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The Rule of Law and Human Rights

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THE RULE OF LAW AND HUMAN RIGHTS

*Berta Esperanza Hernández-Truyol**

I.	INTRODUCTION	167
II.	THE RULE OF LAW IDEA(L)	168
III.	THE RULE OF LAW AND CULTURE	176
IV.	STRUCTURAL REALITIES OF THE RULE OF LAW	180
V.	CRITIQUES OF THE RULE OF LAW	181
VI.	THREE KEY OBSERVATIONS ABOUT THE RULE OF LAW	186
	A. <i>Human Rights</i>	187
	B. <i>International and Local Linkages</i>	187
	C. <i>Trade and Human Rights</i>	189
VII.	CONCLUSION	193

I. INTRODUCTION

This Essay engages the idea(l) of the rule of law and its relationship to the human rights ideal. This piece opens by exploring just exactly what is meant by the rule of law. To develop this analysis, this work initially explores the definitions, elements, and theoretical underpinnings of the rule of law. Second, it delves into the cultural particularities of the rule of law; third, it describes numerous structural realities of the rule of law; and then, it sets out several of the critiques directed at a universal rule of law idea(l).

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This essay next makes three key observations concerning the rule of law: (1) the relationship between the rule of law and human rights; (2) the interrelatedness of the international rule of law to a local rule of law; and (3) the insights the concept of the rule of law affords to the exploration of the nexus between trade and human rights.

To conclude, this piece suggests a holistic approach to the rule of law. Such a model recognizes both the instrumental or rule book dimension and the substantive or rights dimension of the rule of law. It also accepts that the rule of law, while universal in its conceptualization, must accommodate cultural particularities of different societies. Moreover, this model acknowledges that local and global versions of the rule of law operate coherently in these different geographies, and that both local and global rule of law discourses are bounded by human rights parameters of full personhood, dignity, and justice.

II. THE RULE OF LAW IDEA(L)

Defining the rule of law is a difficult undertaking; it almost seems that the rule of law is somewhat like the Potter Stewart vision about obscenity: we know it when we see it.¹ This observation suggests that each person, group, or nation can have a different vision of the rule of law. The definitional challenge derives from the reality that the rule of law is a contested concept.² With the passing of time, different conceptions have evolved. Moreover, different legal traditions have divergent understandings of what the rule of law idea(l) is or should be.

The modern idea of the rule of law has been traced as far back as Aristotle for whom the rule of law was tantamount to the rule of reason.³ Others have identified the rule of law with natural law or respect for transcendent rights.⁴ The term itself, however, at least in its contemporary

1. *Jacobellis v. Ohio*, 84 S. Ct. 1676, 1683 (1964) (Stewart, J., concurring).

2. Margaret J. Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

3. See Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) (describing Aristotle's view that the rule of law is "nothing less than the rule of reason").

4. See Walter Berns, *Foreword: Natural Law, Natural Rights*, 61 U. CIN. L. REV. 1, 2 (1992) ("[M]an is by nature inclined . . . toward a variety of ends that possess a natural order. . . . The natural law consists of commands and prohibitions directing [man's] actions toward these ends."); Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 163 (2002) ("[T]he 'natural law' . . . theory of law, which goes back at least as far as Aristotle. . . . is based on rational reflection on the nature, conditions, and experience of being a 'free and equal' human being in a world with other such beings."); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1510 (1988) ("[E]ach person, whether she knows it or not, ought to accept the law in

usage, is more directly traced to the British jurist Albert Venn Dicey, who articulated it as follows:

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. . . . We mean in the second place, . . . not only that with us no man is above the law, but (what is a different thing) that here 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.⁵

