The Social History of Crime and Punishment in America: An Encylopedia

Rule of Law

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Today the concept of the rule of law as a government of laws and not a government of men is inherent in democracy. It has gone beyond the specialized realm of legal doctrine. In fact, the very conceptualization of the rule of law predates the emergence and establishment of democratic politics. Euro-American history traces the origin of the rule of law back to the ancient Greeks and later to the events and the illustrious figures that contributed to the foundation of British constitutionalism. Aristotle and Plato (400–300 b.c.e.) argued that "the rule of law is better than the law of any individual" meant that judges and governments should abide by the law in order to restrain despotism and to avoid discretionary power. However, until the medieval period, the general assumption was that the prince or the king would be above all law. During the Christian era of the late Roman Empire, the emperor was subordinated to the law of God but certainly not to the law of other men.

The Magna Carta, one of the most ancient written guarantees of English liberties, is traditionally regarded as the first step toward the emergence of the rule of law. It was drafted at Runnymede by the Thames and signed by King John in 1215 under pressure from his rebellious barons. The barons, exasperated by cutthroat royal taxation and supported by the archbishop of Canterbury, Stephen Langton, requested a solemn grant of their rights. While deeply revealing of the feudal system for limiting to nobles the newly acquired rights, the Magna Carta provided for equality before the law, right to property, and religious freedom, reforms of law and justice, and restrained the power of royal officials.

It was not until the 17th century in England that a specific limitation to the power of the king was formulated. Sir Edward Coke, one of the most authoritative common law lawyers of the time, argued that although the king had no superior on earth, he was not legitimated to act as judge because he lacked the specialized knowledge possessed by lawyers. Toward the end of the 17th century in England, the Bill of Rights (1689) provided the Parliament with the first recognition of the principle of exclusive privilege of legislative rights. This had immediate effect on the revenue system, for the king could not raise taxes without seeking legislative approval. Yet separation of powers and primacy of the rule of law in the society at large took a long time to be established. It was not until the 18th century that the judiciary was granted security on the basis of the Act of Settlement (1701), by which King **[p. 1588 ↓]** William III established tenure

for judges unless the Parliament would remove them. Secrecy and independence of the jury would not, however, be a priority until the 18th century. The latter saw four main events taking place, all of which are considered to have substantially contributed to the consolidation of the rule of law: the U.S. Declaration of Independence in 1776, the U.S. Constitution in 1787, the French Declaration of the Rights of the Man in 1789, and the U.S. Bill of Rights in 1791 positing the freedom of religion, of person and property, and the right to due process and a fair trial (also the controversial right to bear arms). Many see the above sequence of events as a historical process of consensus progressively affirming the necessity for the primacy of the rule of law and the progressive abandonment of feudalism for the embracement of modernity and democratic institutions. However, until the 19th century, civil service was still appointed on the basis of patronage, and political participation was still limited to the elite, and all of this was perfectly consistent with the classical liberal tradition theorized by Alexis de Tocqueville.

Contemporary Rule of Law

The current formulation of the rule of law is indebted to Albert Vann Dicey (1835–1922), professor of constitutional law in the United Kingdom. The essential characteristics of the rule of law, as originated from Dicey's ideas, should involve (1) supremacy of the law—all persons, irrespective of their rank and condition, and governments alike, are subject to the law; (2) interpersonal adjudication—law based on standards and on the importance of legal power; (3) restrictions on the exercise of discretionary power and **[p. 1589 ↓]** exclusion of arbitrary power; (4) the doctrine of judicial precedent; (5) the common law methodology; (6) that legislation should be prospective and not retrospective; and (7) separation of powers—the parliament has the exclusive right to the legislative power, restrictions apply on the exercise of legislative power by the executive, and the judiciary is independent.

A crowd is allowed to view the heavily guarded ancient Magna Carta document after it is installed in the U.S. Congressional Library in Washington, D.C., by British Ambassador Lord Lothian in 1939 for the time span of World War II. The Magna Carta was a set of laws imposed on King John by a group of feudal barons attempting to limit his powers.

Dicey's positivistic vision, which did nothing to hide some disregard for continental legal traditions, was limited by its inability to distinguish between arbitrary governments lacking formal rules and political regimes (such as apartheid in South Africa, colonial settlements in many areas of the world, and Nazi Germany) that had rules that were discriminatory and unjust. However, Dicey's original formulation of the rule of law, which he used for the first time in 1875 to describe a salient feature of the constitution, was reinterpreted and expanded by subsequent generations of scholars.

In the 20th century, following the growing legal consciousness regarding the perpetration of human rights abuses at the hands of governments, the concept of rule of law became increasingly interlinked with international human rights seen as focusing on the protection of ethnic minorities, women, and children, as well as on the achievement of international standards of labor. However, it was after World War II, with a shift from human rights as protection of minorities and specific social groups to a set of political, civil, economic, social, and cultural rights established as universal and applicable to everybody, that the notion of the rule of law acquired crucial importance: It was no longer about procedures and formal requirements but about substantive conditions in absence of which governments would be free to infringe upon human rights. The rule of law—it was argued by the United Nations—should meet international standards. Yet in the aftermath of World War II in Europe, imposing positive international laws on all states was perceived as likely to jeopardize the exclusivity of state sovereignty.

