"[The Rule of Law]" in the US Supreme Court

Hague J Rule Law
DOI 10.1007/s40803-016-0030-1

NOTES

"[The Rule of Law]" in the US Supreme Court: the Elephant in the Court Room?

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Abstract In this brief note I question, in part, the justification for thinking that the US Supreme Court *should* – in a recent Opinion – consider the Rule of Law. I further consider whether it did in fact fail to do so. I take an introspective approach to this question and explore the validity of us – Rule of Law-people – taking a Rule of Law-centric view of the world. In this respect, I do not forensically examine the Court's opinion nor do I question its general accuracy or acceptability. Instead, I consider the omission of *any* mention of the Rule of Law in terms of both the Court's presentation of an argument and our consideration – as readers of a journal with a specific Rule of Law-centric focus – of the same. I conclude that, whilst it is possible to identify Rule of Law related issues almost anywhere, and it may be problematic to seek to do so in every instance, there are some places where it is appropriate to do so. The Court's Opinion was one such place.

Keywords Rule of Law · US Supreme Court · Fuller's desiderata · Bank Markazi v Peterson · Explicit reference

1 Introduction

In its recent opinion of *Bank Markazi v Peterson* 2016, the U.S. Supreme Court upheld the validity of *The Iran Threat Reduction and Syria Human Rights Act* (2012) ("the Act"). The Act operated in retroactive and non-general terms regarding a specific (named) pending litigation. The Rule of Law is not mentioned in the Court's Opinion or the dissent. But, for anyone with a passing acquaintance with

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Published online: 28 July 2016

conceptions of the Rule of Law, when issues related to generality and retrospectivity are explicitly raised – in terms capable of impacting certainty and predictability – it is difficult to read the opinion without the Rule of Law coming to mind. In this note I question the justification for thinking that the Court *should* consider the Rule of Law in the Opinion and, further, consider whether it did fail to do so. In doing so, and somewhat introspectively, I question the validity of (our) taking a Rule of Law-centric view of the world.

I do not forensically examine the Court's opinion in relation to the Rule of Law nor do I question its general accuracy or acceptability. Instead, after briefly outlining the facts and the Opinion, I consider the omission of *any* Rule of Law references or content in terms of both the Court's presentation of an argument and our consideration – as readers of a journal with a specific Rule of Law-centric focus – of the same. I conclude that, whilst it is possible to identify Rule of Law related issues almost anywhere, and it may be problematic to seek to do so in every instance, there are some places where it is appropriate to do so. The Court's opinion was one such place where Rule of Law issues should have been directly addressed.

Before I consider the Opinion or even question whether there should have been any Rule of Law-related discussion therein, it is necessary to explore why the Court's decision or, indeed, any opinion of the Court is significant in relation to the Rule of Law (widely conceived).[1] In doing so, I do not propose to argue for the importance of the Rule of Law generally; I simply take it to be the case that the Rule of Law *is* important. I will, however, consider several reasons why the Court's opinion is significant in this context.

2 Significance of the Opinion

In the crudest sense, the Opinion's significance can be principally delimited in geographical or jurisdictional terms: significance varies whether the case is considered from a perspective that is internal or external to the United States. Inside the United States, most obviously as a result of stare decisis and the doctrine of precedent, the decision has the potential to have immediate and direct impact through the subsequent adoption of a similar non-Rule of Law attitude in similar cases. Yet, there exists significance beyond this. This significance relates, in no small part, to the Court's own frequent invocation of the concept. In its most controversial decisions, the Court has cited the Rule of Law as being of principal importance and it has reaffirmed the Court's role in the maintenance of the Rule of Law. A frequently cited example – from the dissenting opinion of Stevens J, with whom Ginsburg and Breyer JJ join, regarding the contested US presidential elections in 2000 – is: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."[2] The Rule of Law and its comparative importance in matters

[1] I thank the anonymous reviewer for stressing the importance of this consideration.

[2] Bush v Gore 2000, pp. 128–9.

relating to the Constitution has also formed central importance in other well-known Court decisions. For example in *Planned Parenthood of Se. Pennsylvania v. Casey* – where overruling *Roe v. Wade* 1973 was being considered – two statements illustrate the relative importance of the Rule of Law to the Court: "Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable" and "when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case".[3] Even on this – all too – brief consideration, it is apparent the operation and application of the Rule of Law has traditionally played a significant role in Court decisions within the United States.