There are close ties between Dicey's conception of the rule of law and liberalism.⁶ At its foundation, the rule of law provides predictability and guidance; in conduct, it enhances individual autonomy.⁷ Modern theorists have observed that three characteristics are central to a cogent notion of the rule of law: (1) absence of arbitrary power on the part of the government; (2) administration of ordinary law by ordinary tribunals; and (3) existence of general rules of constitutional equality resulting from the ordinary law of the land.⁸ With these characteristics, the rule of law serves three purposes: (1) it protects against anarchy; (2) it allows persons to rely on laws and plan their lives in a way in which they can predict what consequences will flow from their actions; and (3) it protects against arbitrary and capricious action of the government.⁹

Because this essay engages the international law, it is instructive to juxtapose Dicey's and the International Commission of Jurists' definitions of the rule of law. In its Rule of Law Project, the International Commission defined the rule of law in a manner that fits a diverse global world:

The principles, institutions and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political

question as conformable to some assertedly objective notion of reason, nature, fairness, utility, or other criterion of rightness.").

5. A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 179, 185 (5th ed., 1897); see also Arthur L. Goodhart, *The Rule of Law and Absolute Sovereignty*, 106 U. PA. L. REV. 943, 945 n.4 (1958).

6. Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 n.2 (1997) (citing A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 181, 205 (2d ed. 1959)).

7. Brian Tamanaha, *Theory*, in *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 12 n.31 (forthcoming 2004) (citing Jeremy Waldron, *The Role of Law in Contemporary Liberal Theory*, 2 *RATIO JURIS* 79, 84–85 (1989)), available at http://www.hofstra.edu/pdf/law_tamanaha.pdf (last visited Oct. 13, 2003).

8. DICEY, *supra* note 5, at 179–92; see also Radin, *supra* note 2, at 781 n.2.

9. See Fallon, *supra* note 6, at 7–8.

structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.¹⁰

Like Dicey's definition, the Commission's version addresses the three concerns regarding arbitrary government power: basic laws, implementation, and a higher authority. In domestic contexts, the higher authority is constitutional norms; in the international realm, the higher authority is human dignity which, this essay posits, translates to human rights.

Given this human rights connection, it is interesting to note the existence of "two very different conceptions of the rule of law,"¹¹ either of which may serve the purposes of the rule of law. One, which Dworkin calls the "rule book" model, is narrow and holds that the government can only exercise power against persons according to "rules explicitly set out in a public rule book available to all . . . [which] must be followed until changed."¹² This approach does not concern itself with the content of the rules.¹³ Others view such an account of the rule of law as an instrumental version which provides that "the rule of law is a prerequisite for any efficacious legal order."¹⁴

The instrumental conception of the rule of law coincides with Lon Fuller's eight elements that comprise "the morality that makes law possible."¹⁵ While Fuller couches these elements in morality and Raz grounds them in positivism, they closely track in substance.¹⁶ Fuller's conditions for law are: (1) generality; (2) notice or publicity/promulgation; (3) prospectivity/nonretroactivity; (4) clarity; (5) consistency/noncontradic-

10. INTERNATIONAL COMMISSION OF JURISTS, THE DYNAMIC ASPECTS OF THE RULE OF LAW IN THE MODERN AGE, Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok, Thailand, Feb. 15-19, 1965, at 17 (citing the working definition of the rule of law as a dynamic concept, adopted by the Commission at the New Delhi Congress in 1959). It is noteworthy that although it is a relatively recent document, this definition uses the traditional, liberal theory gender-exclusive term dignity of "man." A better term would be dignity of persons. See *infra* text accompanying notes 41-42.

11. See RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

12. *Id.*

13. *Id.*

14. Radin, *supra* note 2, at 783.

15. *Id.* at 784-85 (citing LON FULLER, THE MORALITY OF LAW 157 (rev. ed. 1969)). Radin labels the instrumental version as "How to Do Things with Rules."

16. See *infra* text accompanying note 28 (articulating eight principles for the rule of law).

toriness; (6) obeyability/conformability; (7) stability; and (8) congruence/consistent application.¹⁷

However, these eight elements can be reduced to two basic principles: (1) rules must exist and (2) rules that exist must be able to be followed, based both on their clarity and their fairness.¹⁸ To be sure, these elements incorporate notions of morality in the requirements of obeyability and fairness.

