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THE RULE OF LAW

The great Question which in all Ages has disturbed Mankind, and brought on them the greatest part of thos Mischiefs which have ruin'd Cities, depopulated Countries and disordered the Peace of the World, has been, Not whether there be Power in the World, nor whence it came, but who should have it.

— John Locke

Western political thought has been dominated, since the beginning, with an interest in the procedures by which political power is applied. Theorists as early in the history of the field as Aristotle were primarily concerned not with what a state does, but how a state once entrusted with power will make decisions. In other words, according to what rules will political power be exercised. Perhaps even more dominant than political theory has been the example of the semitic tradition of submission of magisterial authority and citizens alike to *ex ante*, written law. One of the critical products of this ferment, applied with varying degrees of consistency, over the past 2500 years of Western history has been the political and legal doctrine that has come to be known as *the rule of law*.

There are two ways that political and legal power can be applied. One way is for coercive power to be exercised by rulers according to their discretion and in reaction to events as they arise. This has been called the application of "discretionary power" or "the rule of man." The alternative norm — the rule of law — demands that the actions of political and legal bodies be bound by a body of *ex ante* laws. Thus the "rule of law" literally means "rule by the law," as opposed to "rule by those in power." The rule of law, as a principle, is ultimately meant to constitute a seal between the application of coercive power and the justification for its use. In some sense, public choice theory can be viewed as an analysis of the effects of breaches in this seal.

But this is only the broadest way of understanding a term generally used with a much more nuanced meaning. There are implications of the norm as described above that are considered more important than others and are generally

more descriptive of the benefits attributed to the norm. This more descriptive criteria for the rule of law says that the use of political and legal power must be applied, ahistorically, impersonally, and generally. It is these three features — impersonality, a historicity, and generality — that make up the norm as it is conventionally used.

The rule of law first of all implies that law is applied impersonally. That is, the law is not created in order to satisfy the preferences of any individuals. The impersonal nature of the rule of law creates a seal between the application of political and legal power (which is necessarily in the hands of persons in positions of leadership) and the justification of the use of that power (which is assigned to the law itself). This is perhaps the most important aspect of the rule of law as it effectively bars the arbitrary use of power. The scope of the use of power is bound and delimited by a fixed source that has neither personality nor preference. Therefore the application of power cannot be used as a means for attaining individual ends. The implications of this aspect of the rule of law should be clear for public choice theorists. If the rule of law is perfectly applied, it is not possible for political action to be a result of personal preferences. Because public choice fundamentally studies political leaders as fulfillers of personal preferences, public choice is fundamentally the study of breaches in the seal constituted by the rule of law.

This depersonalization is accomplished via the law's fundamental *a historicity* and *ex ante* character. The rule of law is said to be in place only in circumstances where applications of power are bound by rules set forth *prior* to any of that power's applications. The *ex ante* nature of law under the rule of law can be read in one of two ways. The law can fulfill the norm by having been developed prior to its applications in historical time. Alternatively, and more broadly, this *a historicity* can be read as a demand that law be independent of events in the world. That is, the rule of law is said to fulfill its *ex ante* character only if law is created without reference to or motivation from particular circumstances or individuals. In either case, under the doctrine, the law must have a certain independence from the particularities of history.

The flip side of the depersonalization of the law implied by the rule of law is the general nature of the law. This third feature of the rule of law has been called the generality norm. Because law must be developed without regard to particular events in the world, and applied without regard to the preferences of its appliers, it cannot apply discriminately. The rule justifying an exercise of power can never be unique to a particular individual or even a particular grouping of people. It must apply generally. This, too, implies a fundamental seal constituted by the rule of law — under the

generality norm, all persons are safe from the arbitrary use of power against them especially on the basis of particular characteristics.

It must be kept in mind, however, that these characteristics of the rule do not imply that the law cannot make distinctions among groups. In fact it is certainly possible for the *ex ante* body of law to single out groups on the basis of gender, race or even ideology and still conform to the rule of law. The salient feature of the rule is only that these laws must not waver on the basis of particular individuals or individual groups in historical time. They must be blind to particular individuals, and not necessarily to groups defined *ex ante* to the law's applications. It is also important to note that the rule of law does not necessarily do away with the need for a legislature or judiciary. Political and legal leaders ultimately must still interpret and apply the law under the norm and the publication of new laws are possible within the framework. But the scope of law, the social and economic spheres it may affect, and the reasoning behind any future legislation are set up and controlled by a body of law that is defined prior to any such applications. The actions of the political and legal authority are ultimately bound, shaped and justified by an impersonal, non-historical and general body of law.

There are several results of the application of the rule of law that make it a desirable norm. One of these is that the law is made to be ultimately predictable. Because the law does not change as quickly as the preferences of leaders, it is relatively consistent over time. If the law is given in a written form this is especially true. However, even the common law has a consistency to it because it changes only very slowly over time — or at any rate, more slowly than discretionary law. The upshot of this predictability is that individuals under a regime of rule of law can make social and economic plans under the assumption that the basic rules of social interaction are not subject to change. This stability allows individuals to, especially, make long term plans, whereas under discretionary law, long term planning is a risky and uncertain thing. It is this aspect of the rule of law that lead Hayek to refer to it as an “instrument of production” (1945, 1973).

