisms of the MDB [the opposition party] is the current lack of the rule of law… Well, I would not suggest here that the rule of law should not be a long-term goal for us. However, before we can even entertain the idea of having the rule of law, we need firstly to guarantee public order. For if we allow the rule of law to exist today, we tomorrow might have to face disorder on the streets. Thus I prefer to be more realistic and not to have the rule of law now, so as to preserve order in this country. Of course, the push for the rule of law is what we can naturally expect from the Opposition. We need, therefore, to find our own ways of being totally immunized against this sort of inconvenience.[142]

The last president of the military regime, General João Figueiredo (1979–1985) promised, upon taking office, to continue the process towards democratization. Figueiredo went so far as to declare on television that he

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[139] Ronald M. Schneider, *The Political System of Brazil: Emergence of a Modernizing Authoritarian Regime 1964–1970* (New York: Columbia University Press, 1971), at 246.

[140] Gordon, *supra* note 62, at 73.

[141] Elio Gaspari, *A Ditadura Encurralada* (São Paulo: Companhia das Letras, 2004), at 35.

[142] Id. at 31.

would arrest and torture (prender e arrebentar) anyone who opposed the advance toward democracy.

In the 1980s massive rallies were organized throughout Brazil agitating for the end of the military regime and for the direct election of the president. It was quite clear that the army leaders were losing esteem among all social classes. Then on 15 January 1985, an Electoral College, convened at the National Congress, elected as the country's new president the civilian Tancredo Neves, a politician from Minas Gerais. The indirect election of Tancredo Neves marked the end of two decades of army rule.

Since the end of the military government, on 15 March 1985, the press has revealed numerous human-rights violations carried out by the armed forces throughout their long years in power. These revelations have tended to support civilian rule, by showing the extent to which the armed forces viewed themselves as an occupying force, rather than governing on behalf of the people.

For this reason, there does not exist at this time the climate that would allow the armed forces to interfere in the political process. The army left power utterly demoralized, not only as a result of their disastrous economic policies but also because of widespread corruption in the public agencies and the approximately 600 companies directly owned by the state, some of which very badly managed by unqualified retired army generals. Consequently, it may take quite some time for the armed forces to repair their tarnished image in the eyes of Brazilian society.

8.3.7 The Seventh Constitutional Period

8.3.7.1 The Constitution of 1988

Tancredo Neves died of natural causes in March 1985, before he even had the chance to take office as president. However, the law was respected, and his vice-president, José Sarney, was appointed as the new president. Sarney had been the leader of the Social Democratic Party (Partido Democrático Social—PDS), a party with strong connections to the military regime. He was the leader of the PDS until making a strategic jump to the Liberal Front Party (Partido da Frente Liberal—PFL) and creating the Democratic Alliance with Tancredo Neves.

On 27 November 1985, Sarney sent a proposal for constitutional amendment to the National Congress, asking for the convocation of an Assembléia Nacional Constituinte (National Constituent Assembly). This assembly was not a body separate from the Congress, but simply the members of the Congress acting under a different name as constitutional legislators for Brazil. The assembly's first measure, carried out on 1st February 1986, was to nominate the leader of the major party in parliament, Ulysses Guimarães, as its president. According to Rosen:

> Combining normal legislative powers and constitution-making powers in the same body made no sense, for the two functions interfered with each other. Congress is a highly political body with a short-term perspective and agenda. Constitutions should be elaborated by statesmen with a long-term and non-partisan perspective. As a political player, the Congress had a clear conflict of interests. It is not surprising that the constitutional document drafted aggravated congressional power at the expense of other institutions and conferred numerous favors upon special interest groups.[143]

President Sarney decided not to send the Assembly a draft of the constitution prepared by a group of experts known as "Afonso Arinos Commission." The group had delivered an absurd document which contained more than five hundred articles. Sarney wisely shelved the Commission Report, allowing the Assembly to disregard it. It was decided that the final draft should be approved through majority consent in two rounds of discussion. Its 559 members divided themselves into 24 committees. Later, on 25 May 1987, they were again divided into eight new committees of 63 members each, with an equal number of auxiliary members.

The result of their work was promulgated on 5 October 1988, 19 months after the start of the drafting process. It is not very clear if congressmen on that day were celebrating the result itself or simply the conclusion of such a long period of work. The result is a lengthy and convoluted document, originally enacted with 245 articles and 73 temporary provisions. The Constitution's "minutely detailed charter," was designed to deal with "almost every aspect of life in Brazil."[144] As historian Boris Fausto notes:

> In a country whose laws are not good for much of anything, different groups tried to put the greatest possible number of laws into the constitution, believing that somehow this would guarantee their being obeyed.[145]

The 1988 Constitution is very long and convoluted. It currently has 250 articles, 74 temporary provisions, and 55 constitutional amendments. Some of its articles are very lengthy and could easily be divided into several articles. For instance, Article 5 contains no less than 77 subsections with four additional paragraphs. This excessive detail has led to the necessity of frequent amendment, making the Constitution seem less to be fundamental law than just another piece of ordinary legislation.

The Constitution is full of trivial details and unaffordable promises.[146] For instance, Article 242 declares that a certain public school in Rio de Janeiro must be owned by the federal government. Likewise, Article 3

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[143] Keith S. Rosenn, 'Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society' (1990), 38 *The American Journal of Comparative Law* 773, at 776.

[144] Page, *supra* note 89, at 22.

[145] Fausto, *supra* note 33, at 316.

[146] *See* Sartori, *supra* note 197.

informs us that that the state shall eradicate poverty and reduce social and regional inequalities. Unfortunately, the mere enunciation of such objectives will not advance solutions to any of these problems.

One article of the original text of the Constitution illustrates documents impracticality by restricting interest rates to no more than 12 percent per annum.[147] In a country that has, for many decades, struggled with high levels of inflation, this would have led to financial collapse had not the STF decided that such a provision was not applicable without implementing legislation.

In Brazil, the 1988 Constitution is considered to be a programmatic document: it is not just a "statute of power" but also a "program of government" to be complied with by the ordinary legislator.[148] Large elements of the Constitution focus on guiding national policy. This follows the example of the 1976 Constitution of Portugal, which demanded, in its original form, the country's "gradual transition" to socialism.

Programmatic constitutions are quite different from the usual models of constitutionalism. They represent, in the words of political scientist Giovanni Sartori, "a deviation and an overload of constitutional capacities that results, in turn, in their failure to function well."[149] Moreover, the superposition of irrelevant details in programmatic documents is highly inconsistent with the long-term nature of written constitutions.[150]

In the case of the current Constitution, its constituent writers seem to have brought about unsustainable promises, confounding real rights with mere expectations of rights.[151] Thus, the constitutional text can arguably create false expectations and exacerbate social frustrations, as numerous of rights seem to exist on paper only, and not in reality.[152] According to Joseph A. Page, the whole process of drafting the new constitution was surrounded by a "surreal aura" in which legislators from the constituent assembly "seemed to assume that constitutional fiat in and of itself could somehow transform the country, and that constitutional guarantees that all citizens would have equal access to basic rights would somehow concretize these aspirations."[153]

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147 This article was revoked by Amendment n.40, on 29 May 2003.

148 *See* Ney Prado, *Razões das Virtudes e Vícios da Constituição de 1988* (São Paulo: Editora Inconfidentes, 1994), at 35.

149 Sartori, *supra* note 13, at 200.

150 *See* Luis Roberto Barroso, *O Direito Constitutional e a Eficácia de suas Normas: Limites e Possibilidade da Constituição Brasileira* (Rio de Janeiro: Renovar, 2001), at 42.

151 Prado, *supra* note 147, at 62.

152 *See* Augusto Zimmermann, 'Constitutional Rights in Brazil: A Legal Fiction?' (2007) 14 *Murdoch University E-Law Journal* 28, at: https://elaw.murdoch.edu.au/issues/2007/2/Elaw_constitutional_rights_brazil.pdf

153 Page, *supra* note 89, at 22.

Designed to exercise rigid control over policy-making, the 1988 Constitution has legal norms often found only in ordinary legislation. It has, therefore, occasioned the tacit revocation of numerous laws and administrative acts and forced the legislator to produce hundreds of additional statutes in light of correlating constitutional provisions. In fact, the enactment of the 1988 Constitution required the production of 285 ordinary statutes, plus 41 complementary laws. This has obviously contributed to the juridical chaos which Brazilians face, and has tended to undermine commitment to the ideal of the rule of law in Brazil.[154]

Under the 1988 Constitution, the National Congress is divided into the Chamber of Deputies and the Federal Senate. Deputies are elected in each state for a 4-year term, and senators are elected for an 8-year term. Both deputies and senators enjoy inviolability, and have the right to special trial before the Supreme Court.[155] Their immunities are preserved even during martial law (estado de sitio). Indeed, parliamentary privileges can only be removed from congresspersons through a two-thirds-majority authorization in the legislative chamber to which the parliamentarian belongs.

In addition, the president has the right to appoint and dismiss the state secretaries (heads of ministries).[156] He also has power to sanction, promulgate, and publish federal legislation, as well as to veto legislative bills in whole or in part. Moreover, the president has power to accredit diplomatic representatives, enforce federal intervention (once authorized by the Supreme Court) and declare war (with legislative authorization), among many other powers. To become president, a candidate needs to obtain the majority of votes in the first round of popular elections. If no candidate achieves this, then the two candidates with the most votes participate in a second round of voting. The candidate with the most votes in the second round becomes the next president for a 4-year term.[157]

Under the Constitution, the president can be impeached for corruption or for breaching the separation of powers, the federal organization of government, and citizens' individual rights.[158] Any charges against the president need to be authorized by a two-thirds majority in the Chamber of Deputies. The proceeding and trial take place before the Senate, and presidential functions are temporarily suspended when senators initiate impeachment proceedings.[159] In December 1992, President Fernando Color de Mello resigned on charges of corruption before the conclusion of his impeachment by the Senate.

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154 Rosenn, *supra* note 142, at 780.

155 Braz. Const., Art.53.

156 Braz. Const., Art.84.

157 Braz. Const., Art.77.

158 Braz. Const., Art.85.

159 Braz. Const., Art.86.

Although the 1988 Constitution preserved the presidential system, it nonetheless includes some elements more suitable to a parliamentary system. For example, either the Chamber of Deputies or the Senate, or any of their parliamentary committees, can summon a minister subordinate to the chief executive. If so, the minister must render the requested information, as his or her refusal, or non-compliance without justification, may invoke a process of impeachment.

In order to restore the supremacy of the legislative over the executive, the 1988 Constitution also abolished presidential decrees. However, the president can now enact delegated laws and medidas provisórias (provisional measures). The former can only be enacted by parliamentary delegation, and on subjects related to the organization of the judiciary and public prosecution, nationality, citizenship, individual, political and electoral rights, or budgets.

Provisional measures, in contrast, are enacted for reasons of relevance and urgency.[160] In such cases, the measure has to be submitted to the National Congress after promulgation and loses its effect ab initio once it is rejected, or congress does not turn this into legislation within 30 days.[161] Sometimes, the executive has sought to adopt provisional measures in place of ordinary legislation. President Fernando H. Cardozo, the "champion" of provisory measures, enacted more than 5,000 provisory measures over his 8-year-long administration. Before him, Fernando Color de Mello re-promulgated provisional measure n. 185 as provisional measure n. 190 after congress rejected the first one. A June 1992 decision from the STF now declares that reproposal of provisional measures already rejected by Congress is unconstitutional.

The power to review any legislation or administrative act in light of the constitutional text is vested in the judicial branch. The 1988 Constitution, by expanding the category of entities authorized to challenge the constitutionality of laws and administrative acts in the abstract, strengthened the power of Supreme Court (STF) judges to protect constitutional rights.[162] The system of constitutional justice in Brazil combines the incidental (and decentralized) model of judicial review of countries such as the United States and Australia with the abstract (and centralized) model of constitutional courts of European countries, such as, Germany, Italy, Spain, and Portugal.[163]

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[160] Braz. Const., Art.62.

[161] The Amendment n.32 has extended this period to 60-days and restricted the subject of provisional measures.

[162] For more details on judicial review in Brazil, *see*: Augusto Zimmermann, *Curso de Direito Constitucional* (Rio de Janeiro: Lumen Juris, 2006), at 307–328 & 567–615.

[163] For a comparison between common law and civil law approaches to judicial review, *see* Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (New York: Clarendon Press, 1989). For a study of the constitutional courts in European countries,

Under the decentralized model of constitutional justice, judges decide matters of constitutionality in the course of ordinary litigation initiated by private or public litigants. At any level of the court hierarchy, judges in Brazil have jurisdiction to declare that a law or administrative act is unconstitutional. This model has been present since the promulgation of the first Republican Constitution in February 1891.

Since 1964, however, the country has also possessed a control of constitutionality in the abstract. In such cases, the STF acts as a typical constitutional court, which, as Alec S. Sweet explains, of all constitutional courts, "is empowered to review legislation before it has affected anyone negatively, as a means of eliminating unconstitutional legislation and practices before they can do harm."[164]

In cases of decentralized judicial review, any judge in Brazil is allowed, at the behest of any litigating party, to disregard a statute or administrative act that is considered unconstitutional. This type of review allows each judge to behave as a sort of "guardian" of the constitutional order. Any determinations of unconstitutionality, according to this procedure, result in inter partes effects, which mean that it binds only the litigating parties.

Unlike common-law countries, such determinations of the invalidity of statutes do not operate as binding precedent. The Senate, however, can convert incidental review into *erga omnes* (valid for all) decisions, once STF judges have decided on the unconstitutionality of a federal law. In such cases, the STF requests the Federal Senate to pass a resolution suspending the norm declared unconstitutional.[165]

Brazilian judges enjoy full constitutional guarantees of life tenure, irremovability (save for public interest), and irreducibility of salary. But also to guarantee their neutrality, judges are forbidden from holding any additional job other than a teaching position. For similar reasons, they cannot receive court costs, or participate in any lawsuit, or engage in political activities.

Moreover, the judicial branch in Brazil is granted financial autonomy, as judges themselves have the power to prepare their budget proposals within limits stipulated alongside other government branches through budgetary legislation. And yet, over these last decades, the backlog of cases in judicial dockets has multiplied by a factor of ten, and as a consequence trial delays have more than doubled.[166] These issues seem to indicate that, since the

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see Louis Favoreu, *Les Cours Constitutionalles* (Paris: Presses Universitaires de France, 1996).

[164] Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), at 34.

[165] Braz. Const., art.52, X.

[166] "More than a decade after the passage of the 1988 Constitution, it is difficult to argue that any of the judicial reforms achieved their desired results or improved public confidence in the courts. Judicial bottlenecks were worse than ever, times to disposition were increasing throughout the country, the average caseload per judge was worsening

country was re-democratized, the performance of the courts might have deteriorated. Indeed, the Brazilian judiciary is still plagued with corruption, and judges are often accused of crimes that range from diverting the funds of courthouses to passing lenient sentences on dangerous criminals in return for payment.[167] In 2003, for example, the police found a judge from the Superior Court of Justice (STJ), Brazil's second-highest court, accepting bribes to give writs of habeas corpus to drug-dealers.[168]

The 1988 Constitution also contains numerous procedural remedies regarding the protection of human rights. In order to protect citizens from arbitrary arrest, the writ of habeas corpus is guaranteed.[169] There is also a mandado de segurança (writ of security) which is filed for the protection of any legal right not covered by habeas corpus. This right, however, needs to be demonstrated by documents attesting situations of illegality or abuse of power. The writ of security follows a summary proceeding, though such action has preference over any other action save for cases of habeas corpus.

The 1988 Constitution also provides a legal remedy called mandado de injunção (writ of injunction) against any absence of law or administrative act preventing the regular exercise of constitutional rights and liberties as well as prerogatives related to matters of nationality and citizenship.[170] This writ allows citizens to seek remedies for constitutional rights not yet regulated by complementary legislation, by requiring that legislation be passed.

When the Court grants an injunction, the authority held responsible for the omission is advised to enact any measure rendering the constitutional right effective within 30 days. If the case relates to the necessity of complementary legislation, then judges can simply advise the legislators about their omission. Although injunctions were created for the purpose of reducing situations of non-enforcement of constitutional rights, judges have no authority under the constitutional principle of separation of powers to oblige legislators to produce legislation.[171]

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rather than improving, corruption scandals inside the judiciary had become commonplace, and the courts steadfastly resisted all reforms. Not surprisingly, public confidence had plummeted"—William Prillaman, *The Judiciary and Democratic Decay in Latin America* (London: Praeger, 2000), at 82

[167] *See* Augusto Zimmermann, 'How Brazilian Judges Undermine the Rule of Law: A Critical Appraisal' (2007) 11 *International and Trade Law Review*' (2007) 11 *Trade and Business Law Review*.

[168] Daniela Trejos Vargas, 'Civil Justice in the Americas: Lessons from Brazil' (2004) 16 *Florida Journal of International Law* 19, at 22.

[169] Braz. Const., art.5, LXVIII.

[170] Braz. Const., Art.5, LXXI.

[171] *See* Regina Quaresma, *O Mandado de Injunção e a Ação de Inconstitutionalidade por Omissão – Teoria e Prática* (Rio de Janeiro: Forense, 1999), at 492.

Citizens can also file popular actions to nullify administrative acts that are contrary to the public interest. But popular actions need to deal with matters of culture and environment. Plaintiffs are exempt from court costs, unless they are guilty of bad-faith litigation.[172] Lower-court decisions dealing with popular actions can be appealed right through to the STF if such a decision can be contested in light of the 1988 Constitution.[173]

Like popular actions, public civil-actions aim to protect the environment, consumers, and properties with artistic, historical, or landscaping value. In contrast to popular actions, public civil-actions can only be proposed by the federal MP, state governments, city councils, public companies, mixed-capital companies and civil associations.[174] Public civil-actions are lawsuits in which plaintiffs, in theory, act on behalf of the community. Thus, decisions on such actions produce erga omnes (valid for all) effects on the whole society and compensation for any damages are deposited in a state fund instead of going to the plaintiffs.

In its section on "Fundamental Rights and Guarantees", the 1988 Constitution discusses, explicitly, the protection of an impressive range of "individual and collective rights," "social rights," and "political rights." It also declares, in its first articles, that all power belongs to the people and that the nation constitutes a democracy under the rule of law (Estado Democrático de Direito). Under the Brazilian constitution its citizens have constitutional rights to life, liberty, formal equality, security, and numerous other "fundamental" rights related to matters of citizenship, human dignity, free enterprise, and political pluralism. According to Rosenn, the concept of human rights in Brazil is more thoroughly protected in law than in any other country in the world.[175] However, as he also recognizes, the reality on the ground demonstrates how human rights ensconced in theory can considerably differ from human rights in practice.

The most impressive of all the articles is Article Five, which, among other things, explicitly prohibits social discrimination on grounds of sex, ethnicity, and religion. It also proclaims basic rights such as those to life, personal freedom, equality before the law, security of the person, private property, and so on. Despite this, there is a significant gap between rights enunciated on paper and the manner in which some of these rights are recognized in society. The reason for this gap is that Brazil still struggles with problems such as corruption, authoritarian behavior, criminality and forced labor.[176]

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[172] Braz. Const., Art.5, LXXIII.

[173] Braz. Const, Art.102, III, a.

[174] *Federal Law* n.7.347/95

[175] Keith S. Rosenn, 'Judicial Review in Brazil: Developments Under the 1988 Constitution' (2000) 7 *Southwestern Journal of Law and Trade in the Americas* 291, at 315.

[176] *See* Zimmermann, *supra* note 151.

Any proposal to amend the 1988 Constitution has to be approved by a third of the members of any legislative chamber of Congress, or the president, or one-half of the state legislative assemblies. Because the constitutional text is rigid, it cannot, at least in theory, be easily modified. Proposals to amend the Constitution must, therefore, be discussed and voted on twice in each house of Congress and can only be approved if it gets a three-fifths majority in both rounds of parliamentary discussion.

There are also temporal limitations for amending the Constitution. First, it cannot be done during times of federal intervention (over any state) or if estado de sitio (martial law) is in place. Second, rejected proposals cannot be subject to another deliberation in the same year. Moreover, the Constitution forbids any amendment intended to restrict norms and principles related to the federal system: direct, secret, universal and periodic popular elections; separation of powers and individual rights and guarantees.

However, the formal rigidity of the 1988 Constitution has been of little avail in terms of avoiding the ongoing multiplication of amendments. Nor has the complexity relating to amendments helped the legal document maintain its stability as the nation's basic law. Politicians have been able too readily to change it, although the 1988 Constitution was clearly designed to make it difficult for this to happen. The 1988 Constitution has proven to be quite flexible in practice to the extent that amendments sometimes seem no more difficult than ordinary legislation. As such, as Schor explains:

> Flexible constitutions … [allow] those in power to rewrite the fundamental rules of the game in their favor. Rules that are readily changed at the behest of those in power facilitate elite power but come at a high cost, which is that elites and the masses lose trust in the rules under which they are formally governed.[177]

Prominent figures in government and society have started discussing the possible enactment of a new constitution. During the last presidential campaign, President Lula da Silva refused to sign a declaration committing himself to respect the Constitution. He argued that a popular government would have the right to create a new constitution if the people so wanted. The idea of a new constitution is supported by the former president of the Brazilian Bar Association (OAB), Roberto Busato, and by the former Chief Justice of the Superior Tribunal of Justice (STJ), Édson Vidigal, who states that only another constitution could construct a new "national project" for Brazil.[178]

It is well to remember, however, that problems such as political corruption are not provoked by lack of legislation but rather by "immeasurable

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[177] Schor, *supra* note 9.

[178] 'Juristas Debatem Soluções Para Fortalecer Congresso', *Jornal do Brasil*, 7 August 2005, A2.

ambitions" and the "lack of ethical conscience" in politicians.[179] Brazil would have far less corruption if politicians developed the "good habit" of respecting legal rules. This would be more directly effective than changing the Constitution.

If the ideal of the rule of law is to be realized in society, respect for legality is fundamental. Once citizens lose respect for the law, they also lose any guarantee against abuses of power. In today's Brazil, widespread political corruption[180] and the imprudent multiplication of laws, including constitutional amendments, are facts that have contributed significantly to the current disrespect for the constitutional order.

8.4 Final Considerations

This article has offered a broad account of the intrinsic relationship between law, politics, and culture within the context of Brazil's constitutional history. The intention has been to establish whether the weakness of the rule of law in Brazil is as much a socio-political problem as it is a legal-institutional one. Altogether, the country has had at least six constitutions that have clearly established bills of rights and a threefold separation of governmental powers. Yet, true constitutionalism cannot be attained by constitutional design alone, but also requires real social acceptance of the rule of law as a standard of human behavior.[181] The fate of the current Brazilian Constitution remains uncertain, but the history of its predecessors gives real cause for concern about the future of constitutionalism and the rule of law in Brazil.

Acknowledgement The author wishes to thank Prof Gabril A. Moens, Prof Jeffrey Goldsworthy, Dr Sale Smith, Dr Vernon Nase, and Mr Frank Gashumba, for reading and commenting on this paper.

[179] Dalmo de Abreu Dallari, 'Golpe contra a Constituição', *Jornal do Brasil*, 13 August 2005, at A11.

[180] *See* Augusto Zimmermann, 'Corruption? No Great Big Deal! That's the Way Things are Done in Brazil', HACER (The Hispanic American Center for Economic Research), 27 September 2005, at: http://www.hacer.org/current/Brazil083.php.

[181] *See* H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), at 116

Chapter 9
Rule of Law, Power Distribution, and the Problem of Faction in Conflict Interventions

Daniel H. Levine

9.1 The Nature of Post-conflict Rule of Law

This chapter will concern the rule of law as it relates to third-party interventions into violent conflicts: peacekeeping missions, humanitarian interventions, peacebuilding, and the like. This context will help fix the boundaries of the very general idea of rule of law, and suggest how we should conceptualize it for these contexts. This chapter will attempt to examine the role of law in a post-conflict society, and begin to develop a concept of rule of law appropriate to that context.

There are two reasons to look for a concept of "rule of law" appropriate for conflict interventions and post-conflict contexts. First, there may not be any single, universal concept of "rule of law," but rather a family of related concepts. "Rule of law" is used very broadly, and often with some vagueness. Interventions and reconstruction projects that do not clarify their concept of rule of law risk aping the surface elements of a (usually) Western legal-political system, without really contributing to peace either in the short or long term. Second, the post-conflict situation illuminates some conceptual issues surrounding law and the "rule of law" that are interesting and important for thinking about the rule of law in non-conflict contexts as well, and would be lost if we assumed the concept was already thoroughly sorted out.

The conception of rule of law advanced in this chapter is functional, rather than content-based, and not connected to any particular institutional image. "Rule of law" in the context of intervention primarily concerns the existence of certain kinds of institutions concerned with the creation, interpretation, and enforcement of rules of social order. Rules

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M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_9,

of social order are necessary because there are conflicts of interest in all societies, and generally it is better for everyone that such conflicts be resolved without recourse to violence. Contests according to generally agreed rules can soften the destructive impact of necessary social decisions. I will assume that we have at least a rough-and-ready understanding of what sorts of institutions are "legal" ones, in part because I do not think that any significant part of my argument turns on questions of distinguishing legal institutions from others. In fact, a functional understanding of the rule of law must reflect the reality that legal institutions are only one element in a broader system of social power, and intimately related to other political institutions. When applied to rule of law promotion and post-conflict reconstruction, these institutions are likely to be connected to states, and to have many of the trappings of modern legal systems, such as courts, prisons, police, and legislatures. None of these attributes are *essential* to institutions that we could intuitively recognize as instantiating the rule of law, and there has been some attention to alternatives, such as customary law and traditional dispute resolution.[1]

The question to be addressed in this chapter is not, "what is rule of law?" but rather, "what sort of legal institutions and political-legal changes are needed to accomplish a conflict intervention's goals?" Legal institutions alone will not guarantee success, but it is hard to imagine any just and stable intervention or post-conflict settlement that does not rely in large part on establishing the rule of law, in this sense.

The primary motive in most third party interventions is usually the desire to end *violent* conflict, or to prevent its recurrence. Ending all social conflict would be an unrealistic aim. The rule of law does not usually so much *resolve* conflict as mitigate or soften its consequences.

The underlying drivers of conflict are not going to be resolved in a court case. But, if the drivers of conflict can be addressed through legislative wrangling, alternations of political power, or constitutional adjudication, life will probably be better for most of the people in the area.

Neil Kritz has rightly observed that the rule of law involves "an evolutionary search for those institutions and processes that will best facilitate authentic stability through justice."[2]

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[1] For example, the US Institute of Peace (a government-supported NGO) Rule of Law program has a project on "The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies," http://www.usip.org/programs/initiatives/role-non-state-justice-systems-fostering-rule-law-post-conflict-societies (accessed August 19, 2009).

[2] Neil Kritz, "The Rule of Law in Conflict Management," in *Leashing the Dogs of War: Conflict management in a Divided World*, ed. Chester A. Crocker, Fen Olser Hampson, and Pamela Aall (Washington, DC: USIP, 2007), 402.

9.2 Rulebook vs. Power-Distribution Concepts

The nature of the functional concept of law becomes clearer when contrasted with a more formalistic view. Formalistic views address questions about the nature and structure of law as a set of *rules.* The reason to look to a functional concept is to understand those rules as a social and political phenomenon. Neither way of understanding law is "right;" they answer different questions.

One common, formalistic way of looking at rule of law is a sort of "rulebook" conception, which takes the rule of law to be established when there are institutions that create and apply rules with certain formal properties. Andrei Marmor's list is fairly representative:

- generality (law must apply to everyone in society, without *ad hoc* distinctions)
- promulgation (laws must be known to the public, or at least easily knowable)
- no retroactive rules
- clarity
- no contradictory rules
- no rules that are impossible to follow
- stability (laws change only gradually)
- consistency of application[3]

This sort of definition is concerned with *distinguishing* law, and is better at answering the question, "what is rule of law, and how does it differ from other exercises of power that happen to involve rules, or from good governance in general," than it is my question, about how law can contribute to conflict transformation. Swinging the pendulum too far in a permissive direction can also be problematic. For instance, Kritz' definition of "rule of law" includes many features that go beyond the formal structure of the rules to include both institutional characteristics and substantive content—including representative democracy and civilian control of the military.[4]

All of these things are important to conflict transformation and eventual stable governance. But they include too much to tell us about what the law in particular can contribute.

The problem is not so much that "rule of law" tends to extend through too many political and social institutions. Even if we stick with a rulebook conception, the requirement that the law be implemented effectively

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[3] Andrei Marmor, "The Rule of Law and its Limits", *Law and Philosophy* 23 (2004),:5–7. Also *see* Marmor's later clarifications of several constraints.

[4] Kritz, "The Rule of Law in Conflict Management," 404.

threatens to encompass most of politics (including, at least, courts, police forces, and all the specialized agencies that implement political decisions, from environmental agencies to child protective services to picking up the trash). There is probably a practical need to delineate some area of post-conflict assistance as "rule of law," and give it some boundaries, but that should not be taken to indicate any bright division between institutions that support the rule of law and those that do not. Rather, the problem is that a very expansive notion of the rule of law threatens to leave us without the ability to recognize the rule of law in systems that do not look like Western legal systems. Perhaps ironically, by being inclusive of so many institutions beneficial to stability and rule of law in a Western context, a broad concept may obscure the principles that allow us to recognize rule of law in other institutional contexts.