Dworkin's second conception is the "rights" notion of the rule of law, which is more attuned to the human rights idea as

[i]t assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole [and] . . . insists that these moral and political rights be recognized in positive law. . . . [I]t requires that the rules in the rule book capture and enforce moral rights. . . . It supposes that citizens have moral rights . . . rights other than and prior to those given by positive enactment.¹⁹

Some regard this rendering of the rule of law as a substantive version which holds that "the rule of law embodies tenets of a particular political morality."²⁰

17. Radin, *supra* note 2, at 784–85; Andrei Marmor, *The Rule of Law and Its Limits*, USC Public Policy Research Paper No. 03-16, available at <http://ssrn.com/abstract=424613> (last visited Oct. 13, 2003); see also CASS, *infra* note 38, at 6–8 (noting Fuller's eight-condition approach).

18. Radin, *supra* note 2, at 785; see also *infra* text accompanying note 26 (listing the two aspects of the rule of law from Raz's formalistic perspective).

19. DWORKIN, *supra* note 11, at 11–13. It is important to note that references to moral rights raises the comparative legal question of what those rights are. States with different legal, political, cultural, and historical traditions similarly have different approaches to moral rights. Even states viewed as having shared political ideologies, such as the United States on the one hand and western European states on the other, have very different approaches to moral rights. The European adoption, to an extent, of canonical moral rights generates a much broader conception than that of the United States. It is "hornbook" law that in the United States a promise without tangible, valuable consideration does not generally constitute an enforceable contract. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 172 (5th ed. 2003) (consideration required, "donative promises generally are not enforced"). Courts might find that a "moral" obligation exists, but that is not generally the basis for an enforceable right. *Id.* at 228–29 ("promise in recognition of a moral obligation" not generally enforceable). In civil law systems, on the other hand, so-called gratuitous promises establish a legal obligation that is enforceable in court. For example, donations, inter vivos gifts, or real or personal property constitute valid and enforceable contracts if accepted by the recipient. Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT'L & COMP. L. REV. 389, 459 (1996) (describing inter vivos gifts and providing citations to civil codes of several countries).

20. Radin, *supra* note 2, at 783.

The substantive conception of the rule of law is one of formal justice which promotes liberty.²¹ The substantive conceptualization of the rule of law has four requirements. First, “ought implies can.”²² This requirement suggests that the persons subject to the rule of law must be able to conform to the norm and that those in charge of enforcing the norm must act in good faith. Therefore, “[i]mpossibility of conformance . . . must be recognized as a defense.”²³ Second, similar cases must be treated similarly. This precept incorporates the requirement of consistency and limiting judicial discretion.²⁴ Third, there can be no crime without law. This principle embraces the notions that law must be known, published, clear, general, and not retroactive. Finally, the fourth factor provides that structures that allow the rule of law to function need to exist — trials, hearings, rules of evidence, due process, competent advocates, impartial and independent judges, and fair and open trials.²⁵ This substantive model also embraces morality.

Other theorists have provided slightly different, but consistent, interpretations of the meaning, content, and context of the rule of law. In Raz’s formalistic approach, the rule of law “has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.”²⁶ Centrally,

the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice.²⁷

He expands on this idea by listing eight important principles that can be gleaned from the rule of law idea:

- (1) All laws should be respectful, open, and clear. . . .
- (2) Laws should be relatively stable. . . .

21. *Id.* at 787 (noting that “Rawls may be read as making the stronger claim that the rule of law is required for liberty”) (construing JOHN RAWLS, *A THEORY OF JUSTICE* 235 (1971)). Radin refers to this substantive conception as “How to Foster Liberty and Constrain Leviathan.” *Id.*

22. Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93 n.377 (2003) (paraphrasing ROGER J. SULLIVAN, *IMMANUEL KANT’S MORAL THEORY* 320 n.6 (1989)).