The rule of law also implies that no individuals have coercive power over others. That is, as Hayek argues, individuals have some degree of liberty from the will of other persons. Because all coercive power is held by the state, and the state is governed by *ex ante* law (which has no personality and therefore no personal conflicts), coercive power can never be used to bend the will of one person to the will of another. Conflicts of interest under the rule of law must be resolved using some set of fixed procedural rule and cannot boil down to coercive conflict. Within the

bounds of the fixed law, individuals must settle conflicts peacefully and mutually. Thus the rule of law alone accomplishes much of the liberal program. Individuals have fundamental freedom, at least from the will of other individuals. This freedom, with open recourse to political conflict barred, allows for the development of a contractual rather than coercive system of relationships between individuals. And, importantly to economists, this is the *sine non qua* of markets. As Hayek puts it: “The classical argument for freedom in economic affairs rests on the tacit postulate that the rule of law should govern policy in this as in all other spheres” (1960, 220).

Neither the liberal program nor Pareto improvement is necessarily accomplished by the rule of law, however. A body of *ex ante* law can, after all, still demand the enforcement of illiberal policies. Laws, for instance, enforcing segregation, punishing consensual sexual acts, or banning criticism of the state are all perfectly consistent with the concept of the rule of law. Neither does the rule of law ensure any degree of Pareto efficiency. Government can still legitimately block Pareto improvements and even cause Pareto regresses under the norm. Thus while the rule of law implies freedom from the will of other persons, it does not imply freedom from coercion by the state (see, e.g., Hasnas, 1995).

Finally, the rule of law is generally taken to imply public knowledge of the law by all individuals subject to the law. This feature of the rule of law is less clearly derived from the doctrine itself. However, it is difficult to imagine an implementation of the doctrine without a public understanding of the law. Because, by the generality norm, no individuals have a privileged relationship to the law, all individuals must be capable of holding others accountable to the law. Although the *ex ante* law in principle dictates the process by which enforcement of the law happens, it also must apply to those enforcers. The solution to this problem — who will enforce the law on the enforcers of the law — is a motivating subject of Constitutional theory and political economy (see Buchanan and Tullock, 1962 and Buchanan, 1975). Knowledge of the law allows the possibility of electoral or literal revolutions against those leaders who do not themselves obey law. Constitutional theory — like public choice theory — can be viewed as a study of the mechanisms that hold the rule of law in place. Mechanisms in constitutional theory such as the division of power allow for an alternative to revolution by creating game-strategic balances between branches of enforcers of the law. These mechanisms, too, generally rely on an informed population since they are predicated on the idea that political and legal leaders will leverage the public's knowledge of the law as an implicit threat against power seeking political rivals.

The classical defenses of the rule of law have usually been connected to the strands of liberalism, egalitarianism and rationalism inherent in political philosophy over the course of the field in the West. The traditional desire for a *rational* political order demanded that law not be governed by the passions (read: preferences) of leaders, for reason and the passions were believed to be opposed to one another. Thus rational law had to be set up *ex ante* and based on philosophy in order to avoid taking on an arbitrary character in the hands of political leaders. Plato's ideal republic was a construction of reason and one of the major concerns of the Republic was the development of leadership that would not corrupt and would remain subservient to its rational law. Egalitarian concerns motivated the construction of the rule of law through the generality norm in Aristotle, for example, who was concerned, in great measure, with the balancing of power among the classes in the polis in order to generate temperate law. Finally, as has been mentioned, the rule of law is a necessary but not sufficient condition for most forms of liberalism that have dominated political thought since the enlightenment. Thus the provision of liberty from the coercive will of other persons has also been a classical defense for the rule of law. Exemplary here are the arguments and intuitions behind the liberality of the body of common law that formed the English constitution. All of these pieces of the classical defense are rooted in the West's fundamental suspicion of those in power.

It is this suspicion, too, that lies at the root of the two major justifications for the rule of law offered by political economists in the twentieth century. The first of these is that the rule of law, interpreted strictly, does away with the possibility of political economic problems such as rent seeking. As has been mentioned, the rule of law, by depersonalizing the law, creates a seal between personal preferences and political power. Political leaders are incapable of applying coercive power discriminately. But without the ability to apply some sort of discriminatory political power, political leaders have nothing to sell to rent seekers. Other political problems like vote buying are likewise barred by the doctrine. Once again, candidates have no political currency with which to purchase support; the growth of government is controlled by the *ex ante* law and not the appliers of the law. The political economic problems of interest to public choice theory only arise when the generality norm is violated because the rule of law has been weakened in some way (see Buchanan and Congleton, 1998).