In particular, when facing the problem of violent factions, an intervention that simply identifies the rule of law with a long list of institutional reforms, may focus on building those institutions at the expense of addressing the problems of a particular conflict. For instance, the US Agency for International Development (USAID) rule of law goals are couched in functional terms, such as the protection of human rights and gender equity. But the indicators listed in USAID's *Handbook of Democracy and Governance Indicators* assume that rule of law requires something very like a Western institutional context, including:

- complaints of human rights abuses filed in domestic courts or regional tribunals
- number of persons in pre-trial detention
- creation of a human rights court or ombudsman
- number of commercial cases filed in court
- courts and police per 100,000 people
- percentage of accused criminals represented at trial[5]

There are some nods to approaches different from Western structures, but the handbook is careful to warn that a high number of cases handled by "alternative" dispute-resolution mechanisms (alternative to courts) "[i]ndicates accessibility if not quality."[6] In the field, practitioners may well adapt to the particularities of the situation—I am not arguing that rule of law assistance as practiced now is futile, but that a guiding concept would help with planning and adaptation.

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[5] USAID Bureau for Global Programs, Field Support, and Research Center for Democracy and Governance, *Handbook for Democracy and Governance Program Indicators* (Washington, DC: USAID, 1998). Indicator charts for rule of law span p. 25–54.

[6] Ibid, 36.

To find the core of a recognizably legal aspect of conflict mitigation, let me present an admittedly stylized picture of conflict. Intrastate conflict, to speak in the abstract, begins when some organized group decides to resist the established power of some other group in society. Ideologically motivated insurgents may take the explicit position that they, not the current regime, should be in formal governmental power, but non-ideological, predatory factions may also destabilize regime structures, by opting not to be controlled by the people empowered by the formal governmental structures. Some destabilizing forces may be motivated primarily by self-enrichment, challenging structures that protect the property of others. Olu Aruwobusoye, analyzing West African conflicts, puts it this way:

> In all of these conflict configurations, the intention of the perpetrators is simple: to gain primacy, not only over their lives, but also over the politics and economy of their terrain, for the simple reason that control over the political and economic landscape fulfills their aspirations.[7]

The concept of the "rule of law, not of men," captures the essence of successful conflict transformation, if we keep in mind that conflicts are largely conflicts over *who* will be in control. It is true that, strictly speaking, laws cannot rule without men to enforce them.[8] Wherever there is government, there will also be some people with power to exercise over the rest of us. An intervention cannot change the fact that someone, somewhere, will be exercising power, but it can hope to create a "rule of law" in the sense that that power will be mediated through institutions in such a way that violent conflict becomes less attractive. When institutional power is distributed in such a way that each potentially violent faction can see their interests being better protected by legal institutions then these institutions themselves will create new powers and limitations that are relevant to the pursuit of interests. One key to the successful transformation of a conflict situation will be to redistribute power, so that more participants in the system feel that they can adequately pursue their interests, and have less motivation to engage in extra-legal, perhaps violent, conflict.

Rulebook conceptions exclude distribution-of-power considerations, as even their proponents concede. Andrei Marmor argues that South Africa's *apartheid* laws did not violate the condition of general applicability/generality (the most likely candidate for a rule-of-law failure there) because there was a rational, although odious, explanation for why they applied only to non-whites, which is that they were designed to oppress non-whites. This is, Marmor argues, *formally* as respectable as restricting the application of a law designed to curtail pollution only to members of a

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[7] Olu Arowobusoye, "Why They Fight: An Alternative View on the Political Economy of Civil War and Conflict Transformation," (Berlin: Berghof Research Center for Constructive Conflict Management, 2005), 4.

[8] As Marmor points out, following Raz. Marmor, "The Rule of Law and its Limits," 2.

certain polluting industry. The difference is not that one violates the rule of law while the other does not; the difference is that oppressing non-whites is *immoral*, while curbing pollution is not.[9]

Similarly, while Philip Pettit has a substantive dispute with the Marxist critique that the law is a tool of the economically powerful under capitalism, his main response is that, even if that were true, it would not show that capitalism violated the rule of law. Rather, it would only show that it violated a different condition on the ideal state concerning the distribution of power.[10]

An insurgent faction that believes its interests are not appropriately protected with some other group in power is unlikely to be comforted by the promise of the rulebook conception that their oppression will be expressed in a clear, coherent, and regular way. There might be *some* advantage to this, insofar as it makes the exercise of (what is perceived as) abusive or inimical power predictable. But predictability is a fairly weak benefit, despite its centrality to some rule of law accounts.[11] It is difficult to imagine that most insurgents would cease fighting if they could be assured that the balance of power would be the same as it was before the conflict, except that they would be oppressed in a less capricious fashion. The benefits of predictability in the exercise of power to certain elements of the overall society, such as the space that would be opened for markets (that could adapt to regulation to some extent, so long as it could be planned for) do not necessarily align with the desires of combatants—the groups that an intervention needs to convince to stop fighting.

A focus on conflict transformation gives us a potentially useful way of thinking about what *law* adds to a postconflict situation. The familiar trappings of law from the industrial democracies such as police forces and independent judiciaries are one way to implement a redistribution of power and create new forms of conflict. They are not the only ways. The forms of law should not distract from its proper function in resolving conflict.

This is not to say that the formal or rulebook elements of law are irrelevant; within a system that looks anything like Western law, they support the basic nature of law as an alternate way of structuring and pursuing conflict. The publicity of law provides the basics of the arena. Rather than fight for interests by attempting physically to eliminate opponents, conflict should be over influencing the content of the law. Non-public rules could not serve

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[9] Ibid, 10.

[10] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (New York: Oxford UP, 1997), 176–177. Pettit uses slightly different terminology; he speaks of the "empire of law" condition, rather than "rule of law."

[11] E.g., "... the most valuable effect of the rule of law is that it enables individual autonomy. Rule of law makes it possible for people to predict the consequences of their actions and, hence, to plan their lives." José María Maravall and Adam Przeworski, Introduction to *Democracy and the Rule of Law,* ed. José María Maravall and Adam Przeworski, 2.

this purpose—at least not rules that were not publicly known by all the powerful factions (more on this later). With public laws, conflicts of interests can take the form of maneuvering politically to fix the content of laws, rather than physically trying to incapacitate one's opponents. There may be other ways to displace violent conflict, but law is a particularly effective technique for doing so. Respect for law also makes interactions with other states easier once the conflict is contained, and it has other formal properties that support it in this role.

Stability and universal application help. If the law were not stable to some extent, no faction would care about having influence over its content. They would not know if the resources expended making a compromise on the law today would be undone tomorrow. A stable way of changing the law does not violate this concern, since one can make rational decisions regarding how enduring a legal compromise is likely to be.

Universal application solves another "why should we care?" problem. In the extreme case, of course, no faction would be interested in disputing to the content of laws that applied to no one, or were complied with by and enforced on no one. Factions would also not be likely to be interested in laws that had significant group-based exceptions, since each faction would vie to be exempt from the law, and be able supplement whatever power they had in the legal realm with their violent power. Either everyone would do so, and we would be back to violent conflict, or each faction's fear of another doing so would help sustain universality for the law.

Marmor's point that law need not be *perfectly* universal is well-taken, but takes a slightly different cast when examined in light of power distribution. Marmor's suggestion for a revised principle of *generality-relevance*, where laws must only apply differentially insofar as the differential application serves the purpose of the law, does not capture the relevant distinction for rule of law in a conflict environment. It seems likely that parties to a conflict would be more likely to accept some forms of relevant non-generality—like Marmor's example of the law that differentially targets polluters—and reject others, such as *apartheid* laws.

The obvious, and not quite right, principle is that laws which entrench the power of one group over another are out of line. But, Marmor's hypothetical anti-polluter law does this, too—polluters are now subject to more exercise of power. If we take this further, it is easy to imagine a situation in which the anti-polluter law would *not* be acceptable to parties to a conflict: one in which the pollution, or the industry, was a significant *casus belli*. The relevant principle of generality for conflict situations is that the laws should not entrench divides that led to the conflict, or are likely to lead to future violent conflict.

A cynic might wonder whether the more equal distribution of power will ever be achievable. There might seem to be a dilemma here, since it is generally relative political power that people care about, making the distribution of power a zero-sum game. Either the legal-political system put in

place merely mimics the balance of power that would be there "naturally," but in the absence of violence (e.g., via informal political pull or economic resources), in which case the disadvantaged parties will take up arms, just as they did when the initial conflict began; or, the new arrangement will be worse for one of the stronger parties than that which they could achieve through force of arms, and so *they* will re-open the conflict.

While the distribution of political power is a zero-sum game, ending violence is not. Or, rather, violent conflict destroys value, and is a negative-sum game. So, it is entirely possible for every faction to be better off simultaneously in a non-violent context of conflict. Purely in terms of political power, a powerful faction may be worse off under the rule of law, since its political clout will be more nearly equal to the clout of others. But political power is not the only kind of value, and is a means to an end in any event. A group might find its ability to enjoy the satisfaction of its goals and interests greater in a peaceful environment, even if a means of ensuring that peace requires the reduction of its political power. So, in principle, it often ought to be possible to find a redistribution of power that would not be so detrimental to any group as to invite defection.

9.3 The Problem of Faction

9.3.1 Classical Solutions

To understand the search for a post-conflict rule of law as aiming at the appropriate distribution of power is essentially to make it into a version of the hoary republican problem of faction, as famously expressed by Madison in *Federalist* 10. "Complaints are everywhere heard … that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of a minor party but by the superior force of an interested and overbearing majority."[12]

Factions are groups within society that share a common interest, but an interest that is *not* shared by society as a whole. One way of putting it is that factions are groups that are not interested in the common good. The

[12] James Madison, Alexander Hamilton, and John Jay, *The Federalist Papers,* ed. Isaac Kramnick (New York: Penguin, 1987), p. 123 (paper no. 10). Madison seemed primarily concerned with the dangers of a *majority* faction, and seemed to think that democracy was a sufficient bulwark against the machinations of a minority. In post-conflict cases, of course, this is not true—an armed minority can easily pose a problem for an unarmed majority. In general, as I will argue below, organization should be seen as a key attribute of factions. Madison is probably too complacent about the possibility that a well-organized minority could pursue its interests at the expense of a disorganized majority.

ideal of the republic is rule by the people (in some form), with everyone participating (or, at least all those worthy of being citizens) in seeking the common good of the nation—and this ideal is echoed in the democratic aspirations of most conflict interventions. A powerful faction can derail the focus on the common good by pursuing its own ends. The most obvious way that this can happen in a democracy is for a majority to use the electoral system to impose its will on a minority, but factions can also use less-formal varieties of power, such as social standing or wealth. And, of course, in a post-conflict situation, they may use violence.

There are two classical solutions to the problem of faction. The first is to divide government power among several institutions. The second is to proliferate factions. This section will deal with the "separation of powers" solution, as advanced by Montesquieu in his discussion of the English constitution in *The Spirit of the Laws*,[13] an argument taken up by Hamilton in *Federalist* no. 9, and returned to by Madison in *Federalist* no. 46 (on the virtues of dividing power between state and federal governments) and 47 (on the virtues of constitutionally dividing power between institutions of the government).[14] More recently, Kritz' list of elements of the rule of law, discussed above, covers distribution of power through such elements as judicial independence and separation between the state and political parties.[15]

Separation of powers seeks to prevent any one governmental institution from becoming too powerful and therefore able to rule tyrannically—a problem that could arise independently of the pre-existence of factions. Separated powers provide factions with two obstacles. First, since governmental institutions have their own hierarchies, any faction desiring control over the government cannot simply capture the single top spot, but must spend resources attempting to influence several different organizations. Second, well-designed separated institutions have incentives to control each other. For instance, a legislature that defers to the executive too often will find its proper powers effectively usurped, making participation in the legislature less attractive. Once institutions are well-established, this effect will work against the effects of factional loyalty, even if a single faction *does* control more than one governmental institution.

The separation of powers offers a useful mechanism for advancing the post-conflict rule of law, though it should be approached with an eye on its underlying rationale, rather than the particular forms it has taken in developed nations. Rule of law practitioners tend to understand the separation

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[13] Montesquieu, *The Spirit of the Laws*, Anne M. Cohler, Basia C. Miller, and Harold S. Stone, eds. (Cambridge: Cambridge UP, 1989), 156–166 (§XI.6).

[14] Madison et al., *The Federalist Papers*, Chs. 9, 46–47.

[15] Kritz, "The Rule of Law in Conflict Management," 402.

of powers in terms of their home nation's institutional context. The particular institutional expressions of separation of powers in developed nations should not, of course, be ignored, but neither should they be taken as a rigid template for dissimilar cultures and societies.

Even beyond the need to take account of the particulars of the situation, establishing a government with a functioning separation of powers is not straightforward in a society emerging from conflict. A conflict intervention does not face the task of creating political institutions that ideally distribute power from scratch. It faces the rather different task of *re*distributing power, among groups that are likely to resist in some measure, and have some power to do so. The intervention seeking to redistribute power must deal with a number of political (though not necessarily governmental) organizations—most importantly, the armed parties to the conflict, but there will likely be other factions, and some of these may come into their own once the conflict intervention changes the balance of violence. Power in a conflict situation will be distributed based on the opportunities and aptitudes for organization (e.g., norms of familial loyalty, or the remnants of a military structure) and the luck of access to material sources of power. Before or during a conflict, various factions may have been able to organize around formal political structures (even in cases of "total" state collapse, the old government or its successor organizations tend to remain powerful factions). The end of conflict will not automatically disperse these factions or break their power.

As a result, the problem of institutional design is not just one of creating institutions that, in principle, or in the absence of other organized loci of power, would distribute power well. The separation of institutional powers will not solve all problems if, for example powerful militias still contest the streets with the police, or if property disputes are handled by negotiations between powerful families rather than through the formal legal system.

Though much of the discussion in Montesquieu, Madison, and their followers is focused on the separation of powers as a way to prevent governmental institutions from becoming concentrations of power in their own right, Montesquieu at least did consider the problem of dealing with pre-existing societal factions.

> In a state there are always some people who are distinguished by birth, wealth, or honors; but if they were mixed among the people and if they had only one voice like the others, the common liberty would be their enslavement and they would have no interest in defending it, because most of the resolutions would be against them. Therefore, the part they have in legislation should be in proportion to the other advantages they have in the state, which will happen if they form a body that has the right to check the enterprises of the people, as the people have the right to check theirs.[16]

[16] Montesquieu, *The Spirit of the Laws,* 160.

A bicameral legislature may appear as an especially *ad hoc* element of the separation of powers. In Montesquieu, it appears not for its own sake, but as a solution to a very specific problem—the wealthy nobility need some institution to "call their own," or they will resort to their considerable extra-political power to get their way. Montesquieu thought the point was of general applicability, because he seemed to think that there would always be hereditary nobility, but we can regard it as a particular way of creating institutions that *re*distribute concretely distributed power.

We should regard the other typical features of separated institutions similarly. Elements such as an independent judiciary and a party-based political system make sense as ways of redistributing and dividing power in societies with a tradition of formal law, where authority will be largely centralized, where power groupings tend to follow socioeconomic class and regional lines. Different approaches may be more effective in some post-conflict situations. Outside observers *should* be cautious of deviations from the Western institutional model of the separation of powers, especially when the deviations are suspiciously beneficial to one existing power group (as one-party or "no-party" democracies often are).[17] But this caution should be based on the fact that certain institutional forms have a proven track record in developed democracies, not on the idea that they constitute rule of law. The process of creating the distribution of power essential to the rule of law should not start from an image of the "rule of law" and proceed to questions of how to re-create that image. Rather, it should start from an assessment of the power distribution in society and ask how to create institutions that will channel that power into non-violent, law-based conflict.

9.4 Dealing with Factions in the Post-conflict

In making the assessment and formulating a plan, an intervention will face two broad possibilities: to destroy/marginalize existing factions, or to co-opt them.

To think that *all* existing elites could be marginalized or eliminated, and a state built directly from "the people" would be naïve.[18] Post-conflict states

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[17] For a careful but cautionary analysis of one example, *see* Nelson Kasfir, "'No-Party Democracy' in Uganda," in *Democratization in Africa*, ed. Larry Diamond and Marc F. Plattner (Baltimore, MD: Johns Hopkins UP, 1999).

[18] The rhetoric of conflict interventions is often questionable on this count. The US and its NATO allies repeatedly declared that the Kosovo intervention was undertaken on behalf of "the people" of the Federal Republic of Yugoslavia (now Serbia) and that their quarrel was only with the government in Belgrade. The US intervention in Iraq in 2003 was framed as a way to free "the people" of Iraq from dictatorship (alongside other justifications, of course). As rhetoric, this may be fine and even express worthwhile

are generally built upon structures established by armed elites. One common provision of peace treaties, for instance, is to create integrated security forces incorporating elements from all parties' combatants.[19] Even when an intervention is very lopsided militarily, eradicating even the most violent and rejectionist factions has most often been unsuccessful, at least in the short run—as the United States' experiences in Somalia (in 1992–1993), and wars in Afghanistan (since 2001) and Iraq (since 2003) illustrate. The idea that armed elites could simply be eliminated by brute force is even more unrealistic for interventions carried out by smaller states, by the United Nations, or by regional organizations such as the African Union, whose military might may be matched or exceeded by that of armed factions.[20] It is easy to take the moral stance that armed elites, especially those which have committed offenses during the conflict, should simply be erased from the new order; but, we should be careful not to take a moral stance that an intervention could rarely or never live up to, unless we are

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ideas, but there is a danger of taking the rhetoric too seriously and assuming that there is a "the people" who can assume governance duties in a fair and equitable manner once an external tyranny is removed. Tyrannies are, for better or worse, some of the people, organized.

[19] For example, *see* the *General Peace Agreement for Mozambique*, Protocol IV, I.i.4 (http://www.usip.org/library/pa/mozambique/mozambique_10041992_p4.html, accessed 18 July 2008); *Chapultepec Peace Agreement* (El Salvador), Ch. 2.7.D (integrated national police, http://www.usip.org/library/pa/el_salvador/pa_es_01161992_ch2.html#1, accessed 18 July 2008); *Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities Between the Government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army During the pre-Interim and Interim Periods* (aka the "Comprehensive Peace Agreement), §20 (on Joint Integrated Units, to form the basis of an integrated military if the agreement's referendum process does not result in secession; http://www.usip.org/library/pa/sudan/cpa01092005/ceasefire_agreement.pdf, accessed 18 July 2008). Incidentally, it is not clear that, on their own, these integration provisions have a significant impact on the duration of peace—*see* Katherine Glassmyer and Nicholas Sambanis, "Rebel Military Integration and Civil War Termination," *Journal of Peace Research* 45 (3) (2008). Glassmyer and Sambanis theorize that the failure of military integration to have a statistical impact on war termination may have to do with poor implementation, and a combination of integration with power-sharing regimes may be slightly better (the evidence is still inconclusive). One lesson we should draw from these results is that the use of rule of law, or other political structures, as a way to redistribute power and thereby transform conflict should *not* be identified with simply creating a structure that explicitly shares power between existing factions. The important element is rather to create a structure that allows non-violent conflict, and then find ways to encourage factions into it, through co-option, building the relevant capacities to use it, etc. This issue will be explored more in the final section of the chapter.

[20] *See,* e.g., Sally Chin and Jonathan Morgenstein, *No Power to Protect: The African Union Mission in Sudan* (Washington, DC: Refugees International, November 2005), 11–15.

prepared to rule out conflict interventions. In the foreseeable future, relatively low-powered UN and regional conflict interventions are likely to be the rule.

An alternative would be not to eliminate the factions directly, but to hope that if sufficiently robust formal political and legal structures could be established, factions will cease to have significant influence. But the presence and persistence of factions and armed elites in many post-conflict situations makes a focus on the forms and formal institutions of law misleading, if we are concerned with the rule of law as a tool of conflict transformation and power-distribution.

For example, consider the case of Iraq in late March 2008. On 28 June 2004, formal sovereignty was handed over to the Iraqi government by the US-led multinational forces, and in December 2005 the first elections (for a non-interim body) were held. While difficulties persisted, by 2008 the Iraqi government was well on its way to hashing out important legislative initiatives, such as an oil revenues law and rules about the creation of federal regions—while many more mundane laws had already been passed. Legal institutions had not been perfected, but looking at the formal institutions, the trend would have seemed to be in the right direction.

This formal progress told only part of the story. In March 2008, with US and British support, the government of Nouri al-Maliki launched an attack on militias in the southern city of Basra, primarily the "Mahdi Army," an armed group led by the Shiite cleric Moqtada al-Sadr.[21] The official rationale for the move was that al-Sadr's militias posed an unacceptable threat to the consolidation of Iraq's new (democratic) government, especially since al-Sadr has been an advocate of resistance—often violent, though he had declared a cease-fire at the time—against the US occupation, which supported the al-Maliki government. Some analysts charge that, rather than being a conflict aimed at simply removing a threat to a state, the fighting in Basra was a sectarian fight between the Mahdi Army and the Badr Brigades, the militia arm of the Supreme Islamic Iraqi Council, a political party allied with al-Maliki's own Dawa party.[22] Many of the "government" forces were, critics point out, members of the Badr Brigades, ten thousand of whom fought alongside official Iraqi forces (a thousand of whom declined to fight in Basra).[23] The criticism is given weight by the fact that not only

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[21] Sholnn Freeman and Sudarsan Raghavan, "Intense Fighting Erupts in Iraq," *Washington Post* March 26, 2008, A section.

[22] Ned Parker, "In Iraq, US Caught in Middle of Shiite Rivalry," *LA Times,* 30 March 2008, A Section.

[23] Juan Cole, "Clashes Continue in Basra: Badr Militia Strengthened," Informed Comment, http://www.juancole.com/2008/04/clashes-continue-in-basra-badr-militia.html, posted April 4, 2008 (accessed August 19, 2009); Fred Kaplan, "Bush Bungles in Basra and Bucharest," *Slate*, http://www.slate.com/id/2188161/, April 3 2008 (accessed August 19, 2009); Stephen Farrell and James Glanz, "More than 1,000 in Iraq's Forces

the Mahdi Army and Badr brigades, but a wide array of militias have been in conflict over resources in the Basra area, and using connections to official government structures to forward their own ends.[24]

It is probably wrong to understand the fighting in Basra as *either* a state vs. spoilers or a faction fight—it is *both*. It was inevitable that the state would be built out of existing factional groups, and hence that state power would be to some extent enlisted in their interests. The mistake was not that some factions were co-opted into the government, but that only some were. The Mahdi Army could not be expected to pursue conflicts within the legal system if it felt shut out of power within that system. Its members, supporters, and many outsiders inevitably saw the use of state force against them not as the enforcement of the rule of law, which one should presumptively accept, but as an assault by a rival faction to which violent resistance was appropriate.

The situation in Iraq exemplifies a more general problem: an intervention, even one that is capable of crushing all armed elites, will not be able completely to "flatten" the social centers of power and formal and informal political organizations in a society. Any post-conflict order will be built on materials provided by the conflict order, which often prove quite resilient. For instance, many African states host entrenched patronage networks that existed alongside formal state institutions before the conflict, and continue to compete for power and legitimacy with formal political institutions—including rule of law institutions—after the conflict.[25] The resilience of power structures should not be surprising. Seekers after power mobilize social cleavages, patterns of reaction, and remnants of existing institutions. Conflict may exaggerate some of those, or at least fail to completely eliminate them, and so new power structures will tend to follow in the lines of the old.

At best, interventions might hope to avoid building the new government from *armed* factions. This may itself be a bit optimistic as armed elites may oppose the move in ways that cause insuperable problems for the intervention, and even where the relationship between armed elites and unarmed elites is not friendly, they may be intertwined in ways that make them difficult to disentangle. Even if it is possible, the mere fact that elites are *unarmed* does not necessarily make them good: their approach might be just as factional and oppressive as that of an armed elite. We should not

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Quit Basra Fight," *New York Times,* April 4, 2008 (accessed August 19, 2009) (the NYT identifies the supplemental forces just as "recruits from local Shiite tribes," rather than as Badr Brigades).

[24] International Crisis Group, *Where is Iraq Heading? Lessons from Basra*, Middle East Report 67 (Washington, DC: International Crisis Group, 25 June 2007), 11–18.

[25] Pierre Englebert and Dennis M. Tull, "Postconflict Reconstruction in Africa: Flawed Ideas About Failed States," *International Security* 32(4) (Spring 2008),116–117.

imagine that unarmed elites operate by some means other than the exercise of power. An intervention which interrupts the use of *violent* power might make some groups relatively more powerful than they were during the conflict. When an intervention successfully bestows state-like powers on an unarmed elite, that elite gains a dominant power of violence that it lacked before.

This does not mean that *no* faction can *ever* be eliminated, but rather that interventions should approach elimination with two things in mind. First, that eliminating some faction will result in the relative empowerment of some *other* faction, not a faction-less situation. Second, the fact that a faction uses violence may be a superficial reason to consider it in need of elimination; or, alternatively, the fact that a faction is nonviolent may not mean that it will be easy to co-opt into a post-conflict order under rule of law.

9.5 Excluding and Converting Factions

There are, essentially, two reasons why one might want to exclude some elite from a share in the post-war order. First, there may be some elites who are not genuinely committed to peace and the establishment of law, perhaps because they have an uncompromising ideology or (more likely) they profit from continued violent conflict. Second, some elites may be purely oppressive, and serve no legitimate interest of the population. The first sort of elite poses immediate practical problems for the intervention, the second poses moral problems.

Most factions will have goals such as personal enrichment, ideology, self-rule, or even a homeland free of ethnocultural diversity, which are more easily achieved or enjoyed with peace and the rule of law. We should not assume that most factions desire violent conflict, or that odious motivations necessarily mean a preference for violence—presumably Rwandan Hutu in 1994 and American neo-Nazis today would like to live in safe, prosperous, peaceful ethnically homogenous societies. Some factions, however, may not only reject a particular peace agreement because they fear their interests will not be represented, they may generally benefit more from conflict than from peace on any (feasible) terms. William Reno, for instance, argues that factions in Sierra Leone "intentionally destroyed state capacity to provide public goods," since it was more profitable to engage in an illicit diamond trade that a well-functioning state would have been able to control (and have been under international pressure to do so).[26] Moisés Naím argues

[26] William Reno, "Sierra Leone: Warfare in a Post-State Society," in *State Failure and State Weakness in a Time of Terror*, ed. Robert I. Rotberg (Washington, DC: Brookings Institution Press, 2003), 71.

that Transdniestria benefits from the fact that, as an unrecognized pseudo-state carved out of Moldova, it can more easily engage in illicit arms deals than if Moldova took responsibility for policing its borders, or if the international community could hold Transdniestria itself responsible, as would usually occur with states.[27]

Within the class of factions not committed to peace, or "spoilers," Stedman distinguishes between "limited," "greedy," or "total spoilers."[28] "Limited" spoilers seek some particular goal that could be achieved within a political framework and on which compromise is possible (e.g., more economic benefits to a particular region). "Greedy" spoilers have goals that can potentially be accommodated, but they will expand their goals to fit what they think that they can get. "Total" spoilers have maximal goals, often radical ideological ones, that can only be satisfied by achieving total power.

"Total" spoilers should not be accommodated, and any attempt to do so may scuttle the establishment of rule of law by allowing them to consolidate. Rule of law values oppose allowing any individual or group to rule, which is (*ex hypothesi)*, the goal of a total spoiler.

Interveners should be very careful, however, when tempted to decide that a limited or greedy spoiler does not really desire peace, and so cannot be accommodated. Because limited and greedy spoilers share the fact that their goals can in principle be pursued without totally dominating society, their attitude towards peace and the establishment of a legal framework for achieving those goals is subject to change. First, a faction's attitude toward an intervention and peace process may be highly dependent on the pattern of forces in play. While the rule of law may be beneficial for a society overall, any intervention seeking to establish it is likely to interfere with some group's private interests. This is all the more likely if we conceive of the rule of law as involving a degree of balancing and redistribution of power. Since political power is a relative good, there is no way to redistribute it without making someone less powerful.

A faction that seems not to support the replacement of violent conflict with the rule of law may, in fact, merely be concerned that it will fare worse in the specific peaceful situation that the intervention is trying to establish than it would in war. Conversely, factions that are "for peace" may not be committed to peace for its own sake, but may see an international intervention as a way of staving off their own defeat in the internal conflict. Whether a faction desires peace and the establishment of a lawful political order has a lot to do with the incentives for conflict, and intervention cannot help but change these incentives. It may be that, in order to build "political

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[27] Moisés *Naím, Illicit: How Smugglers, Traffickers, and Copycats are Hijacking the Global Economy* (New York: Doubleday, 2005), 58.

[28] Stephen John Stedman, "Spoiler Problems in Peace Processes," *International Security* 22(2) (Autumn 1997), 10–11.

will" for peace, the intervention needs to adjust the incentives. Some of the "spoilers" may not, in fact, be implacably opposed to the establishment of a peaceful legal order.

A related point is that factions may be interested in maintaining the conflict because they do not have the resources to benefit from peace, not because they see an absolute advantage in war. Reno describes the insurgency in Sierra Leone as composed in large part of "armed marginals," who saw in violence a way of pursuing economic opportunities denied them by the cronyistic economics of the country.[29] It would be fantastic to imagine that these individuals, many of them young and with few skills other than warfare, would see a great opportunity after the end of warfare, even if the formal laws governing economics and employment changed to be more inclusive. Nearly all conflict interventions face the problem of how to prevent former combatants from turning to banditry or other violent means of making a living.

At the leadership level, we should keep in mind that a militant group is not a political party. Factions need to be understood as organizations, not mere aggregates of individuals with common interests. Different skills and methods of organization are needed to compete successfully in a political or legal arena than are needed to compete on the battlefield. A faction "committed to war" may be organized in such a way that makes it difficult for it to do anything as an organization besides make war. An intervention should consider the possibility that apparent spoilers may benefit from resources and training that would make them more confident of their place in the post-conflict order. As odious as it may sound to throw money and support at violent groups, this may be what is needed to bring them into a legal order. For instance, the RENAMO insurgency in Mozambique was not immediately ready to become a political party after the 1992 peace agreement. RENAMO had initially been notorious for not having a clear political agenda, and held its first political congress only in 1989. By the time of the peace, it still suffered from a severe lack of members with higher education, and many of the "political" recruits to the movement had not fought during the war, and were regarded with suspicion by RENAMO's (better established) military elements.[30] Dennis C. Jett, former US ambassador to Mozambique, credited Aldo Ajello, the head of the UN mission that oversaw the peace process, with a significant role in the success of the peace. In particular, he praises Ajello for being flexible about the use of UN funds to help "RENAMO convert from a guerrilla group to a political party."[31]

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[29] Reno, "Sierra Lene," 86.