23. *Id.* at 788 n.25 (citing RAWLS, *supra* note 21, at 239).

24. *Id.*; see Walter E. Williams, *False Civil Rights Vision and Contempt for Rule of Law*, 79 *GEO. L.J.* 1777 (1991) (discussing the need to treat similarly situated persons similarly).

25. Radin, *supra* note 2, at 788.

26. Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 213 (1979).

27. *Id.* at 214.

- (3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules. . . .
- (4) The independence of the judiciary must be guaranteed. . . .
- (5) The principles of natural justice must be observed. . . .
- (6) The courts should have review powers over the implementation of the other principles. . . .
- (7) The courts should be easily accessible. . . .
- (8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.²⁸

The instrumental or rule book conception and the substantive or rights conception of law have common “philosophical underpinnings.”²⁹ Yet, notwithstanding these commonalities, the instrumental and substantive

28. *Id.* at 214–18. As with the notion of moral rights, judicial independence is an interesting comparative issue. “Judicial independence” is viewed in radically different ways on the opposite sides of the Atlantic. The “American” view is that the judiciary is a separate and coequal branch of government with the power to limit the actions of the other two branches. The U.S. judiciary largely defines its own discretion. *Marbury* is perhaps the most famous example of this power in American law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). “It is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177. But to the French, the ordinary judiciary is not a branch of government that is equal to the legislative and the executive. *See generally* RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 133–46 (3d ed. 1985) (describing French and other civil law systems’ approaches to the judiciary). Therefore, the power of the judiciary is severely limited by law. For example, Article 5 of the French Civil Code provides: “Judges are forbidden to pronounce decisions by way of general and regulative dispositions on causes which are submitted to them.” CODE CIVIL art. 5 (Fr.) (John H. Crabb trans.). Moreover, in France only the administrative adjudication system, which is not considered to be part of the “ordinary” judiciary, has the general power to review executive action, and legislative action may only be reviewed by the constitutional council, a specialized body that is only allowed to invalidate legislation before it is signed into law by the president. In other systems, such as those of Spain, Germany, and Italy, specialized constitutional courts have been created to resolve constitutional questions but their power and the legal effect of their decisions are expressly defined by constitutional provisions. *See generally* JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, EAST ASIA AND LATIN AMERICA* 750–57 (1994) (general approach to “ordinary judiciary”); *id.* 729–40 (describing administrative adjudication in France and Germany, among others); *id.* 757–801 (describing French Constitutional Council, and Spanish, German, and Italian constitutional courts).

29. Radin, *supra* note 2, at 792. Specifically, Radin notes five shared assumptions of both conceptions:

- (1) law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule-givers and appliers, *versus* rule-takers and compliers); (5) the person is a rational chooser ordering her affairs instrumentally.

Id.; *see also supra* text accompanying notes 11–13 (introducing Dworkin’s rule book and rights models).

conceptions of the rule of law are different because “[t]he instrumental conception is a model of government by rules to achieve the government’s ends . . . [whereas t]he substantive conception is a model of government by rules to achieve the goals of the social contract: liberty and justice.”³⁰

It is appropriate to note two other important conceptual distinctions. One is the difference between the notions of rule of law and rule by law. The other is the distinction between the ideas of rule of law and rule of men.

First, on the one hand, the rule of law provides that no one is above the law, not even the government, which itself is subject to norms and normative standards.³¹ This notion of the rule of law provides that law’s authority emanates from its autonomy. As such, the rule of law satisfies its three characteristic meanings.³² Significantly, as discussed above, the rule of law can possess an instrumental or rule book conceptualization which, unlike the substantive or rights model discussed by Dworkin,³³ is not linked to notions of justice or fairness. As Raz, who focused on law not only as formal but also as positive,³⁴ has famously stated,

A non-democratic legal system, based on the denial of human rights . . . may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. . . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.³⁵

Such a notion of rule of law can be invoked against the powerless and such “a version . . . has no memory and no soul.”³⁶