The second of the contemporary political economic justifications of the rule of law, offered by Hayek (who was also concerned with a defense of liberalism generally)

favors the rule of law as a precondition for the blessings of the extended order of the market economy. In Hayek's thought, the rule of law creates an atmosphere of predictability that allows long term economic plans to develop. Capital formation, trading conventions and extensive price systems are impossible without a stable institutional environment to grow in. Further, as has been mentioned, without the rule of law, confiscation and arbitrary punishment, fueled by rent seeking, become viable (and often less risky) alternatives to production and contracting. But this alternative is ultimately a zero sum game, offering none of the growth and innovation offered by markets.

Indeed, there has been some evidence presented in the modern growth literature that the rule of law is strongly connected to growth and thus concludes that Hayek's conjecture about the rule of law as an instrument of production may indeed be right (see Barro, 1997 and Mahoney, 2001). This modern literature fits with historical explanations that place the emergence and adoption of a rule of law — which provided secure and predictable backdrop for economic actors instead of the uncertain and arbitrary backdrop that characterized unbound political rulers — as a primary cause for the economic growth experienced in West from the middle-ages onward (see Birdzell and Rosenberg, 1986). The difficulties of the transition from socialism in East and Central Europe and the former Soviet Union throughout the 1990s, and the failure of development in Africa and other less developed regions has led to a renewed appreciation of the underlying institutional regime required for economic growth. It is now not uncommon for economists to conclude that without private property and freedom of contract, encrusted in a rule of law, and economic actors will be thwarted in their attempts to realize the mutual gains from exchange and economic growth will be stalled as the economic and financial institutions required for advanced material progress will fail to emerge (La Porta et al., 1998). The question that now has moved to center stage of political economy scholarship is how does one successfully grow a rule of law in these reforming economies (see Rubin, 1997).

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RULES VERSUS STANDARDS

In crafting laws, lawmakers cannot effectively foresee all the particular circumstances to which their laws could apply. This renders legislation general in nature and incomplete as a matter of practical necessity, leaving an unavoidable margin of discretion to judges when interpreting laws and applying general principles to the specific situation at bar (Posner, 1989). To guide judges through the margins of discretion, lawmakers may opt to incorporate rules or standards into the laws they write. The functionality of these rules or standards, the consequences of their incorporation into laws, and their significance from an economic perspective, are all the subject of the present study.

A "standard" is the legal or social criterion that adjudicators use to judge actions under particular circumstances. In that sense, standards are circumstantial; they are opened, allowing the adjudicator to make a fact-specific determination such as whether a driver used "reasonable care" in given situation. Standards such as reasonableness are largely intuitive, which makes them easy to understand for the general public. A "rule," conversely, withdraws from the adjudicator's consideration the circumstances that would be relevant to decision-making according to a standard. Rules are more specific than standards; they create bright line tests such as whether a driver exceeded the speed limit of 55 miles per hour. Greater specificity decreases the

flexibility of a rule, often at the expense of an optimal fit between the coverage of a rule and the regulated conduct.

When legislators choose between rules and standards, they must consider when, and at what cost, the rules and standards should be applied to specific situations. For instance, rules require advance determination of the law's content because of the high degree of specificity involved in their formulation. Lawmakers must perform research in advance to determine the appropriate rule to create, *ex ante*. Therefore, rules are more costly for legislators to promulgate than general standards, which require less specificity. Standards, however, are more costly for legal advisors to predict or adjudicators to apply because they require determinations of the law's content *ex post*. Hence, in the event of a car accident where the driver was traveling more than 55 miles per hour, liability would be automatic under a 55 miles per hour rule. However, under a standard such as "reasonableness," the judge or jury would have to determine the facts and circumstances at the time of the accident, and decide whether to impose liability. The application of a standard is more fact specific, but naturally less consistent in the long run. Thus, from an *ex ante* perspective, rules are typically optimal, and from an *ex post* perspective, standards are typically optimal.

1. The Problem of Judicial Interpretation

The optimal degree of specificity of laws has been a frequent subject of debate for centuries. Legal theorists have long attempted to formulate principles that should guide judges when interpreting incomplete legal precepts. In ancient Greece, Aristotle (350 B.C.) realized the unavoidable necessity of incomplete laws. He advocated the doctrine of original intent in legislative interpretation, suggesting that, given the unavoidable incompleteness of legal rules, techniques of legislative interpretation should be developed to give guidance to judges and interpreters when applying such general laws to specific circumstances. In the process of legislative interpretation, judges should fill the void of the letter of the law with the finding of how the original lawmakers would have specified the rule in light of the specific facts, if they had foreseen the problem and dealt with it explicitly.

Incompleteness of legal rules is not only a matter of unavoidable necessity. At times, incomplete legal precepts can be purposefully enacted as a way to delay the decision-making process, transferring to the judiciary some of the tasks that would otherwise have to be carried out *ex ante* by the legislature. In this setting, Jeremy Bentham (1776) addressed the question of optimal specificity of laws, providing fertile ground for the modern debate on rules versus