[30] Andrea E. Ostheimer, "Transforming Peace into Democracy: Democratic Structures in Mozambique," *African Security Review* 8(6) (1999), http://www.iss.co.za/pubs/ASR/8NO6/Transforming%20peace.html (accessed August 19, 2009).

[31] Dennis C. Jett, *Why Peacekeeping Fails* (New York: St. Martin's Press, 1999), 77.

Interventions should be sensitive to the fact that the establishment of formal legal institutions, backed by the overwhelming coercive force of a state, may radically redistribute power in the direction of elites who possess technical knowledge and access to monetary wealth. Other groups may see this as a threat and react violently. This does not *necessarily* mean that the groups are not interested in peace or the establishment of law, or could not come to be. Nor, of course, does it mean that such groups *will* necessarily come around to a more peaceful attitude. Those considering intervention should examine the possibility that some spoiler groups might come around if given organizational and material resources to benefit from the rule of law. In the end, this is simply an application of the principle that the plan for establishing rule of law should take its primary goal to be the redistribution of power.

9.6 Factions and the Ecology of Power

Some factions may be willing to deal, but embrace ideals, goals, or behavior so odious that it would be morally reprehensible to empower them at all in the post-conflict. Their survival as a political force might strengthen oppressors with the instruments of the state. In such cases, outside intervention should not refrain from making moral or political judgments when building rule of law. Nevertheless, there would be serious costs to making even the most distasteful faction ineligible for cooptation. There are two questions here. First, what should be the basis on which a faction is considered "too evil" to be given a role in a post-conflict order? Second, what should be done about factions that *do* fail that test?

Merely being willing to use violence cannot be the standard for refusing to try to bring factions into a legal order, though this is generally what invites the label "spoiler." Even being willing to use violence in defiance of a peace process may be too blunt a criterion. Some violent factions may not have been parties to the process, and retaining their option to use violence may be an understandable response best addressed by bringing them into the process. Or, as I have argued above, some factions may violate the peace for reasons that can be addressed without trying to eliminate them. Conversely, non-violent factions may also be oppressive or determined to subvert rule of law—consider, e.g., religious groups that are labeled "moderate" because they eschew violence and condemn terrorism, but share with terrorist groups a vision of a theocratic state that subordinates women and restricts personal liberties.

The criteria an intervention uses for deciding that certain factions ought to be marginalized or eliminated should flow from the underlying rationale that justifies the rule of law. In the immediate term, rule of law components to an intervention should be aimed at bringing violent factions into a

political order. In the longer view, the rule of law should make it possible for anyone in a society to contest power through legal-political means, rather than resort to violence.

A conflict intervention's rule of law work sits on the border between these long-term and short-term goals. An intervention cannot create a fully inclusive society but it can lay the groundwork for broad inclusiveness through the means by which it deals with factions. Even in a stable society, factions and organized groups will be the primary way that individuals pursue their interests. Western democracies may not be primarily organized around familial, clan, or regional groups, but their political and legal systems are best influenced by corporations, advocacy groups, trade unions, religious organizations, and the like. An intervention focused on laying the groundwork for an inclusive legal system, sensitive not only to the dangers, but also to the inevitable role of groups and factions, should be guided by the goal of leaving in place the resources for all segments of society to organize for non-violent conflict.

The question to ask is, "does this faction represent or protect some constituency's *legitimate* interests, and how would those interests fare if the faction were eliminated or marginalized?"

Viewed in this light, the decision to attempt to marginalize or eliminate some elite because it is violent, or even because it has committed immoral acts against individuals in society, becomes more questionable. Simply put, the inherent viciousness of a group is not the most important issue from the standpoint of the rule of law.[32]

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[32] One might ask, "is there some level of atrocity so vile that we should not invite involved groups to the table, no matter what the consequences might be?" For example, one might think that the Hutu *genocidaires* who fled to Zaire (now the Democratic Republic of Congo) ahead of the Rwandan Patriotic Front, after the 1994 genocide, in some sense represented a significant sector of society, who were potentially in danger of oppression at the hands of the new Tutsi-dominant RPF government—but also that it would be morally obtuse to include them in the post-conflict government. For current purposes, I will bracket this concern. First, though I will not argue it fully here, it may be more possible than it first appears to reintegrate especially the rank-and-file and mid-level leadership of groups involved in atrocities—as Arendt persuasively argued, the kinds of atrocity that the modern age has seen do not necessarily involve radical individual evil (she was considering genocide, but I suspect a similar psychology applies to atrocities like mass rapes and impressment of child soldiers). Second, I believe the best way of considering this issue is as prior to concerns about the rule of law. Rule of law, I have argued, should concern itself with how to create systems and distribute power so as to transform violent conflict into legal conflict. There is no guarantee that legal conflict will create morally superior *outcomes*. It may be, in some situations, that allowing a violent conflict to continue would lead to the destruction of the morally-worst factions, and so allow the creation of a more objectively just post-conflict order (*see*, e.g., Edward N. Luttwak, "Give War a Chance," *Foreign Affairs* 78(4), July/August 1999). These kinds of concerns should be seen as weighing in favor of *not* pursuing the rule of law in some situations, rather than as arguments about how to pursue rule of law.

The issue is, rather: does the existence of this group contribute to the protection of the interests of some constituency in the society, *in the situation as it is*? The last rider is important, since we are not concerned with how to organize the society in an ideal situation, but how to approach the balance of power in the actual, necessarily distorted, post-conflict situation.

There are two parts to this question. First, is the armed elite connected in some meaningful way with a constituency? This is a low bar, and almost all armed elites will meet it. Even fairly unsympathetic elites, such as the Somali "warlords" active in the 1990s, were not *mere* predatory thugs. Prominent warlords Mohammed Farah Aideed and Ali Mohammed were not direct inheritors of the pre-colonial clan-based social order. Their power and support was, however, linked in complex ways to clan and family lineages. The geographic divisions imposed by colonialism on Somalia's nomadic culture, along with the need to unify to resist colonial rule, led to a lower political profile for clans and a form of "proto-nationalism." Siad Barre, Somalia's dictator from 1969–1991, cemented his power in part by favoring members of his family, sub-clan, and clan (in roughly that order) and, when groups arose that opposed Barre, they often gained support by connections with clan or sub-clan leadership, even if they splintered and allied in ways that had little to do with clan structure.[33] At the same time, the customary legal structures and traditional conflict resolution strategies used by clans to manage disputes over water and grazing rights gave way in a situation where the conflict was over control of state apparatuses.[34] The militias created from remnants of the government and military were better-suited to contest state power than the traditional clans, and were able to gather power on that basis.

There are good theoretical reasons why most armed elites will meet the requirement that they be connected to, and in some sense serve the interests of, a genuine constituency. Armed groups would not, except perhaps in some exceptional cases, survive long if they did not serve some interest of a larger population, and hence garner support.[35] Insurgency theory tends to differentiate most insurgencies not on the basis of *whether* they have

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[33] Jarat Chopra, Toralv Nordbo, and Age Eknes, "Fighting for Hope in Somalia," *Journal of Humanitarian Assistance* (19 February 1995), http://jha.ac/1995/02/19/fighting-for-hope-in-somalia/; *See* also Stig J. Hansen, "Warlords and Peace Strategies: The Case of Somalia," *Journal of Conflict Studies* (Fall 2003), 57–59.

[34] Elmi, Afyare Abdi and Abdullahi Barise, "The Somali Conflict: Root Causes, Obstacles, and Peace-building Strategies," *African Security Review* 15(1) (2006): 33–34.

[35] Armed groups that truly have little support from a population tend to be propped up by outside forces, such as RENAMO in Mozambique (backed by Rhodesia and then South Africa), UNITA in Angola (backed by the United States), or the LRA in Uganda (with significant support from elements of the Ugandan diaspora). Note also that "support" should not be confused with "positive attitude toward." Populations may hate and/or fear an armed elite, but hate or fear other armed groups more.

popular support, but on *how* that support is gained and *whose* support is necessary.[36]

What is it that factions provide in return for support? Insurgents may supply a wide variety of social services, but the most basic service provided, by any faction that wants some degree of popular support, is some degree of protection against violence. In a situation of violent conflict, having the protection of an armed elite (assuming that they do a good-faith job of protecting at least their allies) may be the best way of avoiding being subject to the power of other armed elites.

This kind of "benefit" may seem uncomfortably close to the kind of "protection" that movie-caricature mobsters offer local businesses. But being protected by an armed elite is not just an extortion scheme. It would clearly be extortion if an armed group demanded support in return for protection only against *itself*. Typically, armed groups are also offering protection against *other* armed groups. This function also tends to create some "ideological" differentiation, even if it is not key to the conflict—individuals are prevented or deterred from joining some other group because they disagree with its views, or they are characterized by a different "primary loyalty" (e.g., ethnicity, religion) than the rival group. In this sense, armed elites operate somewhat like governments. I give my government support in part because, in good Hobbesian fashion, it protects me from other people who may want to harm me.

On the other hand, armed elites in civil conflicts are not quite like governments. Unlike governments, they are at least in part responsible for the violence from which they seek to "protect" people.[37]

This ambiguous relationship between armed elites and their "constituents" leads to a second question: given that factions are playing some important part in the conflict's ecology, what would be the consequences of marginalizing or eliminating them? First, the intervention should take account of the fact that any attempt to do so will be resisted, leading to violence, at least if the goal is removal in the near term. Realistically, the intervention will need to take account of both the adverse effects of such a move on the population in the area of operations, and on the intervention's own stability. It might have been better not to have attempted to remove Mohammed Farah Aideed in Somalia, if this forbearance would have averted the early withdrawal of US forces.

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[36] *See* Bard O'Neill, *Insurgency and Terrorism: From Revolution to Apocalypse* (Washington, DC: Potomac Books, 2nd Ed. 2005), 46–63; for a more concise but very similar treatment, *see* US Department of the Army, *Counterinsurgency*, FM 3-24/MCWP 3-33.5 (Washington, DC: Department of the Army, 2006), §1–25, 1–30.

[37] The case may not be so simple for governments, either—anarchists have long argued that governments are a source of violence, not a solution to it. If governments cause violence, however, it is in a much less direct way than the participants in a civil conflict do so.

Second, the intervention should ask who, if anyone, is likely to take the place of the eliminated or marginalized faction. The answer will almost inevitably be some *other* elite, not "a legitimate government" or "a neutral legal system." It may be that, if some particularly nasty armed faction is eliminated, a more tractable or inclusive faction would take its place. There is no general way to approach this question. In each conflict situation, the intervention planners will have to assess the situation and then play the odds. Relevant questions include the process by which the particular elites in question acquired and hold on to power, and what other *organized* factions there are in society that could take their place. A general commitment to democracy will probably not be a sufficient protection for constituencies that lose their elite champions. Many of the democracies that back the rule of law have long-standing and entrenched legalistic traditions that are not present in post-conflict societies, at least not in the same forms.

The theoretical point is that this sort of assessment should not be considered to be a competitor with the rule of law. The rule of law cannot take hold in a situation in which attempts to marginalize an armed elite will destabilize security. Any attempt to establish rule of law by eliminating a faction while making no provision for protecting its constituency's interests in some other way is not compatible with the conflict-transforming and power-distributing ideals of the rule of law. It risks merely putting the full power of a state behind one particular faction's, or a coalition of factions', private agenda. This might satisfy certain formalistic definitions of the rule of law, but a post-conflict rule of law should establish the legal-political system as a realm in which all of society's constituencies can pursue their interests without a need to resort to violence. If one faction is eliminated without somehow being replaced, or without provision to ensure that its "constituency" is effectively protected by another, the intervention will create an out-group that is a risk for a return to violent conflict.

9.7 Reconciling Factions with Inclusiveness?

One final issue needs to be addressed. This discussion began with the question of how to use rule of law as a tool for conflict transformation, one of many in a post-conflict intervention's kit. In the last section, I argued that the underlying moral imperative to do this is the idea that, in a well-ordered society, the law ought to be a fruitful arena for *all* social conflict, and not solely for the conflicts that drove the war. Even if the intervention is careful to bring all factions with constituencies into the new system, and share power among them, we are left with the problem that many of the factions among whom power is distributed serve the interests of the broader population in a morally questionable way, that has arisen out of the distorted

context of widespread violence. That is, even if we must accept, for example that many "warlords" must be promised ministries and semi-autonomy for their fiefs and areas of influence—because to deny these benefits to all will scuttle the peace, and to deny them to some will just mean that "their" people will be snatched up by some *other* warlord—we might hope that there is some way to distribute power more broadly through society. While we cannot entirely eliminate factions, we might hope to tame them.

The moral basis of this hope is the recognition that violence is not only the purview of insurgents and armed factions. As the example of the Iraqi government's assault on the Mahdi Army in Baghdad illustrates, the state is a major purveyor of violence. It may be going too far to *define* the state, as some political theories do, in terms of its monopoly on force, or to condemn the state (as anarchists do) as *only* organized violence, but the fact remains that organized and overwhelming force is one of the major attributes of a robust state. The moral point of conflict intervention, if it is not just to advance the intervenor's interests, is in some way tied to the presumed badness of violence being visited upon people in an oppressive or arbitrary manner. While "merely" achieving peace (no small feat) will usually be an improvement over war, achieving a peace that allowed armed factions from the conflict to use the post-conflict legal order to cement a position in which they could hold power, while providing little other than the absence of war to the bulk of society, should not be the moral ideal.

Again, *how* to avoid this problem will require a detailed analysis of the particular conflict. In the concluding sections of this chapter, I can offer only some general considerations.

The solution is *not* to swing the pendulum back the other way and naively assume that we can simply distribute power amongst the whole population the way that we can among elites. Elite power distribution is a problem of institutional design, at its heart. However, institutions create and foster elites. Bureaucracies, including legal bureaucracies, are hierarchical systems. Unless the intervention is undertaking a *radical* restructuring, away from anything that looks like a modern state, legal institutions will distribute power unequally. The problem of faction we have been grappling with is, in one sense, how to deal with the fact that, once those bureaucratic hierarchies are in place, individuals will use their broader social power to occupy the top of the hierarchy, meaning that legal power will tend to concentrate other forms of power.

Pure institutional design might help a society to distribute power more broadly. For example, democracies have their elites, but they tend to be less dominating than the elites in a monarchy. But these are only partial solutions. Well-established democracies are notorious for not being completely equal in the distribution of political power. Rather, they are often cauldrons of conflict between advocacy organizations, political parties, NGOs, media outlets, corporations, entrenched bureaucracies, religious movements, and the like. These rival elites all pursue their own agendas—but usually

without violence. It would be too much to ask of an intervention to create an ideal democracy. The elements that a rule of law strategy, within an intervention, can add are more modest: a rule of law strategy should seek to distribute legal knowledge and organizational skill broadly throughout the society.

So far, I have discussed only one approach to the problem of faction—the strategies of institutional design. I have argued that, even when this is not explicitly tied to faction, the broad distribution of power should be one of the guiding principles for post-conflict rule of law, properly understood. However, the explicit solution that Madison offers to faction is most helpful for thinking about, not how to balance the influence of elites, but how to mitigate the elite/mass divide.

To return to *Federalist* No. 10, you cannot get rid of faction entirely (unless you are willing to take totalitarian control of society), but the way to combat the invidious influence of factions is through their proliferation.[38] The more factions there are, the harder it will be for any one faction to take control of the government to a meaningful degree, and the easier it will be for any individual to align herself with a faction that promotes her interests. Madison focuses on increasing the *number* of factions, but a similar effect could be achieved by making factions more open and fluid. The power to leave one faction and join another is functionally similar to the power to join an existing faction and change its character.

This is a point in favor of the kind of elites that tend to dominate and predominate in established democracies. Judicial institutions may be powerful organizations in their own right, but if the process for selecting judges is reasonably meritocratic, most people who criticize judges will at least have a decent opportunity to join that organization and influence it so long as they are willing to make being part of that elite a serious career and life goal. This is not "rule of law" in the sense that everyone, always, has an equal say in the law's content and equal power over how it is implemented. Equality arises rather from making sure that power over the law and its applications is not barred to anyone from the start.

But Western-style bureaucratic elites are not the *only* kind that could be open, and openness will always be a matter of degree. Schumpeter pointed out that even in authoritarian regimes, the leadership cannot be *totally* cut off from the interests of the populace if it hopes to hold onto power. "[Monarchs, dictators, and oligarchs] rule.... subject to the necessity of acting with some people, of getting along with others, of neutralizing still others, and of subduing the rest... Beyond 'direct' democracy lies an infinite wealth of possible forms in which the 'people' may partake in

[38] Madison et al., *The Federalist Papers*, p. 126 (no. 10).

the business of ruling or influence or control those who actually do the ruling."[39]

For Schumpeter, the advantage of democracies is that they provide a significant amount of freedom to their subjects due to the pressures of competition among elites.[40] Since it is possible for almost anyone—or, at least, a large class of individuals—to gather enough support to displace a leader (or currently leading elite), leaders must make some genuine concessions to the interests of the population at large. Even an authoritarian state will generally rely to some extent on the allegiance of the population, but authoritarians have structures of control that allow them to survive with a relatively small base of loyalists. The relative fragility of allegiance in a formally democratic system means that leaders must work harder to maintain it. The threat is two-fold: a political "entrepreneur" might always arise with a more attractive idea and the skill to organize around it, and a large number of elites means that one must always work to maintain harmony among enough factions to control the government. The advantage of democratic protections is that they tend to make elites less stable and more open.

We should take Schumpeter's insight seriously at both ends of the spectrum. Actual attempts to create inclusive and participatory structures of government create what may be more attractive elites, but do not magically create non-hierarchical perfectly mutualistic arrangements free of power relations. For example, when an electoral alliance led by the Worker's Party won municipal elections in Porto Alegre, Brazil, in 1989, it created a participatory budgeting process for the city. The process began with large meetings at the neighborhood level, and of "thematic" groups (e.g., cultural groups). These large meetings discussed priorities and budgeting issues that affect the relevant community, and also selected representatives for the more technical meetings. Representatives received training on technical aspects of budgeting, and participated in more detailed deliberation about the budget, and were expected to remain in contact with their larger "constituencies."[41] The Porto Alegre process is probably one of the better examples of an inclusive political process in a large, modern system. But if this is correct, it proves the point that elites can be changed, but not

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[39] Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Row, 1942), 245.

[40] Schumpeter, *Capitalism, Socialism, and Democracy,* 280–281.

[41] An extended discussion of the Porto Alegre budgeting process can be found in Gianpaolo Baiocchi, "Participation, Activism, and Politics: The Porto Alegre Experiment," in *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, ed. Archon Fung and Erik Olin Wright (New York: Verso, 2003).

eliminated. The process still relies on informal social power groups (neighborhoods, cultural groups, etc.) and creates new elite structures based on them.

Interventions can use this insight to guide thinking on how to foster political and legal power among the population. A formal protection for rights of association should certainly be included as an inherent part of the rule of law. Even if it might seem divorced from the core concept of law, allowing groups to organize is a key component of distributing power throughout society. This bottom-up approach would complement the legal institutions' more top-down structure.

One of the more interesting practical policy lessons from these considerations is contained in the fact that the Porto Alegre process involves an *educational* component. Freedom of association is not sufficient. Even in the absence of official restrictions, people will not be able to use this freedom effectively unless they are trained in the skills necessary to create effective organizations. Rule of law practitioners should therefore see the provision of training and education to the population in skills such as grassroots organizing, management, and civics (broadly conceived) as an element of their work. This is just an extension of the general theme of viewing the rule of law as being embedded in a broader social system. Law cannot rule if there remain groups in society who cannot effectively invoke in the law to settle their disputes.

Ideally, the provision of knowledge and skills training should permeate the entire approach of any conflict intervention, as a particularly important aspect of local capacity-building, but rule of law practitioners have a special role to play in imparting specifically *legal* knowledge. Legal systems are complex and often impenetrable to non-specialists, and where an outside intervention is creating a Western-style legal system that may differ from the experience of the target society, wide distribution of knowledge about how the legal system operates is especially important.

Even given a good-faith opportunity and forum for participation in the creation and execution of their laws, not everyone will come automatically equipped to participate in a meaningful way. Some of this problem may be solved by making legal fora friendlier to individuals who are not used to operating in the highly rule-bound, rationalistic, and professionalized structures that characterize Western legal and political systems. Appreciation of traditional and customary legal structures in some post-conflict situations may represent a step in this direction. Even here, while relative familiarity may be a benefit, we should be careful not to equate "traditional" with "non-oppressive." Traditional social structures are still power structures. The more important thing, whatever political structure is created, will be that some effort be made to distribute more broadly the knowledge of how to operate it. An important part of this is disseminating information on the governance structure's formal properties and organization, as interventions

often do. But, in addition, interventions should concern themselves about the less formal knowledge required to contest power effectively.

Recall that the point of including power distribution in our understanding of the "rule of law" was the fact that an intervention is essentially seeking to substitute conflict through law for violent conflict. Law, of course, has its own arcane skill-set: we should no more expect individuals or groups with no legal training to be able to contest effectively through the law than we would expect a group with no weapons or training to win a battle. To indulge in a cliché, knowledge is very much a kind of power.

If a group (or individual) does not see itself as having the skills effectively to contest social conflict through law, it is less likely to accept law as an alternative to violence. And, to the extent that we care about preventing the oppressive use of violence for its own sake, establishing a rule of law and the enforcement structures to back it up without some attempt to give people the skill to use it is morally questionable.

There is a "legal empowerment" strand among rule of law practitioners, that focuses on giving individuals—especially the poor—the skills needed to access legal protections.[42] This chapter's analysis implies that we should elevate the importance of legal empowerment in two ways.

First, we should recognize legal empowerment as an integral part of establishing the rule of law, not just as a desirable add-on to a legal regime. When the rule of law is understood as a system of distributing power and redirecting conflict, a system of laws or even a set of legal institutions that systematically excludes factions in the population becomes inadequate. It does not much matter—especially from the perspective of the excluded—whether they are "out" because of formal restrictions or because they are unable to access the resources needed, in the form of wealth or legal skills necessary to participate fully in society.

Second, the reliance on existing power groups in post-conflict societies indicates that we should consider the skills and resources required for organization-creation to be part of the legal empowerment strategy. The skills needed to access legal bureaucracies and to identify means of redress will empower individuals and *existing* groups to contest power through the legal system. Widely dispersing the skills to use the tools of legal conflict will give everyone in a society with established legal institutions some power, but that power will still heavily favor organized and well-resourced groups. In a post-conflict situation, this may be preferable to having those elites both dominating *and* using violence to pursue factional conflicts. However, this still leaves the possibility of entrenched factions and a legal system

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[42] *See*, e.g., Stephen Golub, "The Legal Empowerment Alternative," in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006).

that facilitates collective domination by the elites.[43] This is not just a moral concern. Dominated groups unable effectively to contest their oppression through the legal system may take the opportunity to renew violence, undoing the conflict-transformation effects of rule of law.

We cannot ignore this organizational element of legal power. Empowering individuals to enter the legal system as individuals is not a substitute for empowering them to organize. Even though, in principle, winning some legal battle is possible for an individual acting more or less on her own, this is not how major legal victories tend to be won even in established legal systems. Identifying or creating test cases and pressing courts and police to exercise their discretion appropriately are tasks best accomplished through organized groups. This is even more important in a post-conflict situation in which organized elites will often have a good deal of informal power over the context in which the legal institutions operate.

9.8 Conclusion

In this chapter, I have attempted to draw some conceptual and policy conclusions from looking at the rule of law as a tool for conflict interventions and post-conflict reconstruction. This perspective does not tell us much that is interesting and new about what "law" is. To the contrary, it encourages a kind of pragmatism. Model codes applied by UN peacekeepers, traditional clan or tribal dispute-resolution procedures, truth and reconciliation commissions, and Western-style courts with lawyers and judges, might all be close enough to law to be part of a worthwhile rule of law strategy. If one looks to conflict interventions and post-conflict situations to try to fix the boundaries of "law" more clearly, the results are likely to be disappointing.

On the other hand, the post-conflict context may shed some light on what the *rule* of law entails. Law may be conceived of as an abstract system of rules, or as a set of institutions, but the rule of law is about the role that

[43] Schumpeter, in a nutshell, seems to think that the presence of democracy, characterized as elite competition for a constituency, will sufficiently moderate the behavior of elites. I am skeptical of this claim—getting one's message out to a constituency requires mass communication (whether television/radio/internet or lower-tech means such as door-knocking volunteers or direct mailings), a function best pursued through organization. Creating new organizations is difficult, and generally speaking policy entrepreneurs who try to work through existing organizations have modest impacts on the overall organizational direction. Competition between existing elites tends to leave in place most of the *status quo*. Radical changes, such as the rise of the power of the Christian right in the US Republican Party represent long-term organizational efforts. Even in a democracy, challenging the power of existing elites requires organizational skills, not just formal competition among elites.

law plays in societal conflict and the general ecology of power. In a conflict intervention, the primary goal is to use law to shift power away from violence and into legal-political institutions. In order to do this, those institutions must be designed in such a way that they walk a fine line between excluding armed factions and being so welcoming that one faction can capture too much legal power at once. The classic doctrine of "separation of powers" should be a core guiding principle in doing this, but interventions should remain open-minded about the form that such a separation must take. A society (for example) in which the poor have little access to courts, but greater access to tribal or religious dispute-resolution, might do better to formalize the power of religious mediators and prevent their co-optation by armed elites, rather than concentrate scarce resources on advancing the independence of the legal profession.

Beyond the elites, the moral core of conflict intervention should extend to an attempt to establish law as a fruitful non-violent arena of conflict for *all* of society, as far as is practicable, rather than just a means through which elites can negotiate their differences and impose their will upon others through state violence. The total elimination of elites is a utopian goal, but even in the near term conflict interventions can aim at increasing access to the law by promoting organizational and legal knowledge. Whether or not the general population can organize themselves to make effective use of the law may not be part of what "law" is. But if the "rule of law" is to play a useful part in assisting societies to recover from violent conflict, then social institutions must be created to facilitate and support the multiple, easily shifting, competitive centers of power that make the just rule of laws possible for all those subject to their control.

Chapter 10
The Rule of Law in Transitional Justice: The Fujimori Trial in Peru

Lisa J. Laplante

10.1 Introduction

The past decade has seen an increased global interest in the rule of law in post-conflict and transitional societies.[1] Economic analysts, human rights activists and security consultants all agree that the rule of law is important, albeit for their own respective causes. In this way, the rule of law enjoys a "sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies. . ."[2] The focus on the rule of law in these settings adds to a growing movement that began during the 1970' when a handful of countries emerging from dictatorial, repressive and authoritarian regimes resorted to a variety of mechanisms to address systematic and widespread violation of human rights and the breakdown of the rule of law. Their collective experience gave rise to what is now considered the field of "transitional justice."

While definitions vary, transitional justice seeks to build sustainable peace by establishing the rule of law, democracy and a culture of rights. The means to this end include a full range of judicial and non-judicial mechanisms including prosecuting perpetrators of human rights violations, revealing the truth about past crimes through truth commissions, providing victims/survivors with reparations and reforming governmental

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[1] This chapter arises out of a presentation I gave at the Institute for Advanced Study at Princeton while a member in 2007–2008. I greatly appreciate the thoughtful comments of my fellow IAS members at that time, along with the general support of the IAS while writing earlier drafts. I also thank Marquette University Law School for the summer research grant that supported final revisions of this chapter.

[2] Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs*, (1998), 95; Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 2000), 4.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_10,

institutions.[3] In theory, transitional justice addresses past legacies of mass atrocities in order to build a better future.[4] Yet, until recently, the mechanisms of transitional justice concerned itself mainly with the concepts of retributive and reparative justice, with the rule of law appearing as an afterthought. Rule of law projects focused traditionally on institutional reforms (judicial, legislative, and security apparatus), rewriting laws (criminal, civil and commercial), and upgrading the legal profession (training, promotion and tenure).[5]

In the last decade, however, advocates of post-conflict justice have promoted criminal prosecutions as "an important tool in advancing the rule of law."[6] Since systematic and widespread violations of human rights often occur in settings with compromised rule of law, it would seem that accountability for these abuses would repair the rule of law. Thus, each time a state holds an individual—especially a high official—criminally responsible for these crimes, it contributes to (re)building the rule of law. This position was endorsed recently by former United Nations Secretary General Kofi Annan who recognized the importance of post-conflict justice in transitional justice schemes as contributing to building the rule of law.[7]

Yet, the question whether the "pursuit of accountability for atrocities through criminal prosecutions and other supplementary methods help to build the rule of law and strengthen justice systems in post-conflict societies" remains "surprisingly underanalyzed."[8] Professor E. Stromseth recognizes that "…. more systematic thinking and empirical research on the impact of accountability proceedings in specific post-conflict societies

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[3] Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2002); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998); Neil J. Kritz, "The Dilemmas of Transitional Justice," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Vol. I (Washington, DC: United States Institute of Peace Press, 1995).

[4] Louis Bickford, "Transitional Justice," in *The Encyclopedia of Genocide and Crimes Against Humanity*, ed. Dinah Shelton (Detroit: Macmillan Reference, 2004); Paul van Zyl, "Promoting Transitional Justice in Post-conflict Societies," in *Security Governance in Post-Conflict Peacebuilding*, Alan Bryden and Heiner Hänggi, eds. (Geneva: Centre for the Democratic Control of Armed Forces, 2005).