30. Radin, *supra* note 2, at 792.

31. BARRY HAGER, *THE RULE OF LAW: A LEXICON FOR POLICY MAKERS* 23 (The Mansfield Center for Pacific Affairs, 2000), available at http://www.mcpa.org/programs/rol_lexicon.htm (last visited Oct. 13, 2003) (noting “th[e] idea that the government itself is bound by law is the heart of the Western contribution to the doctrine of the Rule of Law”); see also Raz, *supra* note 26, at 212; Bo Li, *What Is Rule of Law?*, PERSPECTIVES, Vol. 1 No. 5 (2000), available at http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm (last visited Oct. 13, 2003).

32. See Radin, *supra* note 2; see Li, *supra* note 31 (“[R]ule of law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.”).

33. See *supra* text accompanying notes 10–13 & 19–29.

34. Tamanaha, *supra* note 7, at 9 (describing Joseph Raz as among those “[l]egal positivists [who] point out that a legal system possessing the elements of the rule of law may nonetheless have laws with terribly unjust content”).

35. Raz, *supra* note 26, at 211.

36. Lawrence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726, 729 (referring to a version of the rule of law that was invoked against Native Americans in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 108 S. Ct. 1319 (1988)).

There are some who see virtues or values in the rule of law, such as “separation of powers, equality, liberty, substantive fairness, procedural fairness, and utility.”³⁷ Others presuppose justice as part of the rule of law equation. As Ronald Cass stated, “In a fundamentally just society, the rule of law serves to channel decision making in attractive ways, to make decisions more predictable, and to increase the prospects for fair administration of public power.”³⁸ This vision, imbued with aspirations of justice and morality, coincides with the substantive model. Both the instrumental or rule book and the substantive or rights models, however different, confirm that even the government is subject to the rule of law.

On the other hand, rule *by* law signifies law as an instrument of government which then is an entity that is above the law.³⁹ The problem with rule *by* law is that it “is substantively empty . . . [and] is compatible with, and may be instituted by, a system that contains the most immoral of laws. . . . The rule [by] law, at least under this dominant theoretical view, contains no substantive moral standards as an aspect of its definition.”⁴⁰

The other distinction that is noteworthy is the rule of *law* versus the rule of *men*,⁴¹ which some suggest would be more appropriately articulated as

37. Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 314 (1985).

38. RONALD A. CASS, *THE RULE OF LAW IN AMERICA*, at xi (2001). Cass articulates four constitutive elements to the rule of law: (1) fidelity to rules; (2) predictability; (3) embodiment in valid authority; and (4) externality to individual government decision makers. *Id.* at 4–19; see also DWORKIN, *supra* note 11, at 12 (noting that “compliance with the rule book is plainly not sufficient for justice . . . [but a] society that achieves a high rating on . . . the rights conception is almost certainly a just society, even though it may be mismanaged”).

39. Li, *supra* note 31.

40. BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 98–99 (2001). The author notes that approaches of Fuller, Weber, and Habermas, because of their view of law as instrumental, and their identification of law with reason, all lead to “substantively empty” approaches to law which focus on procedural and formal aspects and do not focus on “the traditional test for the legitimacy of law in its consistency with the content of moral principles or with prevailing customs.” *Id.* at 102. Tamanaha goes on to note:

Instead of reflecting the substantive content of moral beliefs, the liberal (empty) rule of law reflects a liberal culture, both embodying the value of toleration for different views in an age of irreducible moral pluralism. That begs the question of whether the cultures with the rule of law are indeed liberal in this sense — whether toleration is truly a prevailing cultural value.

Id. at 103.