Why should those of us located outside of the United States be concerned with the Court's consideration – or non-consideration – of the Rule of Law? Whilst there is, of course, no real precedential value to the Court's decision outside of that country, there are two broad realms in which the Court's approach could have some impact or relevance: the theoretical and the practical.[4] In the realm of theory, and the debates surrounding the conceptual content of the Rule of Law, any application or non-application of the concept is arguably of interest and significance; the reasons for and rationale behind the decisions of one of the most public and widely scrutinized courts in the world – where the Rule of Law has previously been held to be of principal importance – render its failure to expressly consider the Rule of Law of fundamental and significant interest. In that realm, the focus or nature of the Court's opinion could be interpreted in many ways. It could be seen as reflecting a trend away from the influence of the Rule of Law on the Court; or, it could be seen as being capable of guiding or influencing the direction or nature of future conceptual debates. I do not suggest or argue for either of these interpretations. I pose them only to illustrate there exists various readily apparent ways in which the Opinion could be significant.

In the realm of the practical application or operation of the Rule of Law, the Court's approach may impact (albeit indirectly) two discreet aspects of the Rule of Law: its perception and its conception. Where the Court has previously placed significant weight on the importance of the Rule of Law, the publication of an opinion that omits any reference to the Rule of Law – where its inclusion may ordinarily be expected or anticipated – has the potential to fundamentally alter perceptions of what the Rule of Law can, and does, do. This altered perception may operate not only on the jurists and theorists referred to above, but also, for example, on donors or other contributors to efforts to promote the Rule of Law in a general sense. Further, and again indirectly, the Opinion may impact future conceptions of the Rule of Law. Whilst I do not intend to suggest that apex courts, or international courts take their cues from the Court, there exists the potential for a shift in focus that may follow from a shift in the theoretical or conceptual understanding of the

[3] Planned Parenthood of Se. Pennsylvania ("Planned Parenthood 1992") p. 854.

[4] Of course, these two broad realms also operate and apply within the United States.

Rule of Law. It does, therefore, seem possible for some important impact or influence to operate – even in some small way – on the interpretation or application of the concept in other fora. This seems to be possible especially as a result of the highly contested nature of the concept and the various ways in which it is, already, interpreted, applied and understood. On this basis, whilst any impact must, without doubt, be an indirect effect, the potential for some impact does nonetheless exist.

Although this brief consideration of why the Court's opinion should be considered important is couched in very general terms, it will hopefully be apparent that there can be ramifications of the Court's opinion not only within the United States but also beyond its borders in the rest of the Rule of Law-world (both conceptually and practically conceived). The significance of the Opinion is, therefore, not to be understated.

As the Opinion's potential importance has been established, I will now go on to consider whether the Court should have considered the Rule and Law and explore the reasons why we – as Rule of Law people – may hold this position. But first I will outline, in very brief terms, the basis and nature of the Court's opinion.

3 The Opinion

The Opinion relates to an Act of Congress that operates so as to make various assets available to satisfy a specific consolidated judgment-enforcement proceeding that was already on foot; that proceeding was directly identified by caption and docket number in the Act. It was accepted that the Act affected a retroactive change to the laws. The specific question to be decided by the Court was whether the legislation violated the doctrine of the separation of powers enshrined in the Constitution; in effect, the question was whether Congress had usurped the role of the Court by dictating an outcome in pending litigation.

The majority saw, in broad terms, no problem with retrospective application of legislation nor with any particularised legislative action that was of non-general application; stating "Congress may indeed direct court to apply newly enacted, outcome-altering legislation in pending civil cases."(2016) The Court explicitly rejected the premise – relied on by one of the litigants – that legislation must be generally applicable.(2016) In doing so, the Court endorsed the acceptability of non-general and retrospective legislation; two commonly cited Rule of Law desiderata.

After briefly surveying the origins and purpose in creating a separation of powers – as a system replacing one where colonial legislatures were at the apex of the judicial pyramid – the Chief Justice's dissenting opinion clearly outlines a view that the Act's terms and focus and impact on a single piece of ongoing litigation amounts to a legislative dictate that "respondent wins". Through reference to, inter alia, the Federalist Papers and Montesquieu, and through a constant thread of references to the dangers of arbitrary power, the Chief Justice sees the majority Opinion as being "a blueprint for extensive expansion of the legislative power" where "Congress can unabashedly pick the winners and losers in particular pending cases".[5]

[5] Bank Markazi 2016, dissent, p. 16.

4 "[The Rule of Law]"?