[5] Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999), 168.

[6] Jeswald W. Salacuse, "Justice, Rule of Law, and Economic Reconstruction in Post-Conflict States," *Studies in International Financial, Economic, and Technology Law*, 8: 255 (2007).

[7] The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Para 9, UN Doc S/2004/616 (23 Aug 2004) [hereinafter, U.N. Rule of Law].

[8] Jane E. Stromseth, "Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?" *Georgetown Journal of International Law*. 38: 256 (2006–2007).

is a critical need and an increasingly important area of inquiry."[9] This chapter responds to Stromseth's call by offering an analysis of the case of Peru, which began a transitional justice process in 2001 after the fall of authoritarian leader Alberto Fujimori (1990–2000). In particular, I will analyze how Fujimori systematically undermined the rule of law during his war on terrorism, which enabled and resulted in widespread human rights violations and corruption. As part of the country's recent effort to account for its past, Fujimori stood trial in 2007 for those same abuses for which he was convicted in April 2009. His trial helped to put on public record how Fujimori's regime expanded the executive's power through "secrecy, illegality, personal and arbitrary rule".[10] Indeed, a close look at the history of Fujimori's rise to power offers a powerful example of how a public will delegate "extraordinary power in the context of profound crisis."[11] I will argue that Fujimori's historical criminal trial has contributed to building the rule of law in Peru, notwithstanding certain challenges.

10.2 How the Rule of Law Breaks Down

The case of Peru illustrates the types of political and legal actions that corrupt leaders can take to systematically erode the rule of law. The genealogy of this legal erosion offers a classic template for the path to authoritarian and tyrannical rule.[12] Importantly, Peru's experience also reveals how the break-down of the rule of law becomes a precondition for systematic and widespread human rights violations. Yet even if Fujimori's monopoly of power arose out of calculated steps, this outcome became possible due largely to a national climate of fear and anxiety arising out of crisis.

In particular, when Fujimori won the presidential elections in 1990 he inherited a country wracked by crisis. Under Alan Garcia's direction (1995–1990) Peru suffered economic collapse with inflation reaching a rate of

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[9] Id. She credits Kritz as one of the few scholars to merge the two fields, citing to Neil J. Kritz, "The Rule of Law in the Post-Conflict Phase: Building a Stable Peace", in *Turbulent Peace: The Challenge of Managing International Conflict*, Chester A. Crocker et al. eds. (Washington, DC: Institute of Peace Press, 2001), 801; Charles T. Call, *Constructing Justice and Security After War* (2006).

[10] Maxwell A. Cameron, "Latin American *Autogolpe*: Dangerous Undertows in the Third Wave of Democratization," *Third World Quarterly* 19: 237 (1998) [hereinafter, Cameron, Autogolpe].

[11] Steven Levitsky, "Fujimori and Post-Party Politics in Peru," *Journal of Democracy* 10:3 (1999).

[12] Naomi Wolf introduced this concept to popular culture through her *New York Times* bestseller *The End of America: Letter of Warning to a Young Patriot* (2007).

7,000 percent, spiraling foreign debt and a plummeting GNP.[13] In addition, the country had already suffered 10 years of internal armed conflict between State agents and insurgent "terrorist" groups. Specifically, the self-declared Maoist group Sendero Luminoso ("Shining Path" or "SL") initiated its "popular war" against the state in 1980, just as Peru transitioned to democracy after years of military dictatorships. Symbolically, SL burned ballot boxes in a rural village during the first presidential election. Shining Path then unleashed a violent campaign in the Andean highlands provoking the state to declare emergency zones and abdicated civilian control by delegating national security to the armed forces.

Both the armed forces and Shining Path would commit atrocities against the civilians whose villages rested in the theater of battle, and by 1989, the death toll rose to an estimated 17,000 and a loss of 20 billion dollars (more than Peru's external debt at time).[14] By then, the United Nations named Peru as having the highest number of disappeared persons in the world. The violence crept into the urban capital of Lima only by the end of the 80s in the form of car bombs, targeted killings and building explosions, thus finally provoking the until then apathetic elite Peruvians to feel an urgency to end the war by any means. Fujimori emerged ready to answer their pleas for security but at high cost.

The history of Fujimori's political rise and fall reads like a popular spy novel; but its real life fatal consequences for thousands of people, more like a textbook tragedy. Fujimori's decade of power tells a tale whose moral provides lessons on executive power run amok. Yet, Fujimori's role in this drama was not predictable given his unexpected arrival to the scene as a political unknown; indeed, it was an "extraordinary set of circumstances [that] catapulted him to center stage."[15] Yet, in 1990 it was precisely Fujimori's status as an "outsider" that became the critical factor for his winning political office. A farming engineer and dean of an agrarian college, Fujimori formed his political party (Cambio90) only a month before he decided to run for office.[16] Fujimori appealed to the historically marginalized and unrepresented Peruvians (provincial, nonelite, nonwhite sectors) who consistently felt sidelined by mainstreamed politics, viewed to be largely corrupt.[17] In their eyes, Fujimori was like them: another political

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[13] Eduardo Ferrero Costa, "Peru's presidential coup," *Journal of Democracy* 4: 29 (1993).

[14] Id.

[15] Ernesto García Calderón, "High Anxiety in the Andes: Peru's Decade of Living Dangerously," *Journal of Democracy* 12: 47 (2001).

[16] Cameron, *Autogolpe*, 223.

[17] Levitsky, 80–81.

"other."[18] They voted *for* change and *against* the political system by rejecting Fujimori's conservative opponent author Mario Vargas Llosa. In doing so, they demonstrated the limits of relying entirely on free and open elections to assure democracy—a situation that ultimately compromised the rule of law in Peru.

10.3 Self-Coup: Dismantling the Rule of Law in the Name of True Democracy

The deep unease and fear that saturated Peruvian society created a populace disposed to an executive whose insatiable thirst for power lead to authoritarian measures. When Fujimori conducted his "auto-golpe" (self-coup) in 1992 with the support of the armed forces by shutting down the congress, dismantling the judiciary and suspending the Constitution, the public polls indicated high rates of approval—as high as 91 percent. He had, however, cultivated popular support before making such a decisive move. Significantly, Fujimori did not act alone, rather relied largely on his advisor Vladimiro Montesinos, who became the de facto leader of the Peruvian Secret Intelligence Service (SIS) as Fujimori's unofficial "spy chief."

Leading the SIS, Montesinos was perfectly positioned to mediate between the armed forces and the executive Branch, each sharing the common goal of curtailing democratic checks to expand their power. Without Montesinos acting as the mastermind behind most of Fujimori's Machiavellian schemes, one wonders if the latter would have simply been just another failed democratic president. Some speculate that even Fujimori ultimately lost control of Montesinos, who reportedly kept the president under his thumb through the use of certain secrets in his possession.

Part of the Fujimori-Montesinos' master plan included dismantling the rule of law. Significantly, the idea was adapted from the Peruvian military's own "Plan Verde" devised in 1989 to overthrow the government, but through Montesinos's persuasion was put on hold and eventually passed on to Fujimori.[19] Plan Verde called for a 'directed democracy' that would be run by the armed forces after they dissolved the congress and dismantled the judiciary, all carried out in the name of defeating the insurgency and also building the market economy.[20] To avoid the growing international stigma of military coup and outright repression of democratic institutions, the military leaders recognized the advantage of pursuing their agenda

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[18] Atwood, "Democratic Dictators: Authoritarian Politics in Peru from Leguía to Fujimori", *SAIS Review* 21(2): 155 (2001).

[19] Cameron, *Autogolpe*, 225.

[20] Id., 229.

under the pretext of democracy. They also learned from Montesinos about the importance of manipulating public perceptions to win support of what normally have been rejected as undemocratic.

Building on an already existing public mistrust of the various political branches, upon entering office Fujimori began to attack the congress and judiciary, claiming they were obstructing his attempts to save the economy and defeat terrorism.[21] Legislators responded by accusing him as "harboring an undemocratic distaste for constitutional checks and balances."[22] The damage of Fujimori's smear campaign, however, had already been done, strengthening a preexisting popular disenchantment with mainstream politics.

Specifically, in the first years of Fujimori's regime, the Peruvian congress exercised its "supremacy over rule-making" to check the executive's power by asking Fujimori to justify his use of emergency powers.[23] Fujimori's political party had only won 14 of the 60 Senate seats; and 49 of 180 in the Chamber of Deputies, making it necessary that the President negotiate for congressional support of his proposed bills.[24] The legislature eventually passed the Parliamentary Control of the President Act that led to the reversal or modification of approximately a dozen or so of the 118 decree laws issued between June and November 1991 that gave Fujimori special powers in economic policy and national security.[25] Yet, despite Fujimori's assertions, the Peruvian Congress did not outright obstruct the executive's rule-making initiative. Instead, it was amenable to approving his proposed bills, even scheduling the final debate for a date that never occurred because it was scheduled the day after the surprise self-coup.[26]

On April 5, 1992, the public watched the televised events unfold as tanks surrounded the Peruvian Congress, and eventually they listened to Fujimori say, "I faced a predicament. Either Peru continued walking, quickly heading into the abyss of anarchy and chaos, pushed by terrorism and before the passiveness of the state organization, or I took the risk of providing the state with the necessary instruments for putting an end to that threat."[27] His promise was simple: to revamp the legislative and judicial branches for efficiency and root out corruption; to pass tougher laws for terrorists

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[21] Id., 228.

[22] Ferrero Costa, 30.

[23] Cameron, 126.

[24] Id., 223.

[25] Ferrero Costa, 30.

[26] Cameron, 126.

[27] Alberto Fujimori, "A Momentous Decision", in *The Peru Reader,* Orin Starn, Carlos Iván Degregori and Robin Kirk, eds. (North Carolina: Duke University Press, 1995), 438–439.

and drug traffickers; and to promote a market economy.[28] He placed major media outlets under military control, and arrested members of the political oppositions, including journalists and members of congress.[29] Former president Alan Garcia escaped by climbing over his roof and fleeing Peru, living in exile in France for many years.

10.4 Legal Grey Holes: The Veneer of Legality in the Name of Authoritarian Rule

Paradoxically, Fujimori eroded the rule of law through legal means. His success at sustaining his legitimacy as a democratic leader and maintaining power arose out of the legal frameworks he used to shroud his otherwise questionable usurpation of power that violated principles of democracy, the rule of law and human rights. While Fujimori claimed to be "saving" democracy, he set in motion the slow accumulation of a dangerous concentration of power in the hands of the president, the armed forces and the National Intelligence Service. In essence, the "three together turned the executive branch into a parallel legislator, a judge of judges, and a force above the law."[30] They solidified their power primarily through creating legal grey holes that nonetheless relied on legal and political institutions to shroud their illegality through a constitutional veneer. In this section, I explore the most prominent of these grey holes.

10.4.1 Constrained Legislative Branch

To begin, Fujimori instituted the "Government of Emergency and National Reconstruction" which authorized him to rule by executive decree for seven months. Fujimori's two-fold agenda also included implementing neoliberal reforms to favor the business elite as well as using a more drastic and otherwise unlawful approach to defeating terrorism. During that time, he reintroduced the same laws debated by Congress a month earlier, which included draconian anti-terrorist laws and measures and drastic neoliberal reforms that led to the defeat of Vargas Llosa who proposed the same during the 1990 election campaign.[31] Fujimori sought to achieve all three elements of what Russell Crandall has described as Latin America's "elusive trinity"

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[28] Cameron, *Autogolpe*, 224.

[29] Id.

[30] Maxwell A. Cameron, "Self-Coups: Peru, Guatemala, and Russia", 9 Journal of Democracy 125–139, 125 (1998) [hereinafter, Cameron, Self-coups].

[31] Calderón, 47.

of national security, democracy and economic stability, which he claims cannot all be maintained at the same time.[32]

To ensure enforcement and control over the coercive means of the state, Fujimori formed a close alliance with the armed forces by subverting the normal promotional scheme for commanders in chief (promotion every two years): He named as permanent chief the hand-picked (by Montesinos) General Hermoza Rios, deemed to be cooperative and loyal to the Fujimori-Montesinos agenda.[33] The armed forces' collaboration with SIS would be essential in silencing dissent.

Fujimori also passed laws to assure his control over decisions on national security by transferring the SIS to the executive branch. Until 1990, the National Intelligence Service, a small, underfunded organization, had withered under civilian rule.[34] Yet, under Fujimori's direction (via Montesinos) it grew to employ thousands of agents and became "an indispensable part of the government's political machine and an instrument for isolating, discrediting, and spying on opponents."[35]

Eventually International pressure compelled Fujimori on May 18, 1992 to announce the election of a new congress which that would serve as a constituent assembly and rewrite the Constitution,[36] which was approved by referendum by a narrow margin.[37] At those elections, Fujimori's party won a majority in its unicameral legislature, which rubberstamped all of Fujimori's proposed bills, often turning them around in a record 24 hours with minimal debate.[38] The Fujimori-backed Congress refused to permit investigative commissions following the complaints of abuse that began to arise. Of a total of 40 requests to investigate human rights allegations, only a few were approved and never conducted with vigor and often kept from the public.[39]

10.4.2 Draconian Anti-Terrorist Laws

Fujimori's anti-terrorist legislation became one of the hallmarks of his regime. Devoid of all due process guarantees, these laws were nevertheless touted by the State as its greatest weapon for capturing terrorist leaders,

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[32] Russell Crandall, "Guadalupe Paz", *The Andes in Focus: Security, Democracy, and Economic Reform,* Riordan Roett eds. (Colorado: Lynne Rienner Publishers, 2005), 2.

[33] Cameron, *Autogolpe*, 236.

[34] Atwood, 156.

[35] Id., 171.

[36] Cameron, *Autogolpe,* 225. *See also* Ferrero Costa, 37 (discussing the Bahama Resolution May 18, 1992).

[37] Cameron, *Autogolpe*, 225.

[38] Cameron, *Self-coups*, 129.

[39] Id.

even though they wielded a sledgehammer approach by imprisoning thousands of innocent people. In the end, many civilians who were active political opponents were detained due only to their rejection of the authoritarian regime—an attitude that became a crime of "sympathy" for subversive groups.[40] The state often characterized legitimate social protest as a terrorist threat, sending a clear message to civil society in its attempts to mobilize against it. Some of the laws' most egregious procedural flaws allowed for:

- arrests without a warrant based on an overly vague definition of terrorism and sedition;
- prolonged incommunicado detention during interrogation;
- denial of petitions of *habeas corpus*;
- conditions that permitted mistreatment and torture used to elicit coerced confessions;
- being paraded before the press in striped uniforms undermining presumptions of innocence;
- prosecutors mandated to bring charges even when they could offer no evidence;
- cursory trials before 'faceless' (masked) judges;
- limited or no opportunity to review the evidence or cross-examine witnesses;
- convictions based solely on police attestations or confessions and/or the uncorroborated testimony of another person "repenting" in exchange for accusations against others and a lower sentence; and other serious limitations to the defendant's ability to a self defense.[41]

The legislation also required many suspects to be tried before military courts for sedition, although this charge varied little from the enumerated terrorist acts which triggered jurisdiction of civil courts. Often a person acquitted in military courts would be transferred to the civil courts for a second trial for terrorism based on the same facts. Thousands report Kafkaesque like tales of being in the wrong place at the wrong time, only then to spend as many as fifteen years waiting in jail to vindicate their innocence. Eventually these laws were found by both the Peruvian Constitutional Court and the Inter-American Court of Human Rights (IACHR) in Costa Rica to violate basic constitutional and human rights norms.[42]

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[40] Lisa J. Laplante, "Heeding Peru's Lesson: Paying Reparations to Detainees of Anti-terrorism Laws," *Human Rights Commentary*, 2: 88 (2006).

[41] *Informe de la Comisión de Juristas Internacionales sobre la Administración de Justicia en Perú* (Lima, Peru: Instituto de Defensa Legal, 1994), 52–68.

[42] Lisa J. Laplante, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention", *Netherlands Quarterly of Human Rights*, 22(3): 347 (2004).

Could Peru's crisis been met through ordinary democratic and constitutional means? Analysts speculate that the "inordinately long time" that a normal arrangement would take made the country face "a difficult trade-off between efficient performance and democratic quality."[43] Yet, Shifter suggests that a democracy will remain "anemic" if its legal system does not guarantee both "equality of all citizens before the law and basic personal rights" and the appropriate checks to executive authority.[44] Likewise, Levitsky suggests that without the protection of civil liberties and the rule of law, a country cannot call itself a true democracy.[45] Observations of Peru's slide down the slippery slope to tyranny despite the appearance of legality lend support to the importance of rights protections, the "substantive approach" to the rule of law. "Maximalist" and "thick" definitions of the rule of law includes substantive norms based on fundamental human rights and democratic governance, as well as purely procedural guarantees.[46] While academics debate the theoretical soundness of this way of defining the "rule of law," the experience of Peru demonstrates that the procedural rule of law will be of little value if it is not protected by minimal substantive normative guidelines.[47]

10.4.3 A Co-opted Judiciary to Ensure Impunity of Specialized Executioners in a War on Terror

During the 1990s, Peru's anti-terrorism laws led to an increase in detainees, and a decrease in the high number of indiscriminate disappearances that took place during the 1980s under Garcia's government. Instead, extrajudicial killings became more targeted through a special death squad composed of military officers called "Colina" that was created by Montesinos. This group became Peru's "political police", carrying out some of Peru's most notorious massacres, including the *Barrios Altos* case—the extrajudicial execution of 12 people (including an eight year old boy) at a local fundraising party in 1991 and the *Cantuta* case—the extrajudicial killing of nine University students and one professor in 1992.[48]

Both cases occurred in Lima, and thus raised far more attention. The government at first blamed Shining Path for the killings, until a local paper

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[43] Shifter, 124.

[44] Shifter, 115.

[45] Levitsky.

[46] Balakrishnan Rajagopal, "Invoking the Rule of law in Post-conflict Rebuilding: A Critical Exasmination," *William and Mary Law Review*, 49: 1372 (2007–2008).

[47] Randall Peerenboom, "Human Rights and the Rule of Law: What's the Relationship?" *Georgetown Journal International Law*, 36: 828–831 (2005).

[48] Jo-Marie Burt, "'Quien habla es terrorista' The Political Use of Fear in Fujimori's Peru," *Latin American Research Review* 41: 47 (2006).

reported on a hidden grave suspected to contain the Cantuta victims.[49] The government then changed its allegations to accuse the victims as being members of the Shining Path. The charred remains of the Cantuta students prompted oppositional leaders to initiate a congressional investigation, calling Hermoza Rios to testify. The next day tanks circled the congressional building in a not so subtle warning. As national and international pressure grew in response to the revelation of Colina's crimes, state prosecutors filed charges against group members in 1994. Fujimori soon passed a law transferring jurisdiction for the cases to military courts, and then soon after, in 1995, issued a self-amnesty law that protected state officials suspected of committing human rights violations within the context of the war against terrorism.[50] As a consequence, imprisoned Colina members went free.[51] The amnesty laws, in particular, demonstrate how Fujimori institutionalized impunity.

Similarly, in 1993, Fujimori rewrote the constitution, which further institutionalized his hold on power by limiting accountability. For example, the new Constitution expanded the military's power (now under Fujimori's political control) by removing civil oversight (on budgetary issues) and creating a parallel military judicial system.[52] He limited the power of the *Fiscal de la Nacion* (attorney general) to investigate and prosecute official abuse, placing her under the supervision of a new governmental body called the "executive commission of the public ministry."[53] This post was filled by a sympathetic figure linked to the armed forces, who often removed "disobedient" judges that showed independence.[54] These "executive commissions," part of a World-Bank-funded judicial reform project, created a parallel justice system whose leaders stood above the Chief Supreme Justice and Attorney General. Since judges were hired on a "provisional" basis, and removable if they strayed from the political prerogative, they could be pressured to rule favorable to the government in politically sensitive cases.[55] Curtailing judicial independence would become especially critical when a flood of requests for *habeas corpus* demanded information on the human targets of the coercive arm of Fujimori's original anti-terrorist strategy.

The experience of Peru under Fujimori's leadership exemplifies what Levitsky and Way view as a "diminished form of authoritarianism" under

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[49] Cameron, *Self-coups*, 127.

[50] Lisa J. Laplante, "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes," *Virginia Journal of International Law* 49 (2009).

[51] Cameron, *Autogolpe*, 236.

[52] Levitsky.

[53] Id.

[54] Cameron, *Self-coups*, 130.

[55] Calderón, 49–50.

the façade of democracy. They write, "[r]ather than openly violating democratic rules (for example, by banning or repressing the opposition and the media), incumbents are more likely to use bribery, co-optation, and more subtle forms of persecution, such as the use of tax authorities, compliant judiciaries, and other state agencies to 'legally' harass, persecute, or extort cooperative behavior from critics."[56] In contemporary times, the political cost is too high to outright eliminate "contestation through the systematic repression or co-optation of potential opponents"[57]

Fujimori was one of the most recent dictators in Latin America, and perhaps learned that he had to be clever to maintain his repression. The learning curve for avoiding "being caught" entailed finding "legal" forms of silencing dissent. In essence, Fujimori's strategy "dangerously weaken[ed] horizontal accountability" by insulating the executive from scrutiny. Normally, arbitrary or questionable government actions would be "impeded by a vigorous legislature, independent courts, and watchful citizens."[58] Here, scholar Maxwell A. Cameron illustrates the correlation between rule of law and democracy:

> Autogolpes threaten the deliberative quality of democracy by broadening the scope for the executive abuses of power and destabilizing the self-correcting mechanisms that inhere in a functioning system of checks and balances. Autogolpes create governments enshrouded in secrecy, unaccountable to the public, and impervious to criticism. The opportunity to control the legislature and judiciary undermines the rule of law. When the executive politicizes the judiciary, men replace laws; when it dominates the legislature, cheap talk replaces deliberation. Vibrant, public legislative debate and an independent judiciary are critical to executive accountability and the rule of law, the twin foundations on which the constitutional democratic state rests. The Peruvian experience vividly demonstrates that sovereign assemblies and independent courts are the best defenses democracy has against the clever but amoral stratagems of Machiavellian politicians.[59]

Fujimori thwarted this normal check on executive power by undermining the power of these democratic institutions to do their job.

10.4.4 Manipulation of Public Opinion and Creating a Culture of Fear

Importantly, Fujimori's monopolization of power depended on maintaining public support through a clearly calculated media campaign that sustained a high level of public fear despite the early defeat of subversive groups.

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[56] Steven Levitsky and Lucan A. Way, "Elections Without Democracy: The Rise of Competitive Authoritarianism," *Journal of Democracy* 13: 53(2002).

[57] Id., 62.

[58] Cameron, *Self-coups*, 125.

[59] Id.

Specifically, five months after his self-coup, intelligence work that began years earlier led to the arrest of Shining Path's leader Abimael Guzman. This victory helped legitimate Fujimori's self-coup despite the fact that it was not the laws and new legal structure that led to Guzman's capture. Acts of terrorism declined notably in the 1990s, dropping from 3,149 incidents in 1989 to 310 in 1998.[60] By the late-1990s, the terrorist threat had for the most part vanished and by 1995 only 4 percent of the population named terrorism as a national threat.[61] Despite this apparent victory in the war on terrorism, the government did not terminate its emergency powers or decrease its use of drastic legal measures even though the national security crisis subsided, and thus the justification for authoritarian rule. Instead, Fujimori capitalized on public anxiety despite an early defeat of the enemy in the spirit of "continuismo" (continuation), which was further assured by a strangle on the rule of law.[62]

Why did the public permit Fujimori's unabashed expansion of power? Fear had become "ingrained in the psyche of the Peruvian population."[63] The intense violence since 1980 created a context in which the population became prone to cede citizen rights for an "extremely personalistic, authoritarian regime in exchange for order and stability."[64] In consultation with psychiatrists, Montesinos manipulated a sector of the media—commonly known as "chicha"— which sensationalized political scandal and was aimed at a less educated population but which shaped popular opinion.[65] He carried out "psychosocial" campaigns to discredit opposition while at the same time instilling fear in the general public about the economic and national security situations, and in essence using propaganda to justify the government's draconian structures. These daily newspapers were subsidized and even directed by the SIS.[66] In addition, Montesinos and Fujimori bribed all the major television channels, making the mass media an effective means of vetting out anti-government messages. This recipe for manipulation "reordered political and social meanings in Peru" and created a culture of fear that perpetuated the willingness of citizens to surrender their rights in exchange for safety.[67]

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[60] Moisé Arce, "Political Violence and Presidential Approval in Peru," *The Journal of Politics*, 65: 576 (2003).

[61] Id.

[62] Levitsky, 80–81.

[63] Burt, 40.

[64] Id., 41.

[65] Lisa J. Laplante and Kelly Phenicie, "'Mediating' justice and reconciliation in postconflict Peru", International Journal of Transitional Justice (forthcoming 2010).

[66] Steven Levitsky and Maxwell A. Cameron, "Democracy Without Parties? Political Parties and Regime Change in Fujimori's Peru," *Latin American Politics and Society*, 45: 17 (2002).

[67] Burt, 35.

Burt analyzes how the "instrumentalization of fear" allowed the government to "penetrate, control and immobilize civil society."[68] The label "terrorist" became the primary means of silencing opposition and undermining one of the essential pillars of democracy: free expression. The anti-terrorism laws worked via contagion theory, and merely calling someone a terrorist or implying that they were "apologists for terror" silenced democratic dialogue.[69] Overly broad and vague definitions of terrorism made anyone a potential target. This "authoritarian political project" kept opposition groups off balance and unable to contest the out-of-balance power.[70] Burt writes,

> The institutional structures that protect individual and civil rights—the sine qua non of civil society organization—disappeared in this context. Without state institutions to guarantee the rights to organize, to free speech, and the inviolability of the person, civil society organization shriveled under the threat of state and insurgent violence by non-state actors, the state contributed decisively to the disarticulation and fragmentation of civil society.[71]

Without a counterbalancing view, the public viewed reports of massacres, disappearances, torture and other human rights violations as "excesses" or collateral damage—the price of the war. The second-class status of the majority of victims made this damage seem negligible compared to the prospect of peace and a desired economic prosperity.

In fact, Fujimori won support from the monied elite due to the free market reforms he instituted, which led to an influx of foreign investments, making Peru one of the most open and liberal economies in the world. At the same time, Fujimori's "quintessential neopopulist" approach of targeting the poor masses with "obras" (public works) helped him gain loyal followers. Journalist Catherine M. Conaghan refers to the deep complicity in Fujimori's regime and that "[t]o understand the sway of Fujimorismo and its staying power, we need to look for the answers higher up in Peruvian society—among the people that should have known better."[72] She refers to the political elite who could have done something but whose indifference led to inaction. Arguably the same could be said for the poorer populations whose necessities kept them from worrying about the larger risks of sacrificing legal principles.

Yet, eventually his monopoly of power began to elicit condemnations from human rights activists who regarded Alberto Fujimori as a de facto

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[68] Id., 33–34.

[69] Lisa J. Laplante and Kimberly Theidon, "Commissioning Truth, Constructing Silences: The Peruvian Truth Commission and the Other Truths of 'Terrorists'" in JUSTICE IN THE MIRROR: LAW, CULTURE, AND THE MAKING OF HISTORY (Kamari Clarke and Mark Goodale, eds., Cambridge University Press, 2009).

[70] Id., 35.

[71] Id.

[72] Catherine M. Conaghan, *Fujimori's Peru: Deception in the Public Sphere* 252 (2005).

dictator even though he had been popularly elected.[73] This accusation became acute when his allies in Congress passed a law that permitted him to run again for office.[74] The Constitutional Court (Peru's equivalent of the U.S. Supreme Court) could not manage to win the six out of seven members to find the law unconstitutional, given that four were put in place by Fujimori's allies. The three justices who voted to find the law unconstitutional were later dismissed by the Congress at the Executive's behest.[75]

Still, the Organization of American States (OAS) called into question the elections[76] and Peruvians finally took to the streets after years of minimal protest.[77] Fujimori's opponent Alejandro Toledo, who dropped out of the race citing fraud, led one of Peru's largest street marches ("marcha de los quartos suyos") on the evening of Fujimori's swearing-in.[78] It seemed that the population no longer tolerated abdicating all of their rights as they finally saw "the regime's unabashed effort to ensconce itself in power."[79] The extraordinary state could no longer be justified as necessary to defeat an insurgency, eventually revealing that it had all along been "a means of maintaining an abusive and corrupt regime in power at any cost."[80]

10.5 States of Emergency: Balancing National Security with Human Rights

In theory, a self-coup should only be "a temporary departure from democratic rule" in which a leader rules by decree until the displaced government institutions are replaced.[81] Fujimori, however, never intended his measures to be temporary, but rather sought to maintain his extraordinary power indefinitely. For this reason, Peru's auto-coup sent a ripple of concern through the international community in which many had been praising the advent of the "third wave of democracy" in Latin America. Importantly, even though Fujimori's self-coup undermined features typically attributed to democratic regimes—independence of the judiciary,

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[73] Atwood, 171.

[74] In 1996, the Congress passed a law of "authentic interpretation" that declared Article 111 (allowing for only two consecutive terms in presidential office) of the 1993 Constitution as inapplicable to Fujimori since he was elected in 1990 under the 1979 Constitution and not the new constitution. Cameron, *Autogolpe,* 235.

[75] Id., 235.

[76] Cynthia McClintock, "The OAS in Peru: Room for Improvement," *Journal of Democracy* 12 (2001); Andrew F. Cooper and Thomas Legler, "The OAS in Peru: A Model for the Future?" *Journal of Democracy* 12 (2001).

[77] Burt, 33.