41. This is often articulated as “the rule of law, not of men.” Fallon, *supra* note 6, at 3; John Adams, *Novanglus* No. 7, January 1775, available at http://douglassarchives.org/adam_a50.htm (last visited Oct. 13, 2003) (“[Aristotle, Livy, and Harrington] define a republic to be a government of laws, and not of men”). The phrase “government of laws, not of men” is frequently mistakenly

“the rule of law, not of individuals.”⁴² This alternative phrasing recalls the reality that when the liberal ideal of the rule of law developed only men — white men at that — could be part of political life.⁴³ The distinction, however articulated, is poignant. Contrary to the rule of law promise of procedural fairness, honesty, and consistency, the rule of men “has the connotation of arbitrariness, corruption, and instability.”⁴⁴

III. THE RULE OF LAW AND CULTURE

The idea of just laws is a difficult and complex one.⁴⁵ For example, the rule of law in the western tradition emphasizes individual rights. Other philosophical foundations emphasize communitarian duties and responsibilities. The western vision does not, however, reject the communitarian ideals that are the focal point in other legal traditions. To the contrary, the western view presumes not only that communitarian ideals embrace the individual, but also that by protecting the individual the community’s desires will be fulfilled.⁴⁶ So which version, the western or the Asian, best fulfills the rule of law goals of liberty and justice? To answer this question, we must travel squarely to the heart of the ongoing debate about the nature of norms — whether they are universal or culturally relative — a question that is quite vibrant particularly with respect to human rights.⁴⁷

attributed directly to Adams. See, e.g., Louis E. Wolcher, *What Is the Rule of Law?, Perspectives from Central Europe and the American Academy*, 78 WASH. L. REV. 515, 516 (2003).

42. Radin, *supra* note 2, at 781 n.1 (rephrasing the ideal in “today’s context”).

43. *Id.*; see also SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989); CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

44. Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 10–11, Carnegie Endowment Working Papers No. 30, Sept. 2002, available at <http://www.ceip.org/files/pdf/wp30.pdf> (last visited Oct. 13, 2003). Upham notes that “[r]ule of law building is not worth spending money on unless the imperfect institutions created by such expenditures will have beneficial effects that outweigh their costs and any harm they create.” *Id.* at 13.

45. See DWORKIN, *supra* note 11, at 12 (observing the “rights” model is “a complex ideal”).

46. See HAGER, *supra* note 31, at 20.

[T]he Western rule of law by no means dismisses these communitarian values that are elevated in various Asian traditions. Rather, it assumes first of all that those communitarian values include respect for individual rights, and second that the best method of maximizing the communal interest is through the protection and vindication of individual substantive procedural rights.

Id.

47. See Berta E. Hernández-Truyol, *Women’s Rights as Human Rights — Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT’L L. 605 (1996).

In brief, the universalist versus relativist discussion goes as follows. On the one hand, the universalists urge that laws are of universal reach and must be evenly applied, with no exceptions and no excuses. On the other hand, relativists insist that laws are culturally contingent and must be applied only according to local understandings.

In this essay, as I have done before,⁴⁸ I suggest that both universalists and relativists are correct. In the international context, as the International Commission of Jurists' definition of the rule of law suggests,⁴⁹ rules need to be both universal in reach and relative in interpretation and application. This position is especially desirable in the global context. The world is an intricate and heterogeneous place comprised of many societies and as many forms of cultural expression, all of which have powerful, dominant actors and vulnerable, subordinated ones.

In this regard, it is indisputable that to both universalists and relativists, culture matters. Local traditions, including religious traditions, have had a large and lasting influence on contemporary values.⁵⁰ These various locations of cultural power and authority create a tension with human rights norms which both advocates and philosophers posit are theoretically grounded on a source of law that is supra-sovereign and universal, and transcends cultural, national, and religious boundaries to provide a uniform moral code. Thus, universalists view human rights as having existed prior to political societies and institutions.⁵¹ This conceptualization is problematic for cultural relativists who claim that all rights are culturally contingent and that the foundations of any normative standards are the unique political, religious, and civic institutions of a society. Relativists reject the possibility of the existence of any individual rights of persons independent of society and culture. In sum, relativists insist that, because society and culture construct all values, there can be no such thing as the presocial or prepolitical human rights embraced by universalists.⁵²

48. Berta E. Hernández-Truyol, *Human Rights, Globalization, and Culture: Centering Personhood in International Narrative*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 353 (Berta E. Hernández-Truyol ed., 2002).