Did the Court discuss the Rule of Law without saying "Rule of Law"? The brief outline sketched above provides a broad understanding of the positions expressed by the Court. Whilst I have focused on various issues I do not intend the account to be – nor do I think it is – ungenerous. In considering the readership of this journal, I would be very surprised if my account didn't prompt a number of Rule of Law-related questions. The decision had just that impact on me; I both anticipated and expected Rule of Law specific comments, at least in dissent, relating to both the Act's retrospective and non-general impact and operation as well as comments relating to its erosion of certainty or predictability. But that did not happen. In fact, there is not one mention of the Rule of Law at any point; nor is there mention of any particular Rule of Law theorist in particular terms.[6] But was the decision lacking in necessary Rule of Law content?

Of course, the more fundamental question could be whether there was a need to provide a Rule of Law response where the question before the Court related to the separation of powers. Here I adopt a position where the Rule of Law does not include the separation of powers. Yet this makes little difference. Even if the opposing view is taken, that simply makes the exclusion of any Rule of Law commentary all the more surprising: if the separation of powers is part of the Rule of Law, it seems appropriate to discuss the Rule of Law when considering a question on the separation of powers. If the separation of powers is not part of the Rule of Law, for the reasons that follow, it seems nevertheless necessary to address that concept.

The fact that a challenge is not couched in terms of the Rule of Law has not previously precluded the Court's extensive comments on the concept. As noted above, the Rule of Law has taken centre stage in decisions where its inclusion was, it seems, not specifically at issue.[7] So it seems inaccurate to suggest a Rule of Law answer is only warranted in response to a Rule of Law question.

In the absence of specific reference, can we infer a position relating to the Rule of Law? Can we infer the lower Court's decision is affirmed on the basis that "the Act does not offend [The Rule of Law]"? Without even considering the opinion, this inference seems unsatisfying. With a concept that is as pervasive and frequently invoked as the Rule of Law, and in terms where, arguably, fifty percent of the most well-known Rule of Law desiderata seem to be prima facie contravened,[8] it seems explicit address is warranted. The Rule of Law absence *seems* to exist as the proverbial elephant in the room. But is this an accurate statement? Or does the decision *really* have a Rule of Law aspect? In answering these questions, I will

[6] The Chief Justice references Montesquieu and Hamilton (regarding the Federalist Papers #78). Both are often associated with Rule of Law ideas. Here they are referred to in relation to their separation of powers' commentary or in relation to arbitrariness generally.

[7] See, for example, Planned Parenthood 1992. Although that matter, fundamentally, related to a reconsideration of the decision in Roe v. Wade 1973, the Court considered the very idea of overruling a prior decision was fundamentally undergirded by the idea of the Rule of Law. See, in particular, pp. 864-5.

[8] Here, I am, of course, referring to Fuller's eight desiderata in Fuller 1964.

shortly consider whether it is appropriate to view the world through our Rule of Law-tinted glasses. But, before going further, it seems sensible, despite any instinctual response we – Rule of Law-people – may have to the Opinion, to first address more fully whether the question before the Court *actually* warranted a Rule of Law-answer.

5 A Rule of Law Issue?

Notwithstanding arguments relating to the precise meaning of the Rule of Law, it is uncontroversial to categorise a question as potentially warranting a Rule of Law answer if it relates to the potential exercise of arbitrary power. I have in mind a meaning where "the exercise of political or legal authority can count as non-arbitrary provided that it is effectively constrained by common-knowledge rules, procedures, or goals."[9]

Based on this bare definition, there seems to be an issue regarding the potential exercise of arbitrary power. The matter before the Court related to the question of whether Congress's actions and the Act have contravened the Constitution in terms of that document's position as a statement of common-knowledge rules or procedures. However, this would imply *all* Constitutional matters relate to the Rule of Law. Perhaps that is the case; but can a finer distinction be identified? The fact that the matter relates to the potential aggregation of power in one arm of government – giving rise to the specific separation of powers' challenge – provides one such distinction. Not all Constitutional challenges take this form. Of course, the aggregation of powers in one body does not necessarily lead to arbitrary power in the sense of the subsequent non-adherence to rules, procedures or goals – but it does increase the *risk* that non-adherence will go unchecked; this suggests a Rule of Law question; the separation of powers' frequent association with the Rule of Law may arise for this exact reason. Another way of thinking of this finer distinction relates to the fact that the Constitution does establish a clear separation of powers doctrine that operates in common knowledge terms. Exercise of a power – to create a law that appropriates more power or impinges on another arm's Constitutional power – could also, therefore, be seen as arbitrary.