[78] Levitsky and Cameron 2002, 19.

[79] Burt, 56.

[80] Id.

[81] Cameron, *Self-coups*, 125.

self-government of the legislature, the principles of rule of law—it preserved the one institution most clearly associated with democracy in the mind of the public and the international community—regular recourse to "democratic" elections. Since Fujimori had gained his power to rule through democratic elections and not military domination, he did not spark the type of automatic rejection that arises when the military overthrows a civilian government.[82] The public viewed Fujimori, as a popularly elected leader taking constitutionally permissible measures to protect the nation. Peru's experience shows that free and fair elections alone do not guarantee the establishment of a liberal democracy and how the trickery of self-coups can create the illusion of legitimacy through the façade of law.[83]

Here, self-coups can create a sort of "hybrid regime", that is, "a halfway house between the barracks and the ballot box" creating the illusion of legitimacy.[84] Peru became a "delegative democracy" in which the majoritarian principle gives an elected executive broad discretionary authority to govern at the margin of democratic institutions and actors, unconstrained by "horizontal accountability."[85] Convincing the public of a grave public emergency led to less popular resistance and more political space in which to expand its power.

Ultimately, the success of a self-coup requires both "domestic ratification and international toleration."[86] If the government can convince the public that a grave public emergency exists, it faces less resistance to cultivating a political space in which to expand executive power. Before there was ever a global war on terror, the Fujimori experience demonstrated how easily the rule of law breaks down when an elusive threat taps into the public's deepest fears. Certainly, a sovereign always reserves the right to declare states of emergency to preserve national security. Even human rights treaties recognize that during these times, states may suspend normal constitutional protections, with the exception of non-derogable rights. However, such exceptional periods are meant to be limited in time.

Was Fujimori a benign "democratic dictator" saving Peru from economic peril and terrorist destruction? Or was he a corrupt man with an insatiable hunger for power? Certainly, Fujimori still earns credit for making Peru one of the World's "successful" examples of a country that defeated terrorism and saved its economy. Eventually, a decade later, Peruvians would see how this power also became a useful way to rob millions of dollars from public coffers and commit egregious human rights abuses. Fujimori's criminal trials validate this sad realization.

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[82] Atwood, 174.

[83] Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and* Abroad (New York: W.W. Norton & Co., 2007).

[84] Cameron, *Autogolpe*, 221.

[85] Levitsky and Cameron, 4.

[86] Cameron, *Autogolpe*, 221.

10.6 Downfall and Flight: The Beginning of the End

In the end, it would *not* be human rights violations that led to Fujimori's downfall, but rather the revelation of his regime's overwhelming corruption. Six weeks into Fujimori's third term, in September 2000, a reporter and congressman leaked one of the thousands of "vladivideos"—the term for the home-made videos showing Montesinos bribing hundreds of powerful elites, including members of Congress, the business community, the entertainment and media industry and other influential personalities. At last, Fujimori's power did have limits and he "fell because forces from within his own ranks tore aside the veil to let people peep into the rotten world of corruption inside."[87] The public watched obsessively as new videos surfaced. Soon they received news that $48 million was found in two Switzerland bank accounts and that an estimated billion was amassed in still undetermined locations.[88] Corruption and embezzlement finally evoked the public's outrage that crimes against humanity never did. *But for* these videos, perhaps Fujimori would have carried out his term.[89]

In the days that followed, TV cameras followed Fujimori racing through Lima accompanied by security forces on a staged man-hunt for Montesinos who had fled to Panama. In the course of this charade, Fujimori seized hundreds of boxes of videos from Montesinos's home, evidence that today still remains hidden—possibly destroyed. Fujimori, under inescapable pressure, called for new elections in July 2001 and deactivated SIS.[90] He then slipped out of the country on November 13, 2000 only to fax his resignation six days later from Japan, stating that he would "let an orderly transition take place." The Peruvian Congress rejected his resignation, declared him "morally unfit," and dismissed him from the presidency.[91]

In March 2003, Interpol issued an arrest warrant for Alberto Fujimori for his alleged responsibility in the extrajudicial assassinations of Cantuta and Barrios Altos carried out by the paramilitary group Colina. On July 31, 2003, the Peruvian government formally solicited Fujimori's extradition from Japan based on corruption and human rights charges. Japan refused extradition on the grounds that Fujimori was a Japanese citizen, his parents having been born there. The "citizenship question" perplexed the Peruvians as they wondered if Fujimori was even a Peruvian (a requirement for being president). Ongoing diplomatic negotiations included the possibility of going to the International Court of Justice to resolve the dispute, and Peruvians wondered if Fujimori would ever be brought to justice. All the

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87 Calderón, 46.
88 Id., 54.
89 Levitsky and Cameron, 21.
90 Calderón, 47.
91 Id., 55.

while, Fujimori lived a luxurious life in Japan, marrying a baroness, and eventually running his own promotional radio show that he broadcasted weekly in Peru to maintain and increase his support base.

10.7 Setting the Stage for Accountability: The Peruvian Truth and Reconciliation Commission

When Fujimori fled Peru he created a political opening for the transitional government to finally address and redress the years of human rights abuses. In doing so, Peru joined a growing international transitional justice movement by forming a truth commission in 2001 to investigate the causes, consequences and responsibilities of the internal armed conflict. The Truth and Reconciliation Commission (TRC) worked for 2 years to collect approximately 17,000 private and public testimonies, including those delivered during twelve public hearings. The TRC published a nine-volume Final Report in August 2003 in which it estimated that 70,000 people had been killed due to the conflict, and thousands more were disappeared, displaced, tortured, and unjustly imprisoned.

The TRC dedicated an entire chapter to the Fujimori regime entitled, "The decade of the 1990s and the two governments of Fujimori" in which it concluded that his

> [c]ounterinsurgency operations ceased to be a means of capturing subversive leaders and concluding the war with the PCP-SL and the MRTA, and became a means of propaganda for the government, in the best case, and a smokescreen, in the worst, to cover up the regime's crime and excesses, which were being denounced with greater frequency. This was possibly largely because of the progressive and almost total control the state had accumulated over the communications media, paid for with state moneys.[92]

The TRC also included separate in-depth studies of both the Cantuta and Barrios Altos cases, and recommended that Fujimori be held criminally accountable. Significantly, the Barrios Altos case had also reached the Inter-American Court of Human Rights which also called for prompt criminal investigation of these crimes. Indeed, the IACHR greatly influenced Peru's ability to eventually hold Fujimori and his conspirators accountable by annulling Fujimori's self-amnesty laws.[93]

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[92] Burt, 53 (quoting the Peruvian truth commission report).

[93] Laplante 2009.

10.8 Delayed Justice

While Peru's TRC worked to produce a final official report on its country's internal armed conflict, Fujimori's radio emissions from Japan made clear that he was determined to return to Presidential office in Peru one day. Indeed, he surprised the world when he arrived in Chile on November 6, 2005 in a private jet with a stop-over in Mexico. Fujimori's allies reported to the *New York Times* that he chose Chile on purpose given their strict extradition rules. The day after Fujimori's arrival, the Chilean Supreme Court ordered his detention. Several months later, the Peruvian government presented a new extradition petition that included 13 criminal charges for corruption and human rights violations, including Barrios Altos, Cantuta as well as an abduction and torture case of a businessman and journalist in the SIS basement.

Eventually the Chilean Supreme Court ruled on September 10, 2007 in favor of Peru's extradition request and on September 22, 2007 the fallen leader was escorted back to Peru to be immediately incarcerated in a specially built prison on the eastern periphery of Lima. Soon after, the Permanent Criminal Chamber of the Peruvian Supreme Court began to hear the first corruption charge against Fujimori concerning his illegal entry into Montesinos's house to seize boxes of documents, for which he received a prison sentence of six years. The next trial covered his human rights violations, specifically those related to the Barrios Altos, Cantuta and the SIS basement cases.

At the height of his power, while carrying out his bloodless self-coup in 1992, former Peruvian president Alberto Fujimori probably never imagined that sixteen years later he would be jailed and facing criminal charges for human rights violations. More incredible would be that on April 7, 2009 the Permanent Criminal Chamber of the Peruvian Supreme Court convicted Fujimori and sentenced him to 25 years of prison for human rights abuses committed as a result of his assault on the rule of law, which included expanded executive power to allegedly defeat terrorism. No one could have realistically expected this outcome. Certainly, it was only in the intervening years since 1992, that new developments in international law made Fujimori's criminal trial a natural step towards ending impunity—at least for the people who suffered most under his hard-handed rule. Indeed, the experience of Peru represents a new evolution in the transitional justice paradigm that fully integrates criminal trials.

Traditionally, the field of transitional justice arose as a direct response to the difficulty of resorting to traditional criminal justice mechanisms to deal with widespread and systematic state abuses, in particular those that lead to human rights violations and crimes against humanity. In settings following conflict and repression, court systems were often are too weak, corrupt or inexperienced to deal with these cases, and were often themselves involved in permitting impunity in the first place, as through denial

of habeas corpus. Where transitional governments negotiate peace through promised amnesties and immunities, prosecutions become impossible. As a response to this bar to traditional retributive justice, a movement grew to offer alternative justice measures. Thus, truth commissions originally arose as a mechanism to respond to settings where a local judiciary could not adequately respond to historical episodes in which the break-down of the rule of law led to massive human rights violations. Certainly, the contentious *truth v. justice* debate within transitional justice circles has revolved around the initial tendency to grant amnesties in exchange for confessions. The value of seeking the full truth outweighed the need to prosecute.

Peru now puts new pressure on the assumption that traditional justice demands cannot be met. Unlike the South African truth commission, the TRC did not adopt a model of amnesty in exchange for confession. In fact, the Peruvian model presents a new evolution in transitional justice settings, with a strong emphasis on criminal justice as part of its transition package. In this way, the Peruvian experience tipped the scales in the *truth v. justice* debates that previously troubled the transitional justice field. The TRC directed the State as part of its general recommendations to pursue prompt criminal investigation of human rights abuses committed during Peru's "war against terrorism" in order to identify and hold responsible its material and intellectual authors – including Fujimori. It also presented the Peruvian's public ministry with preliminary investigations into 42 criminal cases that it deemed compelling—18 of which occurred under Fujimori's watch, including the Barrios Altos and Cantuta case. In 2003, the government initiated new criminal proceedings against the Colina group, and has initiated hundreds of human rights investigations and begun to hold trials. In addition, Peru has become one of the few examples of a wholly domestic criminal trial for a former head of state for human rights abuses that occurred within the context of systematic attack on democratic institutions and the rule of law.

10.9 Upholding the Rule of Law: Holding Heads of State Accountable for Human Rights Violations

The evolving field of transitional justice and international criminal law recognizes the importance of the domestic enforcement of international crimes. When a former head of state is held criminally liable for the violation of human rights, he or she is in effect also being held accountable for transgressing the norms associated with the rule of law. In this way, criminal trials enforce the duty to guarantee local protection of fundamental rights, a duty that necessarily depends on the rule of law and constitutes the overriding objective of the human rights system. Charges of corruption

and human rights abuses amount to what might be properly termed a proxy for criminalizing attacks on the rule of law.

There is no explicit "right to the rule of law" in any human rights treaty—and thus there is no corresponding crime for an assault on the rule of law. However, the Universal Declaration of Human Rights recognizes in its preamble the critical role of the rule of law in preserving all other rights by declaring: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by *the rule of law*. . ."[94] Indeed, the rule of law which embodies the supremacy of legal procedure and equality before the law arises out of other recognized rights, such as the right to a fair trial, freedom from arbitrary detention and other types of civil and political rights enshrined in treaty and customary law. In this way, the "procedure" of the procedural rule of law becomes the "substance" of the substantive rule of law—blurring the distinction between usually distinguishable levels of rule of law.

Given the fundamental importance of the rule of law, post-conflict recovery necessarily involves redress for the breakdown of the rule of law. Certainly, the mechanisms of transitional justice—trials, truth commissions, reparations, institutional reforms—contribute to this response. Criminal trials for systematic violations of human rights symbolize the rule of law in action since they demonstrate the primary tenants of the supremacy of law. British constitutional scholar A.V. Dicey proposed as the most basic requirement of the formal rule of law that "no man is above the law. . .. every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . ."[95] Here, scholars agree that at a minimum, the rule of law requires that the law must be supreme for ruling officials and judges as well as citizens and that there should exist "instrumentalities of impartial justice."[96] Post-conflict prosecutions also replace private vengeance and thus promote political stability by assuring that the law will be applied equally to political and military officials and military commanders. In this way, "trials can also reinforce legal impartiality by sending a message that the law will apply equally to ruler and ruled alike."[97]

Yet, until recently, former heads of state enjoyed widespread immunity from prosecution. This trend took a sharp turn in 1999 when the British

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[94] Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948) (italics added).

[95] A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (New York: Macmillan 1st ed. 1885), 171.

[96] Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97: 1, 8,9 (1997).

[97] David Tolbert and Andrew Solomon, "United Nations Reform and Supporting the Rule of Law in Post-conflict Societies," *Harvard Human Rights*, 19: 34 (2006); Salacuse, 257.

House of Lords ruled against immunity for certain international crimes in the case involving Chile's former military dictator Augusto Pinochet. Although Pinochet was returned to Chile due to health reasons, the legal precedent of "universal jurisdiction" stood and put all heads of state on notice that they could be held accountable for genocide, crimes against humanity and war crimes. We now have witnessed a rise of such trials including the trials of Serbian Slobodan Milosevic, Liberian Charles Taylor and other high profile cases.

Significantly, the Pinochet extradition case also created a parallel debate in which Chilean nationals argued that they should have the right to be the first bring their former President to trial. Upon returning, Pinochet was stripped of his immunity (as a life-term Senator) and faced 300 criminal charges. The investigations were interrupted only by his death on December 10, 2006—oddly enough, human rights day and a year exactly before Fujimori would begin his own trial after being extradited from Chile. Yet, the movement to nationalize international criminal law presents a new opportunity to strengthen the rule of law through domestic human rights trials.

10.10 Opportunities and Challenges: Strengthening the Institution of the Rule of Law

In theory, human rights trials help build an "accountability cascade"—through which expectations of accountability become the norm- overcoming the legacy of a "previous and pervasive impunity cascade in which order and accountability simply broke down."[98] This "cascade" refers to one of the

> most important and difficult challenges confronting a post-conflict society is the reestablishment of faith in the institutions of the state. Respect for the rule of law in particular, implying subjugation to consistent and transparent principles under state institutions exercising a monopoly on the legitimate use of force, may face special obstacles. In territories where state institutions existed as tools of oppression, building trust in the idea of the state requires a transformation in the way such institutions are seen.[99]

Yet, commentators warn that this "faith" entails "a mental transformation as much as a political one."[100] Simply holding a criminal trial does not guarantee the societal shift of perceptions that must accompany the building of a culture of rights. Sometimes trials can even undermine this process if trials are perceived as "victor's justice."

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[98] Stromseth, 265.

[99] Simon Chesterman, "Rough Justice: Establishing the Rule of Law in Post-conflict Territories," *Ohio State Journal on Dispute Resolution* 20: 69 (2005).

[100] Id., 96.

For example, one of the key elements in this transformation relates to perceptions of fairness from the point of view not only of the victims but also the supporters of the fallen leader. In theory, adherence to strict standards of procedural due process would satisfy both groups since post-conflict trials have come to sanctify the idea of procedural guarantees as a means for building the rule of law.[101] Allegiance to procedural due process emanated from the top echelons of the international legal community when the United Nations announced it would support post conflict justice "that complies with the comprehensive principles of UN human rights and criminal justice standards developed in the last half century."[102]

Thus at a practical level, human rights trials contribute to drawing immediate attention to solidifying rule of law practice and experience in local judiciaries. At a symbolic level, they show the irony of offering fundamental protections to even the worst culprit: the political leader whose abandonment of these very same principles led to the break-down of the rule of law. A trial of a former head of state that complies with basic due process norms offers the ultimate symbol of rule of law by offering the former leader the fairness of the rule of law that he/she denied those who became victims under his/her rule. In this way, even the worst law-breaker enjoys minimal legal protections. At the same time, the population at large gains confidence "that they will be protected from predatory state and non state actors. . . .and that the legal and political institutions will protect rather than violate basic human rights."[103] Both advantages help "establish a credible and functioning justice system."[104]

In principle, then, criminal trials that guarantee the panoply of procedural protections contribute to building the rule of law in post-conflict settings. However, there are challenging contextual realities to norm creation. It is cautioned that "[p]lanting a [constitutional] proposition in a different cultural, historical, or traditional context may lead to results quite different from those one finds in the country from which the proposition was borrowed."[105] Rosa Ehrenreich Brooks points out a formalistic approach to building the rule of law post-conflict overlooks the need for "norm creation" which is something that does not exist beyond culture. It cannot be "somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes.

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[101] Ellen L. Lutz and Caitlin Reiger, "Conclusion", in *Prosecuting Heads of State,* Ellen L. Lutz and Caitlin Reiger, eds. (Cambridge: Cambridge University Press, 2009), 276

[102] U.N., *Rule of Law*.

[103] Stromseth, 252.

[104] Id.

[105] A.E. Dick Howard, "The indeterminancy of Constitutions," *Wake Forest Law Review* 31: 403 (1996).

In its substantive sense, the rule of law *is* a culture, yet the human-rights-law and foreign-policy communities know very little – and manifest little curiousity—about the complex processes by which cultures are created and changed."[106] She urges the study of how and when societies change their legal cultures towards the static principles of procedural and substantive due process. Similarly, Paul Kahn views this process as the "construction of a complete worldview" that includes the evolution of subjective meaning.[107] He calls for examining "thick description of the legal event as it appears to a subject [and his/her] unique understanding of time, space, community and authority."[108]

Thus, in the context of Peru, arguably each "side" of the post-conflict recovery process may bring to the experience a locally contextualized understanding of justice that may contradict the more formalistic definition of criminal justice. For example, supporters of Fujimori who still believe that he "saved the country" from economic despair and terrorist destruction perceive human rights violations as the "cost" of this victory. Thus the criminal trial seems a perversion of justice, and even victor's justice meted out by the human rights community. It is questionable whether the trial itself can instruct a shared definition of substantive rule of law which includes standard definitions of human rights.

Alternatively, victims of Fujimori's regime may question the formalistic adherence to procedural rules when they already believe the evidence proves Fujimori's guilt. Indeed, the report of the Truth Commission along with the decisions out of the Inter-American Human Rights System provides substantial indication that Fujimori's policies eroded the rule of law that permitted their families to be killed and disappeared. If the evidence exists, then why conduct a trial? In essence, they must buy into the societal project of a trial for the greater good: to show that procedural fairness reigns supreme even when the defendant seems irrefutably guilty.

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[106] Rosa Ehrenreich Brooks, "The New Imperialism: Violence, Norms, and the Rule of Law," *Michigan Law Review*, 101: 2285 (2003).
[107] Kahn, 2.
[108] Id.

Chapter 11
The Interaction of Customary Law with the Modern Rule of Law in Albania and Kosova

Genc Trnavci

For centuries, Albanian traditional law has been preserved in its most comprehensive form in the *Kanuni i Lekë Dukagjinit* (The Canon of Lekë Dukagjini). The Canon of Lekë Dukagjini has had a particularly strong influence in Kosova and in the more secluded regions of Northern Albania. Reliance of customary law is a pervasive characteristic of Albanian culture, and indeed of all rural Balkan peoples.

The Franciscan, Shtiefën Gjeçovi from Janjevo of Kosova (1874–1929), carefully collected and reformulated these canons of the law. His compilation was later scientifically explored and studied as literature and, in particular, as a work relating to oral literature. The canons had existed in an unwritten form for centuries, and it is impossible to be too definite about their origins, or whether in fact there ever was such a real historical person as Lekë Dukagjini.

The so-called Canon of Lekë Dukagjini has been criticized for its dependence on blood feud and vendetta as intrinsic principles of the legal order. But these elements are peripheral to the Canon's more central concerns, which are to moderate the force of such conflicts by creating a set of formulae for compensation, according to social standing and to social class. The Canon of Lekë Dukagjini also advances the sanctity of oaths, of promises generally ("besa"), and of concern for others, particularly guests and friends.

The Canon of Lekë Dukagjini has had a profound influence on Albanian culture and the civil law.[1] In some areas of Albania and especially in Kosova, the Canon still has direct effect, superseding more recent

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[1] Surja Pupovci, *Građanskopravni odnosi u zakoniku Leke Dukađinija*, Zajednica naučnih ustanova Kosova i Metohije, Studije, knj. 5, Priština, 1968.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_11,

legislation.[2] Reliance on customary law is not unique to Albania, and has played an important role throughout Europe.[3] Nonetheless, Albanians have been particularly loyal to their old ways and old institutions.[4] The Albanian expression for their customary law of "Kanun," developed from the Sumerian "gi," and is related to the Akkadian word "qanu" and Hebrew "qane." The Albanian version of the word entered the language from Greek ("Kanna"), and is used to signify the customary law.[5]

Although Albania and Albanians living in the Balkans have undergone significant historical, social, economic and political changes during the last century,[6] norms of Albanian customary law, or the Canon of Lekë Dukagini, still have a strong influence on contemporary Albanians.[7]

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[2] Law of inheritance is governed by Canun in the rural parts of Kosova and Northern Albania. Modern law and institutions of land register are completely neglected.

[3] S. Pupovci, ibid., p. 9. See about this in general in: Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA, and London: Harvard University Press, , pp. 8, 11, 85) etc.

[4] Miloš Mladenović, *Zakonik Leke Dukađinija*, Prilog postavljanju problema uporedne istorije balkanskih prava, Beograd (1938), pp. 3.

[5] See about this in general: Zef Ahmeti, *The Criminal Law in the "Kanun of Lek" Dukađjini—The Albanian Customary Law* (Switzerland: University of St. Gallen, 2004).

[6] Albanians originate from Illyrians, one of the indigenous peoples of the Balkan Peninsula. They are the descendants of the Illyrian tribes that, living in isolated mountain areas, although to some extent Romanized under the rule of the ancient Rome, avoided assimilation to the Slavs invading the area sometime during the seventh century. Their language is of Indo-European origin. The two largest groups among Albanians show some difference both in their dialects and some customs. In the northern areas of Albania Gheg dialect is spoken (this is the principal dialect of Kosovar Albanians), while Albanians living in the south speak Tosk.

The religious diversity of Albanians is readily seen from the following figures: about two thirds of the population—including most Kosovar Albanians is Sunnite Muslims, 10 percent are Roman Catholics, and 15 percent—mostly living in the south—are Albanian Orthodox Christians.

In the Middle Ages, Albanians lived under the rule of Byzantium and the Serbian state. In later centuries, most Albanians adopted the Muslim faith, and the elite of the Albanian society became an integral part of the power structure Ottoman Empire as solders, officials, and landlords. The rise of nationalism reached Albanians as late as the end of the nineteenth century. One of the centers of the national movement was Kosova. Established in 1878 in Prizren, the Albanian League was the first organization representing Albanian national movement. The mission of the League was no less than to achieve the unification and autonomy of the four Albanian-populated vilayets (vilayet—a Turkish administrative unit) of Skhodra, Kosova, Monastir, and Janina. However, the same regions were also claimed by those nations living in area that had started their national development and risen to national statehood somewhat before the Albanians. The vilayets of Skhodra (part of present Albania) and Kosova (an independent state now) were claimed by Serbs and Montenegrins, Monastir by the Serbs and Bulgarians, and Janina by the Greek. Of course each of the young nations based their claims on historical and ethnic reasoning.

[7] While 3.5 million of Albanianans live within the national borders of Albania, another 2 million inhabit Kosova, 445 thousand live in Tetovo and Kumanovo region of northwest

11.1 The Kanun as a Part of Wider Balkan Culture

Despite their great diversity in language and religion, the Balkan Peninsula in many ways constitutes a single cultural environment. This is as true of the law as it is of other aspects Balkan life. Borders have never been stable, and different groups have dominated at different times, but the Byzantine Empire played a significant role in promoting cultural unity, as later did the rule of the Ottomans.[8]

Resistance to a series of invaders encouraged unity among the Balkan peoples, and in the absence of their own states they developed highly patriarchal societies, regulated for the most part by customary law.[9] These customs provided a form of internal justice for subjugated peoples.[10]

This led in turn to considerable similarities between Albanian institutions and those of neighboring Montenegro and Herzegovina.[11] It is no wonder, therefore, that there is a great similarity between the customary law of the Canon of Lekë Dukagjini and customary law of Montenegro and Herzegovina, as the result of mutual influence and permeation.

11.2 The Origin and Name of the Kanun (Canon)

The roots of the Canon of Lekë Dukagjini are in the old unwritten Albanian law of the land.[12] These unwritten laws, passed down through the generations through oral tradition, were interpreted primarily by religious leaders, such as the Franciscan Shtiefën Gjeçovi of Kosova (1874–1929) who played a special role in collecting rules of the Albanian customary law.[13] The *Kanuni i Lekë Dukagjinit* (the Canon of Lekë Dukagjini) as we have it today

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Macedonia, 70 thousand in the Presevo valley and 61 thousand in Montenegro's border region with Albania and Kosova. *See*: Xhevat Lloshi, *Denomination of Albanian and Albanians*, http://www.al.undp.org/download/pdf/albanian.pdf (last viseted on January 24, 2008).

[8] In 1453, Constantinople was conquered by the Ottoman Turks.

[9] Lloyd Bonfield in his masterpice "Nature of Customary Law", 520–521 (*The Nature of Customary Law in the Manor Courts of Medieval England*; *Comparative Studies in Society and History*, 31(3) (July, 1989), pp. 514–534), writes: "It must be remembered that inter-peasant disputes arose within a community in which the decision-making body possessed a wide array of knowledge about the character of the litigants and perhaps even the issue in controversy."

[10] H. Berman, op. cit., ibid.

[11] *See* about this in more depth: Andrija Jovićević, *Malesija*, Srpski etnografski zbornik SKA, knj. 27, Beobrade, 1923.

[12] J.G. Hahn, *Albanesischen Studien*, Helf II, Jena–Wien, 1853–1854.

[13] According to the famous German scientist, Karl Steinmetz, Shtiefën Gjeçovi was a poet and writter, a translator, and a folklorist. *See* about it in more depth in his monograph: *Od Adrije do Crnog Drima*, Skopje, 1911, p. 88.

is primarily his work.[14] Gjeçovi began to publish the collected sources of law in the magazine of the Albanian Franciscan order *Hylli i Dritës* in the year 1913.[15] After the Serbian gendarmerie (police) killed him on October 14th, 1929,[16] other Franciscans systematized the remaining materials and published them under Gjeçovi's name in Shkodra in 1933.[17]

The *Kanuni i Lekë Dukagjinit* is the most widely known comprehensive summary of traditional Albanian law ever published in Albanian language. The customary law of the "Kanuni" was divided into 1263 paragraphs, gathered into twelve books. The Kanuni regulate both civil and criminal issues.[18] Gjeçovi's collection also includes the Appendix *"Shembuj në Kanun të veçanta* (The Examples from the Canon of Lekë Dukagjini),[19] which illustrate how the Canons had been adapted to suit the evolving needs of Kosova and Northern Albania.[20]

Numerous Albanian customs have been carefully collected and recorded in this collection.[21] Although Gjeçovi recorded Northern Albanian traditional law in its fairly late stages of development, there are also significant survivals of an earlier way of life, such as the rules governing the birth of a child,[22] blood brotherhood,[23] wedding customs,[24] death and burial custom,[25] and customs in extended family groups[26] etc.The stratification

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[14] Shtiefën Gjeçovi, *Kanuni i Lekë Dukagjinit,* (vepër postume), Përmbljethë e kodifikue prej A. Shtjefën Gjeçov, me parathanë t' A.Gjergj Fishtës, e biografi tëA. Pashk Barthit, Shkodër, 1933; Faik Konitza, *Ca kujtime mi At Gjechovin*, «Dielli», 18 marc 1930, no. 5156, p. 2.

[15] Ibid.

[16] Owen Peterson, *Albania in the Twentieth Century*, *Albania and King Zog*, Volume 1, The Centre for Albanian Studies in association with I. B. Tauris Publishers, pp. 311–312.

[17] *Kanuni i Lekë Dukagjinit*, vepër postume, përmbljedthje e kodifikue prej Shtiefën Konst Gjeçovit, me parathane fAt Gjergj Fishtës e biografi fAt Pask Barhit, Shkoder, 1933. (translation: *The Canon* of *Lekë Dukagjini*, posthumous volume, collected and codified by Shtiefën Konst Gjeçovi with the preface of the reverent Gjergj Fishtë and biography of the reverent Pask Barthi, Shkoder, 1933).

[18] Zef Ahmeti, *The Criminal Law in the "Kanun of Lek" Dukagjini—The Albanian Customary Law"*(Switzerland: University of St. Gallen, 2004).

[19] *Kanuni i Lekë Dukagjinit*, op. cit, pp 113–129.

[20] Syrja Pupovci, *Kanuni i Lekë Dukagjinit*, përmbljedthur the kodifikuar nga Shtiefën Gjeçovi, me biğrafi the parathënje të prof. Syrja Pupovcit, Enti i teksteve dhe i mjeteve mësimore i Krahinës Socialiste Autonom të Kosoves, Prishtinë, 1972, p. 27.

[21] E.g., those are the rules devoted to tribal society, flag and flag carriers, military commanders etc.). *See*: S. Pupovci, ibid., pp. 38–39.

[22] § 28.

[23] § 101–108.

[24] § 11–33.

[25] Ch. 24, § 130–1263.