49. See text accompanying note 10.

50. Ronald Inglehart & Pippa Norris, *The True Clash of Civilizations*, *FOREIGN POLICY*, Mar. 1, 2003, at 62.

51. Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 *BUFF. HUM. RTS. L. REV.* 211, 212 (1999) (noting “[human rights advocates] assert[] that all persons, regardless of culture, citizenship and nationality have inherent rights”); see also DWORKIN, *supra* note 11, at 13 (noting that the rights model of the rule of law “supposes that citizens have moral rights . . . [that are] prior to those given by positive enactment”) (emphasis added).

52. Binder, *supra* note 51, at 214. He adds that “[b]oth sides in the cultural-relativism/universalism debate see the same dilemma: either International Human Rights Law is

In recent times, this universality/relativity debate has been situated in North/South and East/West divides. The North versus South discourse focuses on the relative importance of civil and political rights embraced by the universalist North in contrast to the importance of economic, social, and cultural rights prioritized by the relativist South in order to attain economic development and well-being in a global society.⁵³ As has been patent since the September 11th events, the East/West divide centers around religious fundamentalism.

In the context of the universality/relativity debate as it relates to the rule of law, it is imperative to recognize that legal norms do not exist in a vacuum. As the International Commission of Jurists' definition recognizes, the existence of similar or even identical rules in different societies does not lead to a uniform or identical application of norms. Thus, for there to be a universal rule of law concept, there needs to be some adjustment in the expectation of the consequences that will flow from the adoption of such a legal norm. To be sure, every rule of law model will be foreign to some society. For a global rule of law to exist and be successful, it must be adaptable to each receiving society's social and cultural structures.⁵⁴

Significantly, the notion of the rule of law, as it has evolved in the dominant Anglo-American experience and in the formulation that has been exported wholesale, is rooted in the Judeo-Christian ethic which, as mentioned earlier, is grounded on the liberal tradition that focuses on the individual. Such a notion of the rule of law is inextricably intertwined with the dual western goals of democratization and capitalism. In this vein, the rule of law discourse emphasizes the notion of individual rights, which can be juxtaposed to other traditions and cultures with an emphasis on communitarianism such as Greek and various Asian ones.⁵⁵

For example, a rule of law founded in ancient Greek philosophies would center on the idea of a "polis" which seeks order that is attainable

rooted in universal truths or it is imperialist. This dilemma is premised on a simple but rarely articulated proposition: that if human rights norms are culturally relative human creations, they are necessarily imperialistic." *Id.* at 217.

53. Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43 (1998); see also Berta E. Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in WOMEN'S INTERNATIONAL HUMAN RIGHTS: A REFERENCE GUIDE (Kelly Askin & Dorean Koenig eds., 1999) (showing a critical consideration for analysis of a rule of law in the Americas).

54. Upham, *supra* note 44, at 33.

55. HAGER, *supra* note 31, at 20. The western notion of the rule of law does not dismiss communitarianism, but it subsumes it into the notion of individual rights and posits that the best way to attain communal interests is by protecting the individual's rights.

through social or political structures.⁵⁶ Chinese scholars have cited Aristotle's notion that the rule of law encompasses two ideas: one, that there needs to be compliance with established norms; and two, that the law's content is a good one.⁵⁷ Other contemporary Chinese scholars note that Confucianism advocates a rule of law by virtue and ethics rather than by norms.⁵⁸

Many Chinese scholars link the rule of law with other liberal goals, including the notion of democracy and "other liberal values such as liberty, equality, human rights, separation of powers, checks and balances, and judicial independence."⁵⁹ As one author has noted,