In its most basic terms, the Act and the challenge to it, relate directly to the ability of the legislature to create, change and, arguably, affect the application of law in terms of a particular piece of litigation. This aspect of arbitrariness was expressly acknowledged in an extract relied on in the dissent: "[i]f the legislative and judicial powers are united []the law may then speak a language, dictated by the whims, the caprice, or the prejudice of the judge."[10] Accordingly, at least in terms of arbitrariness acting as a proxy indicator of – or a justificatory factor for – the existence of a Rule of Law question, any intuitive Rule of Law-inclinations that the issue has a Rule of Law aspect appear well founded. This suggests a Rule of Law answer is required.

[9] Lovett 2010, p.99.

[10] Bank Markazi 2016, dissent, p. 5, (quoting Handlin and Handlin 1966, p. 377).

6 A Rule of Law View (of the World)?

These justifications may be self-evident to us Rule of Law-people: of course questions of arbitrariness give rise to Rule of Law questions; of course Rule of Law questions arise on reading the Opinion; of course it is surprising there is no mention of the Rule of Law in the Opinion. But is it appropriate for us to constantly wear our Rule of Law-tinted glasses? *We* – Rule of Law-people – may respond: "why would it *not* be appropriate?" Non-Rule of Law-people may reply that: the Rule of Law is too broad and is an ill-defined and jurisdictionally and conceptually endemic concept; there is *so much* Rule of Law 'stuff' that one could identify questions everywhere in everything; and the endemicism of the Rule of Law results in the conceptual equivalent of snow-blindness. I am surely not alone in seeing the irrationality in these replies. However, these potential issues alone do not suggest the endeavour itself is not useful (no matter how difficult). A Rule of Law view of the world is not, therefore, inappropriate.

7 Is "the Rule of Law" Needed (in the Opinion)?

Is there a need to specifically talk about and refer to the Rule of Law? The phrase "the Rule of Law" is not mentioned in the Opinion but – as we have seen and although the question is couched (and answered) in terms of the separation of powers – addressing the Rule of Law in terms of the potential for arbitrary exercise of power is necessary. But does the *phrase* need to be used to obtain a Rule of Law result? Brief historical reflection suggests a negative response. The broad idea of the Rule of Law was not magically created upon Dicey's popularisation of the phrase. Any number of popular articles' introductory paragraphs cite the Rule of Law as originating with Aristotle. There are few instances of the phrase's use by Rule of Law favourites like Locke and Hobbes; even Fuller makes scant use of the phrase itself. So a Rule of Law result can follow despite the phrase's absence.

So, does the Court affect a satisfactory Rule of Law solution *without* invoking the phrase? In other words, does the Opinion, by virtue of the close relationship between the question asked and the Rule of Law, address the same issues *had* a Rule of Law solution been provided? The answer in this instance seems to be an unequivocal 'No'. The very nature of the Court's decision which, in essence, suggests Congress can enact non-general retrospective legislation notwithstanding the separation of powers doctrine indicates a specific discussion of the rationale behind the contradiction of these frequently cited Rule of Law desiderata would have been necessary (to remove the elephant in the room). The potential benefit in doing so would not only flow through to the community of Rule of Law-tinted glasses wearers, but would have fortified a decision that may be seen – by virtue of the endorsement of non-generality and retrospectivity – as being intuitively hard-to-swallow by many others. In these terms, a lack of explicit address means there is no satisfactory Rule of Law answer.

Putting aside the actual Opinion of the Court, can a Rule of Law solution be affected – in a post Diceyan, Rule of Law-phrase, world – *without* invoking the

phrase? Whilst there is no magic in its use, and although it remains heavily contested, can a sensible Rule of Law account follow without reference to the phrase? The Court could have addressed issues associated with both generality and non-retrospectivity as well as issues of certainly and predictability in relatively short terms. These could have been addressed directly without invocation of the (non-)magic phrase itself. Doing so would have avoided any speculation as to the Court's positions on these things and would have directly addressed the elephant in the room. But, of course, this would have simply been an instance of an explicit Rule of Law answer that avoids using the phrase itself. This approach would only lead to conceptual unclarity. There seems little to be gained by *not* using the phrase.

8 Summary

In terms where we – Rule of Law-people – identify Rule of Law issues almost anywhere, the failure to address the Rule of Law in explicit terms wherever a Rule of Law question exists *may* not be something that is readily criticised. However, where there appears to be very clear Rule of Law implications and the consideration of related ideas – like the separation of powers – does not cover the field, the failure to explicitly address the Rule of Law does little to ground a judgment, focus the mind, and generate certainty and predictability. To satisfy *those* Rule of Law desiderata that the Court has professed to uphold, it was, in this decision, incumbent on the Court to directly and explicitly address the Rule of Law.

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