[26] § 9–10.

of this unwritten body of law across the various historical ages can be easily observed through the mixing of powerful pre-Christian motifs with motifs from the Christian era.[27] Likewise, it embodies customs that can be connected with manism, animism and totemism.[28]

The tribes of the northern areas preserved and respected the Kanun as having priority over any other legal system, despite the fact that over time both national law and Church legislation made attempts to supplant it. The Kanun lived on as an alternative or supplementary body of law to Albania's national law. This helped the mountain tribes to preserve their identity, neutrality, and way of life in the face of centralizing incursions.[29] Unfortunately this has also meant the preservation of certain retrograde tendencies in customary law, such as discrimination against women.

Until recently, Gjeçovi's collection of the Canon of Lekë Dukagjini, has been studied primarily by those interested in oral literature.[30] However, this work is also important for legal research.

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[27] Those are the following strata: 1. Pre-Indo-European; 2. Indo-European; 3. Ancient-Greek; Roman, generaly Balkan and Osmanli (Turkish). See about this in: Ekrem Čabej, *Život i običaji Arbanasa, Porpdica i društveni poredak*, knjiga o Balkanu I, Beograd, 1936, p. 313.

[28] The Kanun functions well as a customary code in a society which has following cultural features that: (1) there's no functioning state power, (2) a kinship system is of great importance, (3) a kin group is deemed a transcendental commune consisting of the living and the dead, (4) the kin group has an ethical obligation to keep its existence in the community, (5) animism and ancestor worship are prevalent, (6) the ethos of warriors is highly regarded, (7) spoken words are appreciated more highly than written words.On similarities between the Kanun and Bushido, the Japanese Code of Warrriors, *see* in: K. Yamamoto, *Study on the Ethical Concepts of the Japanese Writer Yukio Mishima, Ultra-nationalist*, Kyushu Institute of Design, Fukuoka, Japan, 2000, pp. 2, 6, 7. *See also*: K. Yamamoto, The Tribal Customary Code in High Albania; a Structural Analysis of the Ethics. In: The Proceedings of Second International Congress on Physiological Anthropology. (Kiel, 1994).—4. YAMAMOTO, K., Coll. Antrop. 23, 1999, p. 221.

[29] "For at least four centuries, the Kanun has de facto been an internationalised form of Albanians' social consciousness. It has been a symbolic framework within which the ethnic and cultural substratum of the Albanians of that period has been identified, and its regulations are also an expression of an organised mode of social response to the external factors, as well as a strategic programme for preserving their own identity irrespective of all such external factors" *See* in: Ferad Muhić, Каноност на Лек Дукагини. Тетово. ФИ & ГА. 1994, с. 15.; according to: Tanya Mangalakova, *The Kanun in Present-Day Albania, Kosovo, and Montenegro* (Sofia: International Centre for Minority Studies and Intercultural Relations (IMIR), 2004, p. 14) (available at: http://www.imir-bg.org/imir/reports/The_Kanun.pdf, last visitedon february 5, 2008).

[30] J. G. Hahn, *Albanesischen Studien*, Helf II, Jena–Wien, 1853–1854; Marin Sirdani, *Skanderbegu mbas gojëdhanash*, Shtypshkroja Franciskane, Shkodër, 1926; M. E. Durham, *Some Tribal Origins and Customs of the Balkans* (London: George Allen and Unwid LTD, , 1928); Salvatore Villari, *Le consuetutini giuridiche dell' Albania (Il Kanun di Lek Dukagjini)* Roma, 1940; P. Stefano, *Const. Gjeqov, Codice di Lek Dukagjini ossia diritto consuetudinario delle Montagne d'Albania,* Tradotto dal P. Paolo Dodaj. Introduzione di Federico Patteta, Roma, 1941;U *Studine e tekste,* Dega I, Juridike,

There is no doubt that Gjeçovi was familiar with the legal literature, legal documents and legal traditions of other Balkan nations. He was educated in Bosnia and was, according to those who knew him well, an extraordinary well-informed and educated person.[31] Gjeçovi uses such terms as "jury" and "juror." Taken from legal terminology found in the Emperor Dušan's Code (from medieval Serbia), the Vinodol State (from medieval Croatia) and other Balkan sources.[32] On the other hand, Gjeçovi often used definitions of legal relations and notions that he could not find in spoken (colloquial) language, which he borrowed from well-known legal treatises.[33]

More recent Albanian ethnographers have sought to supplement Gjeçovi's understanding of Albanian Customary Law.[34] Scientific research has found traces of customary law throughout Albania and established the existence of several local canons used in various periods in different parts of the country.[35] These canons were collections of customary law. They were not the products of individuals, but of the people collectively. In many cases, local customs were adjusted to the specific needs of ruling dynasties and feudal lords.[36]

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no. 1, Instituti i studimeve shqiptare (Redaktor Zef Valentini) Roma, 1944; P. Stefano, *Const. Gjeqov, Codice di Lek Dukagjini ossia diritto consuetudinario delle Montagne d' Albania,* Tradotto dal P. Paolo Dodaj. Introduzione di Federico Patteta, Roma, 1941; Rr. Zojzi, *Mbi të drejtën kanunore të populli shqiptar*, Buletin për shkencat shoqërore, no. 2, Tiranë, 1956; Kahreman Ulqini, *Gjurmime etnografice në trojet e Skanderbegut*, Buletin i Univerzitetit Shtetëror të Tiranës, Seria Shkencat shoqërore, no. 2, 1961.

[31] Ibid.

[32] S Pupovci, ibid., p. 75. *See* also in: Julia Ivanova, *Kanuni i Lekë Dukagjinit (Sprove e karakteristikave historike)*, Buletin i Univerzitetit Shtetror të Tiranës, Seria e Shkencave Shoqërore, numër 2, Tiranë, 1960, p. 114.

[33] J. Ivanova, ibid., p. 114.

[34] Salvatore Villari, *Le consuetutini giuridiche dell' Albania (Il Kanun di Lek Dukagjini)* Roma, 1940; P. Stefano, *Const. Gjeqov, Codice di Lek Dukagjini ossia diritto consuetudinario delle Montagne d' Albania,* Tradotto dal P. Paolo Dodaj. Introduzione di Federico Patteta, Roma, 1941, p. 7–8.U *Studine e tekste,* Dega I, Juridike, no. 1, Instituti i studimeve shqiptare (Redaktor Zef Valentini) Roma, 1944, pp. 270–278; P. Stefano, *Const. Gjeqov, Codice di Lek Dukagjini ossia diritto consuetudinario delle Montagne d' Albania,* Tradotto dal P. Paolo Dodaj. Introduzione di Federico Patteta, Roma, 1941, pp. 7–8; Rr. Zojzi, *Mbi të drejtën kanunore të populli shqiptar*, Buletin për shkencat shoqërore, no. 2, Tiranë, 1956, pp. 144–148; Kahreman Ulqini, *Gjurmime etnografice në trojet e Skanderbegut*, Buletin i Univerzitetit Shtetëror të Tiranës, Seria Shkencat shoqërore, no. 2, 1961, pp. 175–186.

[35] J. G. Hahn, *Albanesischen Studien*, Helf II, Jena–Wien, 1853–1854; Marin Sirdani, *Skanderbegu mbas gojëdhanash*, Shtypshkroja Franciskane, Shkodër, 1926; Rr. Zojzi, ibid.

[36] S. Pupovci, *op. cit.*, p. 32.

11.3 Kanun and Its Link with Lekë Dukagjini

In the folk tradition of the North Albania, the name of the Canon is linked with the person of Lekë.[37] When and how he promulgated his Canon remains extremely vague. According to folk tradition, Albanians respected the Canon because—"*As Lekë said, so it remained among the people*".[38] Therefore, all valuable traditions tended to become attached to his name.[39]

Historians still disagree about the origin of the Canon of Lekë Dukagjini.[40] On the basis of scant historical data, the majority now holdthat

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[37] K. Ulqini, *op. cit.*, pp. 175–186.

[38] M. E. Durham, *Some Tribal Origins and Customs of the Balkans* (London: George Allen and Unwid LTD, 1928, pp. 65).

[39] J. Ivanova, *op. cit.*, p. 97; K. Ulqini, ibid.

[40] Lekë Dukagjini was a quite curious historical figure. Furthermore, his figure has also taken the dimension of a myth comparable to the Albanian national hero Gjergj Kastrioti—Scanderbeg. Through the work of his first biographer, *Marin Barleti*, he is remembered for his struggle against the *Ottoman Empire*, whose armies he successfully ousted from his native land for two decades. (*See*: *Marin Barleti*, 1508, *Historia de vita et gestis Scanderbegi Epirotarum principis*; *Edward Gibbon*, 1788, *History of the Decline and Fall of the Roman Empire*, Volume 6, Scanderbeg section; Camille Paganel, 1855, *"Histoire de Scanderbeg, ou Turcs et Chrétiens du XVe siècle"*; Hodgkinson, Harry. *Scanderbeg: From Ottoman Captive to Albanian Hero*. I. B. Tauris; Noli, Fan S.: George Castrioti Scanderbeg, New York, 1947) Actually, Lekë Dukagjini (1410–1481) was contemporary with Gjergj Kastrioti (1405–1468). Historiography knows both of them as hereditary princes reining over their respective homonymous princedoms. Leka had become the Prince of Dukagjinini when his father, Pal Dukagjini died, (1446), while Gjergj had become the Prince of Kastrioti eight years after his father's, Gjon Kastrioti, death (1443). Dukagjini's Princedom, with Lezha as its own capital city, included Zadrima, the areas in north and northeast of Shkodra and was extended in remote areas of present Serbia, having Ulpiana, near Priština, as the second capital city. On the other hand, Kastrioti's Princedom, with Kruja as its capital, included Mat and Dibra region, reaching Rodon Castle on the Adriatic coast. Lekë Dukagjini had gained a comprehensive education under the spirit of Europian Renaissance in cities like Venice, Raguza (Dubrovnik) and Shkodra. Meanwhile, Scanderbeg had achieved a fast and splendid military career in the Sultan's court of Istanbul. Leading the Lezha League (founded in Lezha in 1444) Scanderbeg considered Leka (initially his father Pal Dukagjini) the most trusted ally. They fought side by side until Scanderbeg died (1468). Lekë Dukagjini continued his marvelous deed leading Albanians in most difficult period of their anti-Ottoman resistance, untill the end of his life (1481). Chroniclers and historians, such as Tivarasi/ Biemi, Frëngu, Barleti e Muzaka, Gegaj and Noli, enlightened the deeds of Gjergj Kastrioti, Lekë Dukagjini and other princes of that time. However, Lekë Dukagjini was shadowed in their works by the main figure in Albainan history, Scanderbeg. Albanian mythology identifies Scanderbeg with a dragon-prince daring to fight and always win against the monster, while Lekë Dukagjini is depicted as an angel-prince, who, with courage and wisdom, safeguards the continuity of Albanian cause (about this topic, see in more depth: Tonin Çobani, *The history of Lekë Dukagjini, History of Shkodra,* www.shkoder.net, 1998–2004).

some elements of the Canon were promulgated by Lekë Dukagjini the III (1410–1481),[41] there is no solid historical evidence that this Lekë actually composed the Canon or in any other way codified Albanian customary law.[42]

Historians now mostly agree that Albanian customary law—the Canon of Lekë Dukagjini—was formed over many centuries and that it can not be scientifically (empirically) ascertained that it was the work of the actual historical person Lekë Dukagjini.[43] The Canon of Lekë Dukagjini is in any case a collection of customary law.[44] It was associated with Lekë Dukagjini, because Lekë had distinguished himself as a leader in the struggle against the Ottoman Empire. The Canon of Lekë Dukagjini contains rules that, in many cases, are much older than Lekë Dukagjini himself.

Serbian authors[45] have sometimes suggested that the Canon of Lekë Dukagjini is an echo or repetition of Dušan's Code (1349 A.D.).[46] Certainly Serbian institutions influenced Albanian life, but soon after the adoption of Dušan's Code, Turkish invaders conquered the medieval Serbian state and the greater part of the Balkan Peninsula. Customary law and many other patriarchal forms of social life revived at this time, particularly among the Albanians.[47]

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[41] For example: Hyacinthe Hecquard, *Historie et description de la haute Albanie ou Guëgoric*, Paris, 1858, p. 218; A. Degrand, *Souvenirs de la Haute—Albanie*, Paris, 1901, p. 151; *Sal— i vilayet-i Kosova* for 1214 (1896/1897), Prizren, n. 10 and 11, 1971; A Jovićević, *Malesija, Naselja i poreklo stanovništva*, knj. 15, Beograd, 1923, p. 96; M. E. Durham, *Some Tribal Origins and Laws and Customs of the Balkans*, p. 65–66; S. Villari, *Le consuetudini giuridiche dell' Albania (Il Kanun di Lek Dukadjin)*, Rome, 1940, p. 14; M. Hasluck, *The Unwritten Law in Albania*, (Edited by J. H. Hutton), Cambridge, 1954, p. 13; M. Krasnići, *Šiptarska porodična zadruga u Kosovsko-Metohijskoj oblasti*, Glasnik Muzeja Kosova i Metohije, IV–V, Priština, 1959–1960, p. 139, etc.

[42] Ludwig Thalloczy, Kanuni i Lekës, *Illyrisch—albanische forschungen, I*, Munchen und Leipzig, 1916, p. 411; Stojan Novaković, *Tursko Carstvo pred srpski ustanak*, Beograd, 1906, str, 197; B. Nedeljković, *KLD*, pp. 434, 437 and 438; J. Ivanova, *KLD*, pp 114; Rr. Zojzi, *Mbi të drejtën kanunore të popullit shqiptar*, pp. 146–147; S. Pupovci, ibid., p. 38, etc.

[43] Dr. Ludwig Thalloczy, *Kanuni i Lekës*, Illzrisch—albanische forschungen, I Munchenund Leipcyig, 1916, p. 411; S. Pupovci, pp. 36–38, S. Novaković, *op. cit.*, p. 197.

[44] Ibid.

[45] T. O. Oraovac, *Albansko pitanje i srpsko pravo*, Beograd, 1913, p. 22.

[46] Dušan's Code (Modern Serbian: Душанов законик, *Dušanov zakonik*) is a legal code, one of two the most significant cultural-historical monuments of *medieval* Serbia, accompanying *St. Sava*'s Nomokanon. It was presented by *Tsar Dušan* in two state congresses: in *1349* in *Skopje* and in *1354* in Serres. *See* about this in: Stojan Novaković, Legal Code of Stefan Dušan, Serbian Emperor, 1349 and 1354, Belgrade, 1989.

[47] S. Pupovci, ibid., p. 38.

The Byzantine Empire ruled over Albanians for a longer period of time than had the Serbian medieval State.[48] This meant that Byzantine institutions also had an influence, on the Albanians and the Serbs alike. According to one of Valtazar Bogišić's surveys, there are traces of Serbian medieval law in Montenegro and Herzegovina. Therefore, some influences on Northern Albanian customary law might have come from these regions.[49] Mutual influences, not only on customary law, but also on religious and cultural life, have been very strong between Albanians and Montenegrins, and to a lesser degree between Albanians, Serbs and Macedonians.[50] Living for many centuries as neighbors and constantly fighting together against the Byzantine Empire, the Ottoman Empire and other invaders, Balkan ethnicities exerted influence on one other in forming their customary law.[51] Another factor influencing similarities in the customary law of the Balkans is the common Indo-European heritage of Balkan peoples, and the similar social and economic conditions of their lives.[52]

Eqrem Cabej has identified numerous local variations in Albanian customs, in law as in other fields.[53] Albanian culture has always been fragmented by conquest and political divisions.[54] The mutual influences with other cultures are numerous and confusing.[55] In this Albanian customary law mirrors the genesis and structure of the Albanian language.[56]

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[48] The Byzantine rule over Albanians lasted intermittently from 330 to 1453. *See* in: Anastos, Milton V. *The History of Bysantine Science, Dumbarton Oaks Papers* 16, 1962, pp 409–411.

[49] Valtazar Bogišić, *O značaju pravnih običaja*, Pravni članici i rasprave, knj. I, Beograd, 1927, p. 40.

[50] Jašar Redžepagić, *Razvoj prosvete i školstva albanske narodnosti na teritoriji današnje Jugoslavije do 1918. godine*, Zajednica naučnih ustanova Kosova i Metohije, Studije, knj. 7, Priština, 1968, p. 245.

[51] V. Bogišić sad once a good neighbor, lends to the neighbor some of his own and also borrows from him. See in: *ibid.*

[52] For example, the aforementioned terms *dorzon* (*dorëzonia*, *dorëzanija, dorzanët*) is a noun of masculine gender. Etymologically, this term is rooted the word *dorë*, meaning hand. That is comparative to Greek *xeup* and Armenian *jern*. All of this associates inevitably to the legal notion of Roman Law *manus—capere*. About the etymology of these words *see* in: Gustav Meyer, *Etymologisches Wörterbuch der albanesischen Sprache*, Strassburg, 1891, p. 77.

[53] Eqrem Çabej, *Život i običaji Arbanasa, Porodica i društveni poredak*, Knjiga o Balkanu I, Beograd, 1936, p. 313.

[54] Eqrem Çabej, ibid.

[55] About the mutual linguistic influences between Balkan peoples and wider *see* in: Harvey E. Mayer, Reflexes of Indo-European Syllabic Resonants in Baltic, Slavic, and Albanian, *Lithuanian Quarterly Journal Of Arts And Sciences* Vol. 37(4)—Winter 1991 (http://www.lituanus.org/1991_4/91_4_05.htm—last visited on March 5, 2008).

[56] Eqrem Çabej, ibid.

Albanian customs, have origins that are: (a) pre Indo-European; (b) Indo-European; (c) Ancient Greek; (d) Roman; (e) general Balkan; and (f) Osmanli.[57]

The rules of customary law, known under the name of the Canon of Lekë Dukagjini, actually reflect many foreign influences. However, most of these were the result of contemporary socioeconomic and other conditions. The Canon of Lekë Dukagjini has participated in continuous changes parallel with the socioeconomic and cultural changes of Albanian society as a whole.

11.4 Kanun and Other Bodies of Albanian Customary Law

The *Kanuni i Lekë Dukagjinit* is not the only collection of traditional Albanian law. Besides the Canon of Lekë Dukagjini, there are other sources of Albanian Customary Law such as: *Kanuni i Skënderbeut* (the Canon of Scanderbeg),[58] *Kanuni i Malsisë së Madhe* (the Canon of the Highlands), and *Kanuni i Labërisë*.[59] The Canon of Lekë Dukagjini has been the most flexible and therefore the most influential of these collections,[60] but there are many similarities, and all such laws of the land are variations of the same underlying legal tradition.[61]

The *Kanuni i Malsisë së Madhe* is implemented by the Kastrati, Hoti, Gruda, Kelmendi, Kuç, Krasniqi, Gashi, and Bytyçi tribes living in the west of the country near Shkodra and on the eastern highlands of Gjakova, just north of the region that follows the *Kanuni i Lekë Dukagjinit*.[62] These two codes are fairly similar. The so-called *Kanuni i Skenderbeut*, also known as "the Canon of Arbëria" is mainly followed in the regions of Dibra, Kruja, Kurbin, Benda, and Martanesh, the former province of the Castriotas, south of the region of the *Kanuni i Lekë Dukagjinit*.[63] The Southern Albanian Kanun of Labëria is upheld in Vlora, Kurveljesh, Himara, and Tepelena, and "the region of the three bridges" (Drashovica, Tepelena, and Kalasa).[64] This Southern Albanian code is traditionally linked to "Papa Zhuli," the founder of the village of Zhulat nearby Gjirokastra.

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[57] Ibid.

[58] J. G. Hann, ibid.

[59] S Pupovci, ibid., pp 38,39.

[60] Rr. Zojzi, *Mbi të drejtën kanunore të popullit sqiptar*, Buletin për shkencat shoqërore, n. 2, Tiranë, 1956, pp. 144–148.

[61] Kahreman Ulqini, *Gjurmime etnografice në trojet e Skanderbegut*, Buletin i Univerzitetit Shtetëror të Tiranës, Seria Shkencat shoqërore, no. 2, 1961, pp. 175–186.

[62] Rr. Zojzi, ibid.

[63] J. G. Hahn, ibid.; K. Uljqini, ibid.

[64] *See* in: http://de.wikipedia.org/wiki/Kanun_(Albanien), last visited on March 5, 2008.

11.5 The Most Salient Features of the Canon of Lekë Dukagjini

The underlying philosophy of the Kanun is difficult to grasp for anyone who has not grown up in the cultural environment of Northern Albania and Kosova. The terminology of the German and Albanian/English versions available in Priština (the capital of Kosova) may actually even be misleading.[65] Nevertheless, the Kanun is worthy of study, because it offers a valuable insight into a unique culture based on honor and chivalry. The code was divided into several books, chapters, headings, articles and paragraphs. Those are devoted to: Church, Family, Marriage, House, Livestock and Property, Work, the Transfer of Property, the Spoken Word, Honor, Damages, the Law Regarding Crimes, Judicial Law, and Exemptions and Exceptions.

11.5.1 Kanuni and Blood Revenge

Outsiders mention the Canon of Lekë Dukagjini most often in connection with the institution of blood feuds.[66] The Canon says that: "*The father of family (pater familias) is responsible for the evil or the one who stands behind it*"; "*he who fires a shot draws blood on himself*"; or "*the gun brings blood home*"; "*the gun stains you with blood*".[67] Blood revenge (gjak, gjakmarrje) is exercised by the victim's family in accordance with the Kanun. The Kanun strictly stipulates the preconditions under which blood revenge must take place: the person subject to revenge must be shot during the daytime, on a main street, face to face, after being addressed by

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[65] The recent German and English translations of Kanuni i Lekë Dukagjinit help international peace-keeping soldiers serving in the region understand the traditional culture of the people of the Northern Albania and Kosova as they maintain the daily contact with the local population. (*Kanuni I Lekë Dukagjinit* (KLD). 1989. Albanian Text Collected and Arranged by Shtjefën Gjeçov, Translated by Leonard Fox. Gjonlekaj Publishing Company: New York)

[66] BBC. 5 May 2002. Mike Donkin. "Eyewitness: Albania's Blood Feuds." http://news.bbc.co.uk/1/hi/world/europe/1964397.stm, Accessed 24 Nov. 2003; *New York Times Magazine.* 26 December 1999. Scott Anderson. "The Curse of Blood and Vengeance." (Albanian Students Association (ALBSA) List Serve 11 Oct. 2001) http://www.albnet.com/pipermail/albsa-info/2001-October/002361.html, Accessed 23 Oct. 2003; *The Observer* [London]. 21 September 2003. Sophie Arie Puke. "Blood Feuds Trap Albania in the Past: Thousands Forced to Take Refuge As Medieval Code Targets Fathers and Sons." (NEXIS); Feuds-Forgotten Rules Imperil Everyone (Part 3)." http://www.rferl.org/nca/features/2001/10/12102001125212.asp, Accessed 24 Nov. 2003.

[67] Book X, Ch. XXII, Art. 124., §886–897.

his name.[68] Every family has the right to avenge the death of its members. Blood feuds have always involved only men.[69]

The killer is expected to notify the victim's family and to arrange for the transportation of the corpse back home.[70] Taking the victim's weapon is absolutely forbidden.[71] A proof of the murder must be sent to the victim's family and 24-h ceasefire must be requested through a mediator.[72] If the victim's family kills the perpetrator during the 24-h ceasefire, the revenge is considered accomplished. Killing the perpetrator against the rules of Kanun would justify yet another blood revenge.

Rules on blood feud form only a very small part of the Canon and are not its core, as is often erroneously believed. The Canon encourages the settlement of blood feuds, when possible, through the efforts of friends, mediators, conciliators, warrantors, and other good-willed persons as well as through general amnesty.[73] Blood feuds can also be avoided by punishing the guilty.[74] There are many Kanun specialists in Kosova and Northern Albania who have been working for decades to put an end to the blood feuds plaguing the country.[75]

Attempts in the Kanun to regularize blood feuds reflect a culture of vendetta that has been extremely hard to eradicate.[76] The blood feud culture preceded the Kanun[77] and has been a longstanding blight on Albania,[78]

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[68] Ch. XXI, Art. 122.

[69] Ch. XXI, Art. 124, §897.

[70] Ch. XXI, Art. 119, §844–845.

[71] Ch. XXI, Art. 119, §847.

[72] Ch. XXI, Art. 121–122, §851–856.

[73] Ch. XXI, Art. 135–140.

[74] Book 11 Art. 141.

[75] During the 1990's, one of the most renowned reconciliators was a famous albanologist Anton Çetta (http://en.wikipedia.org/wiki/Anton_%C3%87etta (last visited 13. mart 2008. godine); Jeta Xharra, Comment: *Time to End Destructive Kosovo Clan Warfare*, Balkan Crisis Report, (http://iwpr.net/?apc_state=hsrfber242282&l=en&s=f&o=242281—last visited on March 7, 2008).

[76] *See* in BBC. 5 May 2002. Mike Donkin. "Eyewitness: Albania's Blood Feuds." http://news.bbc.co.uk/1/hi/world/europe/1964397.stm (last visited 24 November 2003); *New York Times Magazine.* 26 December 1999. Scott Anderson. "The Curse of Blood and Vengeance." (Albanian Students Association (ALBSA) List Serve 11 Oct. 2001) http://www.alb-net.com/pipermail/albsa-info/2001-October/002361.html (Accessed 23 Oct. 2003); *The Observer* (London). 21 September 2003. Sophie Arie Puke. "Blood Feuds Trap Albania in the Past: Thousands Forced to Take Refuge As Medieval Code Targets Fathers and Sons." (NEXIS); Feuds-Forgotten Rules Imperil Everyone (Part 3)." http://www.rferl.org/nca/features/2001/10/12102001125212.asp (Accessed 24 Nov. 2003).

[77] Book X, Ch. XXII, Art. 124.

[78] *See* media accounts, op. cit., ibid.

leading to significant depopulation in Northern Albania.[79] Similar feuds can be found wherever the institutions of government and criminal law are to weak.[80] Many organizations have tried to mediate between feuding families and try in an effort to get them to "pardon the blood" (in Albanian: *me e fal gjakun*), but often the only resort is for men of the families involved to stay in their homes, which are considered a safe refuge by the Kanuni,[81] or to flee the village or even the country.[82]

11.5.2 Kanuni and Family

Albanian society is based on the extended family. Often, several generations live together under one roof, even in the more advanced areas. Younger generations consider it is their duty to take care of the elderly.[83] The oldest man in the family (household) is an almost omnipotent *paterfamilias*. The Roman influence on Albanian customary law can be easily observed through the similarity of the role of the *pater familias* in early Roman law and in the Kanun. In the absence of any organized state structure, the *pater familias* takes on a state-like authority, empowered to punish, adopt, and banish members of his family.[84] Under Kanun, the *"father"* of the family is not to be self-appointed, but rather chosen among the elder members of the group. If his rule is not beneficial to the family (household) or leads it into poverty, the other adult family members have the right to dismiss the ineffective *pater familias* and replace him with someone else.[85]

Before the head of family dies, he usually makes his will known on all pending or ongoing family matters. These decisions are respected by all members of the family.[86] Should the head of the family die without having expressed his will in this way, the elders convene to discuss the matters of community life. In such circumstances, the family heritage is usually distributed by the oldest man of the village.[87]

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[79] Ibid.

[80] Ibid.

[81] Book X, Ch. XXII, Art. 124, § 896.

[82] Jeta Xharra, *op. cit*., ibid.

[83] Book II, Ch. II, Art. 9–10, §18–27.

[84] *See* in more depth about this in: Obrad Stanojević, *Rimsko pravo*, Službeni list SFRJ, 1989, p. 34. This similarity of father's authority over life and death of his sons in Roman Law of XII Tables and Kanun was noted by Gjecovi himself in the footnote 32 of Art. 33, §59.

[85] Book II, Ch. II, Art. 9, §24.

[86] Book III, Ch. I,X Art. 39, §105.

[87] Book II; Ch. VIII, Art. 36–43.

No relationship is allowed between men and women outside marriage.[88] Entering into such relationships is considered to be a most serious crime: The male perpetrator faces banishment, his house is to be burnt and his land deserted.[89] The parents of a woman have the right to determine whom she will marry.[90] If she refuses, they can punish her by any means they choose, including death.[91]

Children born out of wedlock are excommunicated from the family and may not inherit the wealth of their parents.[92] A wife and her lover may only be killed caught in the act of adultery with the restriction that the outraged husband may only fire one shot.[93]

11.5.3 Kanuni and Besa

A central element in the jurisprudence of the Kanuni is the concept of the sacredness of promises or "*besa*." The institution of the "*besa*" makes truces possible, and temporary grants of protection to those who would otherwise be subject to blood feuds.[94] The sanctity of the "*besa*" is so profound that it is considered to prevail even after one's death. Other Balkan cultures have adopted the same terminology, so that the concept of "*besa*" exists in the Bosnian, Serbian and Croatian languages. Both "*besa*" and "*vjera*" (the word used in South-Slavic languages) are also used in the same sense in Montenegro and other parts of the West Balkans.

The legal concept of *besa* and solemn oath in the Kanun is notably similar to the concept of *stipulatio* in Roman law and *promissory oath* in the ecclesiastical law of the Catholic Church. These legal concepts are characterized by their formalism and sacral nature coupled with an intrinsic religious and emotional effect. The influence of religion on customary law is typical of legal systems in their early stages of development.[95] The insufficient development of the state apparatus in these young nations prompted them to rely upon customary law and religious sanctions.