Formal and Substantive Rule of Law

North American legal theories know two main versions of the rule of law: formal and substantive. The first one, advocated by Joseph Raz, Lon Fullers, and Robert Summers, stresses procedural features; the second one, promoted by Ronald Dvorkin, Sir John Laws, and Trevor Allan, foresees the need for substantial requirements based on contents in addition to its formal requirements. As a result, a middle path has also been articulated as principled adjudication grounding on legal reasoning, transparency, and accountability. The oaths that all government officers, including the president, Supreme Court justices, and the members of the Congress in the United States must pledge on the Constitution, confirm the superiority of the rule of law over any human prerogative. However, both the judiciary and the executive are granted some degree of discretionary power that fuels scholarly debates on the interpretation of the rule of law, especially in relation to the ongoing absence of ratification by the United States of the Rome Statute of the International Criminal Court in 2000. In the 21st century, the universalistic framework of the rule of law was reasserted with renewed vigor by post-9/11 security precautions resulting in a reconfigured world order. Since then, although a certain consensus consolidated around the necessity to reach universal standards of the rule of law, the debate on how this is to be done is still open on the basis of the factual ground that careful scrutiny of the notion and implementation of the rule of law shows how this encompassing and powerful idea assumes different forms in different contexts.

Although the conceptual origin of the rule of law is considered to be indisputably Western, some scholars point out that similar ideas have been elaborated in the east as well. The most ancient example may be the Cyrus cylinder dated 539 b.c.e. It is a written declaration on a clay cylinder, which attests to a long tradition in Mesopotamia whereby kings used to begin their reigns with reforms. For a long time, the cylinder has been interpreted as an act of self-legitimacy by Cyrus seeking the loyalty of his new Babylonian subjects and promising in exchange respect for the religious and political traditions of Babylonia. However, in the early 1970s, the last shah of Iran adopted the Cyrus cylinder as a symbol of his reign, and while celebrating 2,500 years of Iranian monarchy, he defined the cylinder as “the first human rights charter in history,” an

interpretation that is still advocated by some, but **[p. 1590 ↓]** criticized by others as "anachronistic, tendentious, and erroneous." Another example of non-Western ancient conceptualization on the rule of law is Ashoka's edicts: inscriptions on rocks and pillars disseminated at different location in Afghanistan, India, Nepal, and Pakistan. Made by the emperor Ashoka during his reign (269–231 b.c.e.), they promised reforms and policies and promulgated his advice to his subjects. The present formulation of these edicts, based on earlier and subsequent translations, provides some insights into the ruler's attempt to legitimize his empire by making the moral and spiritual welfare of his subjects the primary concern. Some scholars also trace the rule of law back to Chinese legal tradition that elaborated on the concept of the well-governed society as early as the 2nd century b.c.e. by founding it on the legitimacy of the ruler, the ability to exercise power, and on the exclusivity of the publicly proclaimed power. In fact, the Qin Code (Qin Lu) compiled by Emperor Qin Shihuangdi, who reigned between 246 and 210 b.c.e., is considered to be the first archived code of law in China for its attempt to depart from Confucian immunities related to social hierarchy and kinship.

Notwithstanding undeniable similarities of conceptualizations in the history of political thoughts and legal theories all over the world, it is also a fact that the rule of law sits oddly with the traditions that view good governance as the exclusive prerogative of the ruler and discourage litigation as potentially going against the interest of stability, efficiency of government, and social peace. Inferring, however, a polarization between countries governed by the rule of law and countries lacking the rule of law would not only be too simplistic but also risks discrimination against societies that have different conceptualizations of the rule of law.

Conclusion

Finally, the rule of law in its Western formulation and historical development has its own detractors: Leftist scholarship has denounced it as an ideological construction whose birth is rooted in the purpose of legitimizing the privileges of feudal landowners thanks to the alliance with the common law courts. Yet the criticism of the rule of law features substantial variants. Roberto Unger, Ugo Mattei, and Laura Nader, probably the most radical critics of the rule of law, have pointed out the discrepancy between the rhetoric of the rule of law and the actual practice of governance by colonial regimes

first, and subsequently in the postcolonial market economy. The rule of law is, therefore, considered to be an instrument of oppression and plunder in the hands of Euro-American expansionism. However, among the scholars criticizing the overvaluation of rule of law for perpetuating the stereotypical image of Western legal superiority, some such as Edward Thompson and William Jenner have advanced moderate instances based on the consideration that even the ruling elite must at least partially abide by the rule of law if they do not want to risk losing their legitimacy. Eventually, the rule of law emerges as a concept historically linked with the political struggles for the establishment of democracy in the West but also as a powerful argument for legitimizing institutional settings and military interventions that have not necessarily supported democratic institutions.

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See Also

- Constitution of the United States of America
- Convention on Rights of the Child
- Juries
- Magna Carta
- Tocqueville, Alexis de

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