Respect for guests also plays a very important role in the legal culture of the Kanuni. The status of the guest is covered by the rules devoted to honor.[96] It is stipulated in paragraph 602 that: "*The house belongs to God*

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[88] Book II, Ch. V, Art. 32.
[89] Ibid.
[90] Book II, Ch. III, Art. 17, §43.
[91] Ibid.
[92] Book II, Ch. V, Art. 32.
[93] Book X, Ch. XXII, Art. 129., §920.
[94] Book X, Ch. XXII, Art. 129., §851.
[95] R. Ihering, *L'esprit du droit romain*, t. III, Paris, 1987, pp. 225, 210.
[96] Book VIII, Ch. XVII, Art. 97–98.

and guest." Therefore all guests are under the host's protection. Murder of a guest dishonors the host and obliges him to avenge the murder.[97]

11.6 Conclusion

The rise and development of the modern state will gradually supplant the need for customary law controls on patriarchal justice, but this evolution is still far from complete. Even in current conditions, the institution of blood feuds, and the rules for the composition of such feuds may be necessary to maintain a (limited) sense of security in society. More modern, sophisticated, and publicly administered laws will and should gradually supplant the local and tribal justice of the Kanuni, but if it is to succeed, this improved rule of law must found itself on the concepts of community, good faith, hospitality and reciprocity that are at the heart of Albanian customary law. The Kanun have played an important role in advancing and maintaining the rule of law for centuries. In a nation that has always suffered under extremely weak and oppressive governments, the tribal system of patriarchy and revenge has offered the only available source of legalism and stability. By codifying, as much as possible, existing customary law, the Kanuni gave Albanians greater predictability and regularity in their social interactions, and to some extent constrained the dangers of absolute power. The institution of blood feuds seems barbaric in modern Europe, but in the absence of reliable state institutions, may be the only available vehicle of justice and stability against crime and lawless violence.[98]

Like all customary law, the Kanuni i Lek Dukagjini are retrograde, patriarchal, sexist and rough. This does not mean that they have not had or do not continue to have a considerable positive effect on law and justice in Albanian and Kosovar communities. More sophisticated justice will become possible only as Albanian society itself becomes more sophisticated. As Albanian commercial life becomes more complicated and Albanian government develops the values and predictability of European modernity, the need for customary law will become less pronounced. This desirable transition will never be successful, however, without a recognition of the valuable traditional values embedded in the Canon of Lek Dukagjini. Albanians have a reverence for honesty and good faith that plays an almost sacred role in their customary law. These same values can bring justice to modernity, and control the atomism and the positivism that have defaced the rule of law in other, more modern, European societies.

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[97] Ibid., Art. 97, §640–652.

[98] Anton Çetta, *Tregime populore, Drenicë*, Bleni I, Prishtinë, 1962.

Chapter 12
Dualism, Domestic Courts, and the Rule of International Law

Fiona de Londras

The continuing development of an international community within which states generate and bind themselves to legal rules and standards is designed not only to achieve international peace and security—as expressed in the Charter of the United Nations[1]—but also in order to create a community of states within which each state is limited by external legal norms and not merely by its own will or political, financial and military resources. In other words, one of the products of the creation of a relatively formalised international community has been the creation of an international legal community of states within which an international rule of law continues to develop. This chapter is not concerned with that international rule of law as it operates on the international legal level; rather it is concerned with the mechanisms by which the rule of international law may be brought about. In other words, it is concerned with ways in which the international rule of law, including international legal norms, might be enforced by means of domestic legal processes thus resulting in a rule *of* international law.

The changing nature of international law—from a body of norms applicable only to states' interactions with one another and with international institutions to a body of norms that can also govern states' interactions with individuals within their jurisdiction—must inevitably usher in a changing role for domestic institutions in relation to international law. If international norms now have a reach inside the borders of a state, then surely those internal institutions must also have some role in the enforcement of those norms? The concern in this chapter will be with the role that domestic courts and judges can play in enforcing the rule of international law in dualist states. This is reflective of the fact that the rule of international law requires domestic enforcement where the international legal norms in question are supposed to limit how states are permitted to act domestically

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[1] Article 1(1), Charter of the United Nations.

M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7_12, © Springer Science+Business Media B.V. 2010

as in the case of international human rights law. It also reflects the fact that domestic enforcement of international law adds to its status as a body of law that has the force of law and must, therefore, be complied with. In other words, domestic enforcement of the rule of international law enriches both the domestic rule of law and the autonomy of international law.

The focus here will be on what courts do in the area of international human rights law. The extent to which judges recognise international legal obligations and the circumstances in which they recognise them provide measures of the strength of what O'Donnell calls "a truly democratic rule of law that ensures political rights, civil liberties, and mechanisms of accountability which in turn affirm the political equality of all citizens and constrain potential abuses of power."[2] In order to ensure that states take their international obligations seriously (thereby bringing about an effective international legal community) and that the malleability of domestic law[3] does not result in situations where states can act in an unacceptably repressive manner within the bounds of domestic legal permissibility and therefore without law-based censure, it is imperative that domestic courts would look to international legal standards (where they are applicable) in their decision-making processes. In dualist legal systems, "looking to" international law may mean different things, depending on the circumstances: it could mean recognising cases in which a particular dispute is substantively governed by international (as opposed to domestic law); it could mean using prevailing international standards to interpret domestic legal standards either in legislation or in constitutions; or it could simply mean domestic courts acknowledging that certain acts—while lawful in the domestic legal system—place the state in contravention of its international legal obligations, even if that has no impact on the domestic permissibility of such acts.

This chapter will concentrate on the degrees to which domestic courts in dualist states "look to" international law, leading to varying degrees of internationalism within dualist legal systems. Dualism, as considered below, is the doctrine that a state is not domestically bound by international treaties it has ratified until and unless those treaties are expressly incorporated into domestic law. This does not diminish the extent of a state's international legal obligations under these treaties. Customary international law (or "the law of nations") has a different positioning and is normally considered to be automatically incorporated as a matter of common law, although

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[2] G. O'Donnell, "The Quality of Democracy: Why the Rule of Law Matters" (2004) 15 *Journal of Democracy* 32, at p. 32.

[3] This refers to the fact that domestic law tends to be particularly receptive to repressive amendment and restructuring, especially where there is a prevailing climate of panic such as, for example, in the wake of a terrorist attack or in relation to a perceived wave of extreme criminality.

that can be particularly problematic in some jurisdictions.[4] The underlying purpose of this study is to consider whether there is something inherently anti-internationalist about dualist legal systems, or to put it another way, to consider whether degrees to which courts use international law are relatable to a legal system's dualist character.

My conclusion will be that there is no necessary conflict between dualism and the international rule of law. The first part of the paper makes out this case on a theoretical level. In Part II, I engage in a short cross-jurisdictional survey that reveals an emerging spectrum of internationalism across dualist states. This survey does not examine every dualist state in the world. The purpose is not, therefore, to present a conclusive picture of the position of international law in every dualist state but rather to argue that dualism alone cannot explain the varying degrees of internationalism we see among superior courts in dualist jurisdictions. Rather, as I argue in the final part of the paper, degrees of internationalism should be understood as matters of legal culture. The final section considers some elements of legal culture that are likely to have an impact on internationalism and identifies areas of possible development in order to strengthen the rule of international law.

12.1 Part I. Dualism and the Challenge of Severed Spheres

The cross-jurisdictional survey contained in Part II of this paper considers international law in the domestic courts of South Africa, the United Kingdom, Ireland and Sri Lanka all of which have dualist systems. The South African Constitution, promulgated in 1996, expressly provides that its jurisdiction is dualist in nature, although "self-executing" provisions within international treaties have automatic domestic effect to the extent that they are not inconsistent with pre-existing international law. To this end, section 231(4) provides:

> Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Pursuant to section 232 of the Constitution, customary international law is adopted as a part of domestic law without legislative enactment. The Constitution also expressly acknowledges the interpretive value of

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[4] Supporting the position see, for example, Harold Sprout, "Theories as to the Applicability of International Law in the Federal Courts of the United States" (1932) 26 *American Journal of International Law* 280, pp. 282–285 and Louis Henkin, "International Law as Law in the United States" (1984) 82 *Michigan Law Review* 1555, pp. 1555–1557. For a critical perspective on this position see, for example, Curtis Bradley & Jack Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 *Harvard Law Review* 815

international law. Thus in section 39(b) it provides that, when interpreting the Bill of Rights, the Supreme Court "must consider international law". Even in the absence of a written constitution, the common law and constitutional convention has long-established that the United Kingdom applies a traditionally dualist approach to international law.[5] The Irish Constitution—Bunreacht na hÉireann—of 1937 clearly identifies Ireland as a dualist nation in Article 29.6: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas [the Irish parliament]."

Although the Constitution of Sri Lanka does not expressly state that the legal system has a dualist approach to international law, it is long and well established that this is the case. This was recently reaffirmed by the Supreme Court in a case that is discussed in some detail below—*Singarasa*—where the Chief Justice held that Sri Lanka was a dualist jurisdiction on the basis its constitutional commitment to separated powers and "republicanism" and on the basis of the historical linkages between the United Kingdom and Sri Lanka.[6]

For some, the dualist tradition means that courts in these and other dualist jurisdictions are inevitably reluctant to look to international legal standards either in place of, as a supplement to, or as a means of interpreting domestic law. As Part II of this chapter will demonstrate, dualist courts do in fact use international standards in all of these ways, albeit to differing extents depending on the jurisdiction. Few courts in any jurisdiction frame their decisions as being expressly dualist or monist, which may indicate that the distinction between the two is more important to theorists than it is to decision-makers. In any case globalisation and the changing nature of international law have made the strict separation of the domestic and international legal spheres very difficult to maintain.

In general, domestic courts faced with the option of applying international principles either in addition to or in place of domestic law have made their decisions on somewhat pragmatic grounds based to a great extent on the particularities of the circumstances and facts of the case or, as Martin Dixon says, they "have looked for practical answers to practical problems".[7] In some cases, this method of deciding upon the applicability of international principles has resulted in what might be called an "anti-internationalist" approach but in others it has led to an "internationalist" approach to the principles at hand. This phenomenon occurs not only

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[5] *Buvot v Barbuit* (1737) Talb. 281; *Triquet v Bath* (1764) 3 Burr. 1478.

[6] *Singarasa v Attorney General* SC SPL (LA) No. 182/99 (2006).

[7] M Dixon, *Textbook on International Law*, 5th Edition, (2005, Oxford; Oxford University Press), p. 83.

between jurisdictions but, as illustrated in Part II below, within dualist systems themselves. This phenomenon was aptly described by Rosalyn Higgins in her volume on *Problems & Process* in international laws:

> . . .I think. . .that the difference in response to a clash of international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned in monist or dualist. I say 'substantially' conditioned, because in reality there is usually little explanation or discussion of these large jurisprudential matters in the domestic court hearing. The response of the court to the problem is often instinctive rather than explicitly predicated. And, if the truth be told, the response is often somewhat confused and lacking in an in an intellectual coherence. The fact that not everything is dependent upon whether a country accepts the monist or dualist view is evidenced by the fact that, even within a given country, different courts may approach differently the problem of the relationship between international and domestic law.[8]

Even leaving aside for a moment this first argument, the theoretical underpinnings of dualism themselves no longer seem to justify the maintenance of a strict approach to the application of unincorporated international standards. Conventionally described, dualism holds that domestic and international legal orders do not interact without express incorporation of the latter into the former because domestic and international law were conceived of as different legal orders operating in different fields. To put it in Kelsenian terms, dualism denies that domestic and international law are "[t]wo normative sources with binding force in the same field."[9] This dualist position may still stand to a degree in what might be described as the "traditional" areas of international law such as diplomatic law, for example, but it could hardly be said to be the case in relation to what Stephan calls "new international law."[10] Julian Ku identifies this new international law as being characterised by two main traits[11]—(1) it deals with the state-individual relationship to an unprecedented extent; (2) it consists of multilateral treaties often administered by international institutions. International human rights law (IHRL) is perhaps the prototypical example of this kind of "new" international law. IHRL is expressly designed to raise the traditional curtain dividing the law between states from the law within states. Rather than dealing with states' interactions with one another, IHRL

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[8] R. Higgins, *Problems and Process: International Law and How we Use it* (1994, Oxford; Clarendon Press), p. 206.

[9] H. Kelsen, *The Principles of International Law*, 2nd Edition, (1967, New York; Holt), p. 553; Kelsen, of course, claimed that they were two such systems and, as a result, "form[ed] part of the same legal order" (p. 553).

[10] P. Stephan, "The New International Law – Legitimacy, Accountability, Authority and Freedom in the New Global Order" (1999) 70 *University of Colorado Law Review* 1555, esp. 1556–1562; *See* also C. Bradley and J. Goldsmith, "Treaties, Human Rights and Conditional Consent" (2000) 149 *University of Pennsylvania Law Review* 399.

[11] J. Ku, "Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes" (2005) 80 *Indiana Law Journal* 319, 329–332.

treats of states' interactions with those within their jurisdiction—an area that is also almost always governed by domestic human rights law. As a result, it is quite often the case that, in relation to individuals' interactions with states, domestic and international law now both apply to the same field at the same time. Thus, on a theoretical basis, dualism does not seem to demand that courts ignore international standards in relation to, for example, individual rights even where there is pre-existing domestic law and the international treaty standards have been ratified but not incorporated.

So, as a matter of first principles and of theory, there is nothing anti-internationalist about dualism. In addition, domestic courts' practice suggests the existence of what I term an "emerging spectrum of internationalisation" between dualist states which demonstrates that different dualist courts are differently receptive to unincorporated international legal standards in their domestic proceedings.

12.2 Part II. The Emerging Spectrum of Internationalisation

If courts' failure to use international law in appropriate domestic settings were a result of the dualist nature of the legal system within which those courts work, then as a matter of logic one would expect to observe relatively constant patterns across a sample of dualist jurisdictions. In reality, however, a trans-jurisdictional survey suggests that different dualist nations take different approaches to international law's role within and relationship to domestic law: some dualist states are super-internationalist, others are moderately internationalist, others take an *á la carte* approach and others are anti-internationalist. In other words, rather than there being a particular dualist position on international law application there appears to be spectrum of internationalisation across dualist jurisdictions. Reviewing a few "plot points" along this spectrum will help to illustrate the phenomenon.

12.2.1 "Super-Internationalist": South Africa

Although South Africa is a dualist state, the Constitution of South Africa creates a structure that could also support a super-internationalist approach. As mentioned above, the Supreme Court is expressly required to consider international human rights law when interpreting the Bill of Rights by section 39 of the Constitution. This is not, of course, a direction that international law is binding absent incorporation (although security services are expressly required to comply with South Africa's international

obligations),[12] nor does it require the courts to give international law a weighting that suggests that it is anything more than persuasive authority. In other words, on the face of it, Article 39 could be satisfied by a cursory reference to international standards. Instead of taking this approach, however, the Supreme Court has tended to apply international standards as a particularly weighty factor in constitutional interpretation. This is especially striking in the area of individual rights under the Constitution and in the developing jurisprudence of binding socio-economic rights in that jurisdiction.[13] Considering the appropriate impact of international law when interpreting the interim constitution, President Chaskelson of the South African Constitutional Court held as follows:

> . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].[14]

This approach has been adopted by the Supreme Court in relation to section 39 of the final Constitution.[15] Thus far, the South Africa Supreme Court has referred to unincorporated international law when finding that the imposition of the death penalty is unconstitutional,[16] that there is a constitutional mandate for the eradication of violence against women that can coexist with the right to a fair trial,[17] that the government has a constitutional obligation to provide housing for those in desperate need of shelter,[18] and that the government has a constitutional obligation to provide anti-retroviral drugs to pregnant women who present with HIV at public hospitals.[19] In all of these circumstances, unincorporated international human rights standards were widely cited to by the court in reaching

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[12] Section 198(c), South Africa Constitution.

[13] *See* generally I. Currie and J. de Waal, *The Bill of Rights Handbook*, 5th ed, (2005, Capetown; Juta and Company), Ch 26.

[14] *S v Makwanyane and Anor*, 1995 (3) SA 391 (CC), para 35 (footnotes omitted).

[15] *Government of the Republic of South Africa v Grootboom & Ors* 2001 (1) SA 46 (CC), para 26.

[16] *S v Makwanyane & Anor*, 1995 (3) SA 391 (CC).

[17] *S v Baloyi* 2000 (2) SA 674 (CC).

[18] *Government of the Republic of South Africa v Grootboom & Ors* 2001 (1) SA 46 (CC).

[19] *Minister of Health v Treatment Action Campaign* 2002 (2) SA 721 (CC)

its decisions. A more in-depth consideration of just one of these cases—*Government of the Republic of South Africa v Grootboom & Ors*[20]—will serve as a useful illustration.

The applicants in the case had left their sub-standard accommodation and began to squat on another's land from which they were also removed. Subsequent to this removal they were awaiting the allocation of low-cost social housing and living in what the court described as "intolerable conditions" in the interim period.[21] Although they had secured an order of the Cape of Good Hope High Court compelling the government to provide them with adequate home and shelter during this period of time,[22] adequacy being described as involving "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum,"[23] the applicants were, instead, provided with sub-standard accommodation with only one tap for water between hundreds of occupants and a complete lack of sanitation.

When considering the meaning of the section 26 constitutional guarantee to "have access to adequate housing" the Supreme Court noted the importance of seeing individual rights within the context of the other rights afforded within the constitutional structure,[24] the context of South Africa's history and its resultant inequalities, and the context of prevailing international legal standards most particularly those contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Although the Court held that there was a difference in the obligations imposed by the constitution and the ICESCR (because the constitution refers to a right of access to adequate housing and the Covenant to a right to adequate housing), the Supreme Court nevertheless engaged in a significant consideration of the Covenant and its role in interpreting the South African constitution. As Penelope Andrews has noted, "even though the Court may not have adopted the methodological approaches of the … United Nations Committee on Economic, Social and Cultural Rights … [it] has for the most part embraced both the substance and the spirit of the various international legal documents."[25]

Thus, the decision in this case was based very simply on the expressly different standards contained in the constitution and in the (unincorporated) ICESCR and not on any notion of the ICESCR as an unimportant or

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[20] 2001 (1) SA 46 (CC)

[21] Ibid para. 3.

[22] *Grootboom v Ooxtenberg Municipality and Ors* 2000 (3) BCLR 277 (C).

[23] Ibid, 293A.

[24] 2001 (1) SA 46 (CC), para 21.

[25] P. Andrews, "Incorporating International Human Rights Law in National Constitutions: The South African Experience" in R. Miller and R. Bratspies (eds), *Progress in International Law*, (2008, Leiden; Martinus Nijhoff), 835 at p. 851.

irrelevant standard. The Court therefore did not depart from its previous holding in *S v Makwanyane* where it held that "while paying due regard to the language that has been used, [an interpretation of the Bill of Rights should be] generous and purposive and give ... expression to the underlying values of the Constitution" including compliance with international human rights law.[26] Thus, even when the Supreme Court diverged from international standards, it did so in a notably internationalist way.

12.2.2 "Internationalist": The United Kingdom

The superior courts of the United Kingdom—and particularly the House of Lords—although not "super internationalist," have nevertheless demonstrated a notably internationalist bent in recent years. Of course, the passage of the Human Rights Act 1998 by which the European Convention on Human Rights was incorporated into domestic law has had an enormously transformative effect on the extent to which international law is considered in the domestic courts. This particular development is itself entirely dualist—the Convention has its present influence precisely because of an act of parliament granting it domestic status. In the area of unincorporated international law and of customary international law, however, the House of Lords has also adopted a significantly internationalist orientation in the last decade or so; a development that can it seems be traced back to the Pinochet litigation[27] and the case of *Kuwait Airways v. Iraqi Airways*.[28]

In the latter case, the House of Lords refused to give effect to a resolution of the Iraqi government purporting to transfer title in a number of aircraft from Kuwait Airways to Iraqi Airways. The case flowed from the invasion of Kuwait by Iraqi forces in 1990 and the consequent transfer of aircraft to Iraq. Following this, the Iraqi Revolutionary Council passed Resolution 369 dissolving Kuwait Airways and transferring all of its assets to the defendant corporation. The question that arose before the Law Lords was whether the Court was obliged to give effect to the transfer of title pursuant to Resolution 369—an Iraqi legislative act. The House of Lords reaffirmed the principle in English public law that acts of a foreign state on its own territory would not be recognised by the UK courts if such recognition was contrary to public policy. The innovative aspect of the case arises in the Law Lords' decision that acts done in violation of international law

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[26] 1995 (3) SA 391 (CC), para 9 *per* Chaskalson CJ.

[27] *R v Bow Street Magistrates' Court ex parte Pinochet* (*No.1*) [2000] AC 61; *R v Bow Street Magistrates Court, ex parte Pinochet* (No.2) [2000] AC 119; *Regina v. Bow St. Metropolitan Stipendiary Magistrate*, *ex parte Pinochet (No. 3)* [1999] 2 WLR 827.

[28] [2002] AC 883.

are not consistent with British public policy and, as a result, were an exception to the act of state doctrine. In reaching this decision the House of Lords relied substantially on unincorporated and customary international law including the ICJ decisions in the *Namibia*[29] and *Nicaragua*[30] cases. In *Pinochet* the House of Lords held that Augusto Pinochet—who had travelled to the United Kingdom on a diplomatic passport—could be extradited to Spain to face trial on charges of having subjected Spanish citizens to torture during his tenure as the head of state of Chile. Although Pinochet claimed diplomatic immunity for acts done while head of state, the Law Lords held that as torture is an international crime in treaty and customary international law, prohibited as a matter of *jus cogens*, and subject to universal jurisdiction it could not be said that the perpetration of torture is an act done in one's capacity as head of state. As a result, heads of state do not enjoy diplomatic immunity against a charge of torture in violation of international law.

Although both *Kuwait Airways* and *Pinochet* suggest an important shift in the extent to which the House of Lords may be willing to take international law into account, it is important to note that these cases have not displaced the principle that certain actions are not justiciable as they form prerogatives not subject to judicial review. Thus, in *R v Jones*,[31] for example, the House of Lords was required to consider whether the alleged illegality of British involvement in the war in Iraq could form the basis of an individual's defence to a criminal charge. The Law Lords declined to assess whether the war in Iraq constituted a crime against the peace and/or a crime of aggression under the Criminal Law Act 1967 by reference to international law, holding that "the courts will be very slow to review the exercise of the prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services".[32] The importance of recognising the executive prerogative relating to foreign affairs and military matters was very much stressed by the Law Lords in this case,[33] but this ought not to be taken to suggest that the UK courts are not internationalist. Notwithstanding the continuing dominance of the prerogative, the Lords have reached to an extraordinary degree for unincorporated international law when assessing the meaning, limits, and compatibility of state action with incorporated international law. This is most clear in cases relating to the Human Rights Act 1998 by which the European Convention on Human

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[29] *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971) ICJ 16.

[30] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Merits, (1986) ICJ 14.

[31] [2005] QB 259.

[32] Ibid, para 30 *per* Bingham L.J.

[33] *See* further K. Reece Thomas, "The Changing Status of International Law in English Domestic Law" (2006) 53 *Netherlands International Law Review* 371, at 386–388.

Rights was made a part of domestic law. This is well illustrated by the Law Lords' decision in *A (FC) and others*; *(X) FC and another v Secretary of State for the Home Department* ("*Belmarsh*").[34]

In *A* the House of Lords had to consider the compatibility of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 with the Human Rights Act. This part of the Act, introduced shortly after the attacks of 11 September 2001, permitted the Home Secretary to certify an individual as a risk to national security and have that individual detained without charge. These provisions applied only to non-UK-citizens who would then be indefinitely detained unless they voluntarily chose to leave the United Kingdom (the government claimed that the individuals affected could not be deported under the absolute principle of non-refoulement in international and European human rights law). Although detainees could challenge their certification in a Special Immigration Appeals Commission, any certificate quashed by that Court could subsequently be reissued by the Secretary of State.[35] The Law Lords considered, *inter alia*, whether this measure was a proportionate interference with Article 5 of the ECHR (liberty and security of person) pursuant to the derogation that the UK had entered to that provision.[36] The Law Lords found the measures to be disproportionate, notwithstanding the emergency that the House accepted existed at the time, because they unreasonably discriminated between UK citizens and non-UK-citizens. In reaching this conclusion, the Law Lords drew on a number of binding and non-binding international legal instruments to substantiate their conclusion that non-nationals can be treated differently in the context of immigration alone; not in the context of counter-terrorism.[37] Although acknowledging that many of these sources were not binding on

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[34] [2005] 2 AC 68.

[35] For comprehensive commentary on this Act *see* H. Fenwick, "The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response?" (2002) 65 *Modern Law Review* 724.

[36] Derogations can be entered under Article 15 of the Convention in the case of war or emergency threatening the life of the nation. Where such a derogation is entered, Article 15 expressly provides that the measures taken on foot thereof must be "strictly required by the exigencies of the situation". In effect, this results in a proportionality analysis of the measures taken pursuant to a derogation.

[37] [2005] 2 AC 68, pp. 117–121 relying on Resolution 1271 adopted on 24 January 2002 by the Parliamentary Assembly of the Council of Europe; General Policy Recommendations published on 8 June 2004 by the European Commission against Racism and Intolerance; Universal Declaration of Human Rights; General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live; General Comment No 15 of the UN Human Rights Committee; International Covenant on Civil and Political Rights; General Comment No 29 of the UN Human Rights Committee; International Convention on the Elimination of All Forms of Racial Discrimination 1966; General Recommendation XI of the CERD Committee; Concluding Observations of the CERD Committee on the United Kingdom (10 December 2003, CERD/C/63/CO/11); R. Lillich, "The Paris Minimum Standards of Human Rights

the Government, Lord Bingham held that "[t]hese materials are inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency" and therefore relied on them.[38]

Even in a time of emergency, then, when one might think that a judicial tendency towards internationalism would be dulled by "national security" argumentation the House of Lords reached for international materials placing itself firmly within the "internationalist" category of the spectrum under discussion.

12.2.3 "Á la carte *internationalist': Ireland"*

Some dualist states seem to apply international law in what can only be described as an *á la carte* manner, where the application of international law does not appear to follow any particular theoretical or even doctrinal trajectory but rather to be more or less *ad hoc*. Ireland is an example of one such *á la carte* internationalist jurisdiction.

As noted above, the Irish constitution provides that international treaties have domestic force only once they have been expressly incorporated by legislative act. In addition, it provides that the general principles of international law (i.e. customary international law) are binding on the state. When considering the role and status of international law within the domestic legal system, the Irish Supreme Court has tended to be relatively willing to accept that "old" international law principles are automatically part of the common law under this provision, but not so in relation to "new" international legal principles.[39] In particular, when confronted with arguments

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Norms in a State of Emergency" (1985) 79 *American Journal of International Law* 1072.

[38] Ibid, p. 121.

[39] Clive Symmons has helpfully separated the kinds of cases in which CIL arguments have been made into a number of categories: (1) "criminal cases where the aim of the litigation was to bring about an acquittal, or for the relevant criminal statute to be declared unconstitutional" which are generally not successful (p. 112. For example *see MFM v MC et al. (Proceeds of Crime)* [2001] 2 IR 385 and *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97) (2) "State-based sovereign immunity cases" where the invocation of CIL has been largely successful (p. 113, *see* for example *Government of Canada v Employment Appeals Tribunal and Burke* [1992] 2 IR 484 and *McElhinney v Williams and the Secretary of State for Northern Ireland* [1995] 3 IR 382); and (3) cases where "a private litigant is seeking not to directly enforce his private rights against the State, but is, rather, taking an *actio popularis* ... to restrain the Irish Government from conducting its foreign affairs in a way allegedly contrary to international law" which have largely been unsuccessful (p. 113. *See* for example *Horgan v Ireland* [2003] 2 IR 468)— C. Symmons, "The Incorporation of Customary International Law into Irish Law" in

that some human rights principles are customary international law and ought to be applied domestically, the Court has tended to invoke the prohibition against incorporating treaties "through the back door" and has taken a non-internationalist approach. This was particularly so in relation to pre-incorporation arguments relating to the European Convention on Human Rights and remains the case in relation to arguments based on "legitimate expectation" of compliance with the state's international human rights law obligations.

Ireland lagged somewhat behind the rest of Europe in terms of incorporating the European Convention on Human Rights and did not do so until the passage of the European Convention on Human Rights Act 2003. Before the passage of that Act, however, the Irish Supreme Court had taken a very inconsistent approach to whether it would rely on Convention principles as persuasive authority in interpreting either statutory, common law, or constitutional doctrine. Thus, in cases related to freedom of expression, for example, the Supreme Court was quite willing to attempt to create a sense of parallelism between Article 40.6.1(i) of the Constitution (protecting the right of the citizens to express freely their convictions and opinions) and Article 10 of the Convention (freedom of expression). In both de *Rossa v Independent Newspapers*[40] and *O'Brien v Mirror Group Newspaper Ltd.*[41] the Supreme Court held that damages for defamation must be proportionate to the damage caused by the alleged defamation. In reaching this decision the Court relied substantially on the balancing approach adopted by the European Court of Human Rights decision in *Miloslavsky v United Kingdom*[42] in which the Court found that an award of £1.5 million made against the applicant (which was so large as to bankrupt him) was "not necessary in a democratic society" and therefore a violation of his freedom to expression in Article 10.

When it came to areas of greater moral sensitivity, however, the Supreme Court was notably resistant to any suggestion that Convention principles ought to influence its constitutional interpretation and application. Thus in *Norris v Attorney General*,[43] for example, the Supreme Court refused to read the constitutional right to privacy and unenumerated rights in Article 40.3 of the Constitution[44] as including any right to engage in consensual acts of male homosexuality, notwithstanding the fact that the very same

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G. Biehler, *International Law in Practice: An Irish Perspective* (2005, Dublin; Thomson Round Hall), 111.

[40] [1999] 4 IR 432.

[41] [2001] 1 IR 1.

[42] (1995) 20 EHRR 442.

[43] [1984] IR 36.

[44] The Irish courts have developed a constitutional doctrine of unenumerated rights—personal rights that have constitutional protection notwithstanding their lack of express protection within the constitutional text itself.

statute impugned before it—the Offences Against the Person Act 1861—had already been found to violate of the right to private life under Article 8 of the Convention in *Dudgeon v United Kingdom*.[45] Rather than accept, as had been argued, that when considering constitutionality the Court ought also to consider compatibility with the Convention, O'Higgins CJ reaffirmed the same Court's holding in *Ó'Laighléis v Ireland*[46] on the relevance of unincorporated international treaties. In that case (which went on to become *Lawless v Ireland*[47] before the European Court of Human Rights), the Supreme Court had held:

> The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, or in the court contemplated by Section IV of the Convention if it comes into existence, but it cannot operate in a domestic Court administering domestic law. Nor can the Court accept the contention that the Act of 1940 is to be construed in the light of, and so as to produce conformity with, a Convention entered into ten years afterwards.[48]

As Samantha Besson has noted, *Norris* is an example of a case where the "Supreme Court took pains not to [invoke the Convention], even when the case at bar presented similar facts to a case decided by the" Strasbourg Court.[49] The Supreme Court has also been particularly resistant to internationalism in relation to what is considered to be the idiosyncratically Irish institution of the Special Criminal Court (SCC). The SCC, established under the Offences against the State Act 1939, is a non-jury court originally established to hear terrorism-related cases but now used to hear any scheduled offences under the 1939 Act (most of which relate to terrorism/paramilitary activity) and any non-scheduled offences that the Director of Public Prosecutions (DPP) has concluded the ordinary courts are inadequate to deal with.[50] The decision of the DPP is reviewable only on the basis of *mala fides* and as he is not compelled to give reasons for his decision such a review is particularly difficult to establish. In the case of *Kavanagh*

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[45] (1981) 4 EHRR 149.

[46] [1960] IR 93.

[47] (1961) 1 EHRR 15.

[48] Ibid p. 125 *per* Maguire CJ. This principle remains good law in Ireland and has been reasserted in, e.g., *Application of Woods* [1970] IR 154; *E v E* [1982] ILRM 497; *O'B v S* [1984] IR 316.

[49] S. Besson, "The Reception Process in Ireland and the United Kingdom" in H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (2008, Oxford; Oxford University Press), 32 at p. 52.

[50] On the history and operation of the Special Criminal Court *see* F. Davis, *The Special Criminal Court*, (2007, Dublin; Four Courts Press).

v Governor of Mountjoy Prison & Ors,[51] however, the petitioner had been successful in his complaint to the UN Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) which found, *inter alia*, a violation of the right to equality before the law as a result of his trial before the SCC for a non-scheduled offence.[52] When Kavanagh petitioned the Supreme Court to strike out his conviction, claiming that he had a legitimate expectation that the state would take cognisance of decisions of the UN Human Rights Commission in individual petitions, the Supreme Court took a distinctly dualist approach. In the Court's single opinion, Fennelly J. held:

> To accept that the appellant has an arguable case under any heading of his claim would imply that the Court may be able to disregard the clear and unambiguous provisions of the Constitution in their relations with international agreements. The Constitution establishes an unmistakable distinction between domestic and international law. The government has the exclusive prerogative of entering into agreements with other states. It may accept obligations under such agreements which are binding in international law. The Oireachtas, on the other hand, has the exclusive function of making laws for the state. These two exclusive competences are not incompatible. Where the government wishes the terms of an international agreement to have effect in domestic law, it may ask the Oireachtas to pass the necessary legislation . . . I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution.[53]

Thus, while the Irish Supreme Court has applied international standards in relatively non-contentious areas within Irish law, the Court has been quite unwilling to express internationalism in relation to individual rights connected to matters of particular moral sensitivity or thought to be connected to the historical and political idiosyncrasies of a partitioned post-colonial island state that endured almost constant political violence and turbulence until the late 1990s. Ireland, then, stands as an example of an *á la carte* internationalist within the internationalist spectrum.

12.2.4 "Anti-internationalist": Sri Lanka

Although Sri Lanka's is a hybrid legal system it does have a distinct and long-standing dualist approach to the role of international law within the domestic legal system. The Sri Lankan courts have long recognised that the UN Charter and the UN Declaration on Human Rights are "of the highest

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[51] [2002] 3 IR 97.

[52] Communication No. 1114/2002, U.N. Doc. CCPR/C/76/D/1114/2002/Rev.1 (2002).

[53] [2002] 3 IR 97, at p. 129.

moral authority"[54] and should be seen in that light. This notwithstanding, a recent decision of the Supreme Court of Sri Lanka appears to mark the Sri Lankan courts out as particularly anti-internationalist.

In *Singarasa v Attorney General*[55] the Supreme Court took the extraordinary step of holding that Sri Lanka's accession to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) was unconstitutional. The decision followed a finding of the UN Human Rights Committee, adjudicating a complaint from Singarasa under the Optional Protocol, that the complainant's rights to a fair hearing (Article 14(1)), to an interpreter (Article 14(3)(f)), to trial without delay (Article 14(3)(c)), to not be compelled to testify in a self-incriminating manner (Article 14(5)), to a remedy (Article 2(3)) and to be free from torture, inhuman and degrading treatment (Article 7) had been violated in the admission into evidence at his trial of a confession allegedly coerced following over 4 months detention in 1993.[56] The confession had been admitted into evidence by the Sri Lankan High Court following a *voir dire* to consider whether it met the standard of voluntariness. However, because the prosecution was proceeding under the Prevention of Terrorism Act No. 48 of 1979 (as amended by Act No. 10 of 1982 and No. 22 of 1988), the burden of proof relating to voluntariness had been shifted to the defendant (in this case, Singarasa) who had failed to convince the Court of the involuntariness of the confession. Singarasa's High Court conviction had been upheld by the Court of Appeal. The U.N. Human Rights Committee considered these proceedings, which were undertaken after Sri Lanka had ratified the Optional Protocol.

Singarasa then returned to the domestic Sri Lankan courts and argued that the court ought to revise its earlier decisions in his case in the light of international law. This followed the argument of the Sri Lankan government that it was not legally competent to release Singarasa or grant him a retrial pursuant to the Committee's finding of violations of the ICCPR.[57] Importantly, Singarasa did not claim that the Court was bound by the Committee's views, but rather than the domestic courts were capable of meeting (and ought to meet) the petitioner's legitimate expectation of state compliance with international law. The Supreme Court, however, rejected this argument and, in fact, held that the ratification of the Optional Protocol was unconstitutional. The Chief Justice's reasoning in reaching this conclusion is somewhat obtuse, but the gist of it seems to have been that the power of conferring public law rights is a legislative power and the

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[54] *Leelawathie v Minister of Defence and External Affairs* (1965) 68 NLR 487, at p. 490 *per* Sansoni CJ.

[55] SC SPL (LA) No. 182/99 (2006).

[56] *Singarasa v Sri Lanka* Communication No. 1033/2001, UN Doc. CCPR/C/81/D/1033/2001 (2001).

[57] Quoted by Sir Nigel Rodley in "The *Singarasa* Case: *Quis Custodiet*. . .? A Test for the Bangalore Principles of Judicial Conduct" (2008) 41 *Israel Law Review* 500, at p. 504.

power to adjudicate individual complaints lies with the Sri Lankan judiciary alone. By ratifying the Optional Protocol, he held, the Executive had exercised legislative powers (through conferring public law rights on individuals) and had unconstitutionally out-sourced judicial powers to the Human Rights Committee.[58] As Sir Nigel Rodley has noted, this line of reasoning was "reached on the basis of complete misunderstanding of the international legal significance of accession to the Protocol"[59] as the views of the Committee are not legally binding in international law.

Not only was the decision patently anti-internationalist in effect, but so too was its structure and reasoning. In addition, the decision had no impact whatsoever in terms of Sri Lanka's international legal obligations under Article 46 of the Vienna Convention on the Law of Treaties. Domestically, however, it appears to suggest not only that accession to the Optional Protocol is now internally ineffective but also to act as a strong disincentive to accession to any other international system that has a capacity to adjudicate on individual complaints in the future. It is also likely to disincentivise individuals from submitting complaints to the Human Rights Committee. Indeed, subsequent jurisprudence from the Supreme Court suggests that individuals ought to be wary about making use of international dispute resolution mechanisms that operate parallel to the domestic judicial system altogether. This seems to be the implication of the unreported decision in *The Joint Apparel Association Forum & Others v Sri Lanka Ports Authority and Others*.[60] In that case the Supreme Court refused to grant respondent trade unions costs on the grounds that they had made applications to the Freedom of Association Committee of the International Labour Organisation while the fundamental rights action before the Supreme Court was still pending. This is notwithstanding the fact that the Committee's jurisdiction does not require exhaustion of domestic remedies.[61] The Court held that litigants are not permitted to seek "external" redress before a matter has been dealt with by the domestic courts and also refused to put the Committee's findings[62] (that a work-to-rule/go slow in effect since 2006 was

[58] SC SPL (LA) No. 182/99 (2006), at pp. 15–17.

[59] "The *Singarasa* Case: *Quis Custodiet*…? A Test for the Bangalore Principles of Judicial Conduct" (2008) 41 *Israel Law Review* 500, 506.

[60] This decision appears not to be reported but is discussed in ITUB CSI IGB, *2008 Annual Survey of Violations of Trade Union Rights*, available at http://survey08.ituc-csi.org/survey.php?IDContinent=3&IDCountry=LKA&Lang=EN (accessed 5 March 2009).

[61] ILO, *Digest of Decisions and Principles of the Freedom of Association Committee,* 5th Edition, (2006), Annex 1, para. 30.

[62] Case No. 2519, discussed in the 348th Report of the Committee on Freedom of Association (2007), available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_087609.pdf (5 March 2009), pp. 311–320.

permissible) into effect, holding instead that the police and armed forces could bring the action to an end.

The net effect of such decisions seems to be to penalise organisations and individuals who elect to avail themselves of international mechanisms of asserting fundamental rights; mechanisms to which Sri Lanka has freely acceded. Importantly, these cases appear to suggest a real reluctance by the Sri Lankan courts themselves (as opposed to the government) to embrace an internationalist approach. Indeed, it seems difficult to avoid the conclusion that the Sri Lankan Supreme Court is substantively concerned with jealously guarding its own jurisdiction and protecting judicial processes and the behaviour of courts from "external" international scrutiny.[63]

12.3 Part III. Theorising the Spectrum of Internationalisation in Common Law

The examples given above would seem to indicate that a legal system's dualist structure is not sufficient to explain a state's positioning on the emerging spectrum of internationalisation. Rather, as Higgins noted over 20 years ago, legal culture also matters in explaining how domestic courts deal with international legal standards. Although it is a complex construct that has attracted a large literature of its own,[64] in the context of this chapter I conceive of legal culture as something very concrete; as cultural perceptions of the nature and role of different kinds of law, legal institutions and lawyers within a domestic legal system. I want, in this final Part, to dissaggregate some elements of domestic legal culture that play an important part in influencing the extent to which domestic courts apply international law and aid in the enforcement of the rule of international law.

12.3.1 Perceptions of the Nature of International Law

It is difficult at times to escape the feeling that at least some lawyers, judges and courts see international human rights law as an interloper rather than as a partner to domestic law. This perhaps flows from the extent to which standard treatments of the relationship between international and domestic law have tended to focus on whether and, if so, when international standards would "trump" domestic standards. Where a state has constitutionally entrenched rights protections it is, perhaps, understandable that

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[63] The ICCPR is now part of domestic Sri Lankan law by means of the ICCPR Act 2007 enacted as a direct consequence of the *Singarasa* decision.

[64] For an excellent review see David Nelkin, "Using the Concept of Legal Culture" (2004) 29 *Australian Journal of Legal Philosophy* 1.

the legal culture would be resistant to a body of externally generated law that threatens to override those established domestic standards. Rather than see international human rights law as an interloper, however, courts and lawyers should view unincorporated international human rights law as a partner and, indeed, interpretative aid to domestic law. This is, as noted above, precisely the approach that has been adopted within the new constitutional order in South Africa and stands in sharp contrast to, for example, Ireland where international human rights law is approached with caution, seemingly for fear of its capacity to undermine peculiarly Irish values or concepts.

This attitude towards international human rights law is particularly curious when it emanates from democratic states with reasonably well established constitutional human rights systems, for it was precisely these kinds of states that had such a powerful influence on the development of international human rights law itself. The United States, for example, was instrumental in the establishment of the Universal Declaration on Human Rights and the resultant international human rights law regime. International human rights law and the US constitutional system share the same basic constitutional values in respect to individual rights (liberty, checked power, balance etc) largely because of the enormous influence that the United States had on the development of this body of law. Given these shared values, the occasional resistance to international human rights law on the part of the US Supreme Court is puzzling.

International human rights law seems especially useful for courts that are undertaking dynamic constitutional interpretation or grappling with issues that raise difficult fundamental questions of constitutional arrangements in crisis situations. Where a constitutional order is committed to dynamic interpretation of constitutional standards, resistance to international human rights law seems particularly misguided because developments in conceptions of individual rights, state powers, and the methods by which proportionate balances can be struck between them have a role to play in informing domestic courts who are engaged in precisely the same function. The same is true where a domestic legal system is grappling with difficult contemporary problems—such as how to engage in counter-terrorism without undermining constitutional structures and values—that the international legal system has dealt with in the past and in relation to which international legal standards have evolved.[65] There have, of course, been times when such a synergetic relationship between international and

[65] On the desirability of relying on international human rights law's structures and principles of counter-terrorism, for example, *see* F. de Londras, "The Right to Challenge the Lawfulness of Detention: An International Perspective on U.S. Detention of Suspected-Terrorists" (2007) 12 *Journal of Conflict and Security Law* 223, pp. 255–260.

domestic standards of rights have emerged, even in areas of particular controversy. Take, for example, the US Supreme Court's decision in *Roper v Simmons*.[66]

Although the US Supreme Court had held in *Stanford* v. *Kentucky*, that the death penalty was not unconstitutional even where it was applied to an individual who had been sentenced to death for a crime committed while a minor in,[67] the Supreme Court drew extensively on international legal standards in reaching the conclusion that the juvenile death penalty was a constitutional violation. All the more striking about this decision is the fact that the Supreme Court relied on the UN Convention on the Rights of the Child in reaching it—a treaty which the United States has not only failed to incorporate into its domestic law but has also failed to ratify within the international legal system. The Supreme Court could, it seems, appreciate in this case the fundamental parallelism between the domestic and international system of rights protection—both systems being concerned with ensuring that the state could combat criminality and enforce sentences for crimes committed, while simultaneously expressing a strong commitment to the limitation of that power by fundamental notions of human dignity encapsulated in the idea of individual rights.

A more widespread appreciation of this synergetic relationship between international and domestic law, in place of a view of international human rights law as interloper, would greatly aid domestic courts in enforcing the rule of international law.

12.3.2 Perceptions of the Place of International Law Within the Rule of Law

As well as a general cultural shift towards seeing international human rights law as a natural partner to domestic law, superior courts in the more internationalist dualist states appear to be prepared to adjust their conceptions of the rule of law to include the principle of compliance with the state's international obligations. Where courts see their role as including the maintenance of the rule of law in situations where other rule of law mechanisms, such as parliamentary processes, have failed to do so, a reassessment of conceptions of the rule of law generally can aid the enforcement of the rule of international law specifically.

Of course, the concept of the rule of law is a notoriously difficult and nebulous one, which suggests that any project proposing to extend its reach might seem questionable. Nevertheless, some judges in dualist states

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[66] 543 US 551 (2005).

[67] 492 U. S. 361 (1989).

have embraced a theory of the rule of law that includes compliance with international law and the protection of individual rights. Lord Bingham is, perhaps, particularly notable in this respect as his article, "The Rule of Law", contains a particularly internationalist articulation of the rule of law.[68] The article formed part of Lord Bingham's project of conceptualising the rule of law pursuant to s. 1 of the Constitutional Reform Act 2005, which expressly recognises the rule of law as "an existing constitutional principle".[69] Undertaking this task, Lord Bingham broke the rule down into eight sub-rules, two of which were linked directly to the enforcement of individual rights and international law in domestic courts[70] —rules that would not usually be perceived as being classically within the definition of the rule of law.

While commentators have long contended that the most renowned of the British rule of law scholars, Dicey, did not intend for respect for human rights to be a requirement of the rule of law,[71] Lord Bingham draws on the Universal Declaration of Human Rights and the European Convention on Human Rights to substantiate his claim that this is now a fundamental part of the contract between state and individual and a contemporary pillar of the rule of law. This is not to say that the rule of law protects all those rights protected by the international covenants cited, but rather that it protects those freedoms, including the right to liberty, involved in the basic social contract Lord Bingham argues affords basis to the rule itself.

Lord Bingham also includes adherence to international legal standards as a sub-rule and implication of the rule of law. While the example he uses in his speech relates to an "older" or more classical area of international

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[68] T. Bingham, "The Rule of Law" (2006) 66 *Cambridge Law Journal* 67.

[69] Constitutional Reform Act 2005, s. 1—"This Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle".

[70] These were (1) the law must be accessible and as intelligible as possible; (2) legal disputes ought to be resolved by application of law as opposed to discretion, except where discretion is "narrowly defined and its exercise capable of reasonable justification" (p. 10); (3) the law should apply equally to all, with the exception of differences that are objectively justifiable; (4) the law must adequately protect fundamental human rights; (5) all people must have the means of resolving good faith legal disputes; (6) public officers must exercise their powers reasonably, responsibly, in good faith and within their allowable extent; (7) methods of adjudication ought to be fair; (8) the state must comply with its obligations under international law—T. Bingham, "The Rule of Law" (2006) 66 *Cambridge Law Journal* 67.

[71] *See*, for example, J. Raz, "The Rule of Law and Its Virtue" in Raz, J., *The Authority of Law: Essays on Law and Morality* (1979, Oxford; Oxford University Press), p. 221; P. Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467. For a detailed consideration of the rule of human rights and judicial determination thereof within a Rule of Law paradigm, *see* B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004, Cambridge; Cambridge University Press), pp. 104–108.

law, i.e. the *jus ad bellum*, there is no suggestion that this basic principle would not also be applicable to "new international law" including human rights law. Unfortunately Lord Bingham does not advance an opinion on whether the domestic implementation status of international law ought to be significant to an assessment of whether a government breaches the rule of law by non-compliance with international legal standards, but he does define international law as including both treaty law and custom, suggesting that regardless of incorporation status certain internationally recognised individual rights may be included in this category.

Lord Bingham's reflections on the meaning of the rule of law are a rare inside glimpse at the centrality of interpreting and applying international law to the job of a superior court judge in the twenty-first century. This seems enormously significant for the status of international law and internationally recognised rights. If courts develop a conception of the rule of law that includes within it the rule of international law then international human rights law may simultaneously increase its own forcefulness in terms of changing state behaviour and succeed in transforming domestic rights standards where those standards fall below the international standard. Judges would take an active role in enforcing the rule of international law and in protecting individual rights without having to step outside of the conceptions of the appropriate judicial role in a system of separated powers. This is precisely the position envisaged by early constitutional scholars to ensure that the principle of parliamentary sovereignty did not result in governmental tyranny.[72]

12.3.3 Perceptions of the Role of the Domestic Courts in Enforcing International Obligations

A common theme in the judgments of *à la carte* internationalist courts appears to be a reluctance on the part of the courts to be seen to force the state into compliance with its international obligations. In Ireland, this has been generally conceived of as an obligation not to incorporate international law "through the back door" of judicial application. Although this may well be a case of reluctance to tred on Executive toes and infringe on the rightful demesne of the government, this is unlikely to be the

[72] Dicey famously argued that individuals' liberties remained protected because of the three-part legislative structure (Monarch, Commons and Lords) and the centrality of the Rule of Law to the English constitutional structure. This structure, he claimed, was "no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch … might effect by ordinances or decrees …"—V.C. Dicey, *An Introduction to the Law of the Constitution,* 8th Edition, (1915, London; MacMillan), quoted in C. Stychin and L. Mulcahy, *Legal Method: Text and Materials*, 2nd Edition, (2003, London; Sweet & Maxwell), p. 63.

totality of the reason for judges' reluctance to apply international law. After all, to keep to the Irish example, the Irish courts have on many occasions handed down judgments that infringe substantially on executive decision-making and arguably breach the separation of powers.[73] The subject matter, together with (or, perhaps, rather than) perceived spheres of institutional competence, is likely to be a significant factor in these decisions. Such reluctance to get involved in matters of international law unless they clearly arise in an inter-state context or concern incorporated international standards perhaps reflects not only a conceptualisation of the rule of law that does not include within it a strong notion of the rule of international law, but also a judicial discomfort with international law generally and consequently with applying it.

The transmission of information about and engagement in training on international law is likely to combat any such discomfort to at least some degree. Indeed, we now know that networks and active participation in local and trans-national networks play a significant role in the shaping and building of information, skills and attitudes. The capacity to "tap into" pre-existing and internationalised networks may well be a mechanism through which some members of the judiciary will be able to become more familiar with principles of international law, together with how other jurisdictions use those norms in their domestic system. In this respect the judges of states such as South Africa and the United Kingdom have the advantage of the Commonwealth system with its sophisticated judicial network system, including the Commonwealth Magistrates' and Judges' Association (CMJA) and Commonwealth Judicial Education Institute (CJEI). Both of these organisations hold regular events in which international law and its relationship to and role within the domestic legal system are regularly considered. Thus, in October 2008 for example, the CJEI held its Biennial Meeting at which an entire session was devoted to "Domestic Application of Human Rights Law."[74] Along the same lines, the CMJA's upcoming conference in 2009 will include sessions on the judicial role in protecting human rights and a half-day colloquium on the rights of children co-sponsored by UNICEF.[75] Not only, then, do Commonwealth judges appear to have a very well-developed pre-existing organised network (at which, of course, informal networks are likely to be formed and cultivated between judges) but that network appears to be committed to considering the judicial role in the protection and enforcement of individual rights. Added to that is

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[73] For a thorough discussion *see* D. Gwynn Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (2002, Cork; Cork University Press).

[74] See the conference programme, available for download at http://cjei.org/events.html (5 March 2009).

[75] *See* the preliminary conference programme, available for download at http://www.paragon-conventions.com/cmja2009/images/updated%20programme_feb_24.pdf (5 March 2009).

the advantage that judges of EU member states enjoy of having become accustomed—albeit slowly—to the application of non-nationally-generated norms through membership of the European Union, which itself has a well-developed sense of judicial networking and an increasingly formalised system of judicial training.[76]

Not only could increasing participation in internationalised and internationalising networks help judges to overcome any comfort deficit that they may experience in relation to international law, but it could also be effective as a means of trying to overcome a potentially underlying cause of judicial discomfort with the application of international law in domestic courts: the sensation of being usurped by international institutions. It seems unlikely that any such feeling is generally a motivating factor in judges' decisions as to whether or not to apply international legal principles, but it can be difficult to escape the sensation that this may well be a motivating factor in some cases and particularly in cases that relate to matters the domestic courts have long held a particular position on. Cultivating an increased conception of international law as something of "us" as opposed to of "them"—or changing our conceptions of international law as interloper, as suggested above—combined with participation in internationalist networks may well help to combat any such sensations and increase judicial receptiveness.

12.3.4 The Existence of an Internationalised Legal Culture

Of course, even where courts may be receptive to the application of international law in domestic settings, adversarial approaches to legal argumentation that are prevalent in dualist systems[77] generally limit judges to relying on materials open to them in argumentation when formulating their judgments. A failure by advocates to open relevant international law to courts can, therefore, have an impact on the extent to which domestic courts rely on international law in their judgments. Not only can this undermine any moves towards internationalism but it can also result in a prudential deficit to one's client whose case could be greatly strengthened

[76] Communication from the Commission to the European Parliament and Council on Judicial Training in the European Union COM/2006/0356; *see* also W. Heusel, "Editorial: A Network for European Judicial Training" (2008) 2 *ERA-Forum* 69. *See* also EuroJust and the European Judicial Network.

[77] There is an emerging recognition of a form of convergence of adversarial and inquisitorial approaches between common and civil law systems, which tend to be adversarial and inquisitorial respectively, in criminal matters that ought not to be discounted in the area of domestic internationalisation. For more on this *see*, for example, J. Jackson, "The Effect of Human Rights on Criminal Evidentiary Processes: Towards, Convergence, Divergence or Realignment" (2005) 68 *Modern Law Review* 737.

by adoption of approaches or principles based on international law. The failure to make international human rights arguments before the US Supreme Court in *Boumediene*,[78] for example, was lamentable "because the protections afforded by an understanding of constitutional standards informed by contemporary international norms arguably affords more secure protection to suspected terrorists … [and] … because it acquiesces in a view of domestic law, as a thing untouched by international standards and understandings of individual rights".[79] Thus, not only judges but also practitioners must internationalise their conceptions of law in order for the domestic legal system to become internationalised in general. Much the same techniques of knowledge- and network-building can be employed to this end, together with the development of an integrated curriculum in law schools where international and domestic law, instead of being taught as entirely distinct fields, are conceptualised as synergetic where appropriate and applicable.

12.3.5 Attitudes Towards Long-Standing Domestic Practice in Sensitive Areas

At times, judicial resistance to international legal standards (particularly in *á la carte* internationalist jurisdictions) appears to peak in cases relating to matters of long-standing areas of sensitivity within that jurisdiction itself. The Irish case of *Kavanagh* considered above concerns one such circumstance. Although international institutions have been critical of the Special Criminal Court and called for its abolition,[80] the Irish system has consistently asserted its constitutionality, appropriateness, necessity and fairness.[81] Indeed, the SCC's role is currently being expanded by legislation to ensure that persons implicated in 'gangland activity' and other forms of organised crime can be tried there.[82] For the Supreme Court to have changed its stance in *Kavanagh* pursuant to views of the Human Rights Committee would have constituted a major break with long-standing

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[78] *Boumediene v Bush* 128 S.Ct. 2229 (2008).

[79] F. de Londras, "What Human Rights Law Could Do: Lamenting the Lack of an International Human Rights Law Approach in *Boumediene* & *Al Odah*" (2008) 41 *Israel Law Review* 562, at 593.

[80] *See*, for example, UN Human Rights Committee Concludes 69th Session, UN Doc. HR/CT/587 recommending "that steps should be taken to end the jurisdiction of the Special Criminal Court."

[81] *See* especially *In re MacCurtain* [1941] IR 83; *The State (Bollard) v The Special Criminal Court,* Unreported, High Court, 20 September 1972; *Savage & McOwen v Director of Public Prosecutions* [1982] 2 ILRM 385; *O'Reilly & Judge v Director of Public Prosecutions* [1984] ILRM 224.

[82] Criminal Justice (Amendment) Act 2009.

domestic policy with absolutely no prompting from the domestic organs of the state. In this idiosyncratically Irish area, there was and remains little official appetite for change. The same is true in other areas where we have developed what are sometimes described as "Irish solutions to Irish problems," such as abortion.[83] Although such a stance may seem inimical to international human rights law which is, after all, designed to motivate changes to domestic laws where those laws are inconsistent with a state's international legal obligations, the truth is that at least some international human rights law systems permit of such an approach. The jurisprudence of the European Court of Human Rights demonstrates this exceptionally well. The Court has developed a Margin of Appreciation which is applied in situations where the Court concludes that no "European consensus" has emerged to give states latitude to enforce sometimes repressive standards without international censure.[84] This approach to areas of moral sensitivity arguably excuses courts and other organs of the state from liberalising their approaches to areas such as reproductive rights and the definition of marriage or family by reference to international human rights law, thereby reducing the liberalising capacities of international standards. Thus, reform and liberalisation at the international level is also required, in conjunction with attitudinal reform at the domestic level, in order to achieve increased internationalisation of domestic law.

12.4 Conclusion

The mere fact that a state has a dualist conception of the relationship between the domestic and the international legal systems does not mean that its courts will fail to be internationalist or that they will fail to refer to international law. Even though an international treaty lacks domestic legal force absent incorporation, it can still have a legalistic function within the state itself by influencing how domestic legal standards are interpreted or, where no applicable domestic legal standards exist, supplementing the domestic legal system. To equate dualism with anti-internationalism is to

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[83] The Irish Constitution includes a recognition of the "right to life of the unborn" (Article [40.3.3]) which now permits Irish women to travel abroad for the purposes of acquiring an abortion, permits the provision of information relating to abortion and other options to women who have unwanted pregnancies, and permits for termination in Ireland where the life of the mother is endangered including as a result of a risk of suicide. For a comprehensive consideration of the long and complex history of the constitutional prohibition on abortion see J. Schweppe (ed.), *The Unborn Child, Article 40.3.3° and Abortion in Ireland: 25 Years of Protection?* (2008, Dublin; Liffey Press).

[84] As well as being applied to situations of 'moral sensitivity', the Margin of Appreciation is also applied as a type of proportionality analysis to state actions taken pursuant to a derogation in times of war or emergency under Article 15 of the Convention. *See Ireland v United Kingdom* [1978] ECHR 1.

ignore both the regulatory capacity of international law and the enforcement capacity of dualist courts in relation to the rule of international law. A brief trans-jurisdictional analysis demonstrates that a legal system's dualist identity does not define the extent of that system's internationalism. A spectrum of internationalism exists across the various dualist jurisdictions. Rather than assuming a lack of internationalism within dualist states and explaining any anti-internationalism that may arise by reference to dualism, in this chapter I suggest that we need to unpack and develop elements of domestic legal culture if we are to understand and increase degrees of internationalism in dualist systems. It is not the dualism of the system that determines the extent to which domestic courts rely on international standards but the internationalism of the actors with it. For domestic courts to play an effective role in ensuring the rule of international law, advocates of international law should aim to study the internationalist elements of other dualist jurisdictions and to internationalise their own legal cultures. This chapter offers some starting points for such a project of internationalisation.

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M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Ius Gentium: Comparative Perspectives on Law and Justice 3,
DOI 10.1007/978-90-481-3749-7,