Chinese scholars appreciate that the rule of law developed in the West as part of a dynamic historical process and has undergone distinct phases of development. Thus one scholar pointed out that the nature of the Rule of Law has changed as the West moved from the period of laissez faire capitalism into the period of monopoly capitalism and welfare states. Another characterized the earlier period as "individuals-oriented" and the later period as "society-oriented." A third writer distinguished the two stages by using the concepts of "a hard rule-of-law" (strict legal rules with little discretion in their administration) and "a soft rule-of-law" (a "living law" administered by the exercise of discretion and search for substantive justice).⁶⁰

Indeed, while some western critics equate a rule of law under socialism with the possibility of arbitrary and unfettered government action,⁶¹ Chinese scholars argue that the rule of law under socialism is at a higher level of evolution than the rule of law under capitalism. They explain that the driving force of socialism is one of human emancipation because it enables human beings to completely develop the full extent of their capacities.⁶²

Two observations are appropriate to close this discussion on culture. First, the rule of law and human rights are related, dynamic concepts that develop and evolve with time and within historical, social, cultural, political contexts of societies. Second, while human rights contain universal values, they also are contextual to national, regional, and cultural

56. Nicholas Capaldi, *The Liberal Paradigm in Affirmative Action Law*, 43 LOY. L. REV. 525, 555 (1998).

57. Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 131 (2000).

58. *Id.* at 129.

59. *Id.* at 133.

60. *Id.* at 132 (citations omitted).

61. See *supra* text accompanying notes 10 & 36.

62. Chen, *supra* note 57, at 136.

specificities. Thus, the universality versus relativity debate in the context of the rule of law appears to create a false dichotomy. While no wholesale exportation of a western vision of the rule of law is going to fit across all cultural and political histories, a general and generalized, flexible, global notion of the rule of law, accepting of and acceptable to varied and various cultures, will further the human rights project by protecting peoples and communities from subordination, oppression, or arbitrariness.

IV. STRUCTURAL REALITIES OF THE RULE OF LAW

The rule of law idea(l) requires a system of accountability of government and its actors which includes a check against the bias, irrationality, corruption, or abuse of those in power — be it the lawmakers, the executive, the judges, or some outlaw group that nonetheless is in control of the state or some part thereof — whose time might be occupied by matters other than justice and just governance. It is inherent in the rule of law ideal that government action has limitations.⁶³ Notions of state responsibility need to be an integral part of the rule of law.

Moreover, the rule of law idea(l) must recognize, embrace, and adapt to the dynamic nature of law. Law can, and does, change as social values and morality change. There must be structures that accommodate and enable such social and moral changes and allow them to be reflected in the law. In this regard, although considering law as dynamic in the context of the rule of law, it would be a grave mistake to suggest that everyone must absolutely obey unjust norms until they can be changed by formal channels. Thus, with changing social mores and conduct, the rule of law must mean something more than blind adherence to written laws; it must mean pursuit of justice.⁶⁴ Martin Luther King poignantly articulated this sentiment when, quoting St. Augustine, he said “An unjust law is no law at all.”⁶⁵ This is indeed a key principle of the rule of law vis-à-vis human right norms: unconditional or unqualified obedience to unjust laws is not a requirement.

63. See *supra* note 31.

64. See DWORKIN, *supra* note 11, at 12–13 (comparing the “rule book” and “rights” models of the rule of law and noting that “compliance will achieve great injustice if the rules are unjust”). Significantly, justice itself is a contested concept. That discussion however is beyond the scope of this essay. *But see* RUTHANN ROBSON, *LESBIAN (OUT)LAW* (1992) (interrogating the notion of justice as a system that was created and is based upon differentials of power).

65. Martin Luther King, *Letter from Birmingham Jail*, Apr. 16, 1963, available at <http://almaz.com/nobel/peace/MLK-jail.html> (last visited Oct. 13, 2003).

Significant for human rights discourses, international customary norms are rooted in natural law rights and are part of the fabric of law.⁶⁶ Thus the rule of law, beyond applying to government actions, requiring accountability, and demanding justice, also protects individuals and individual liberty and freedom. As such, the rule of law idea(l) provides a normative and doctrinal basis for the respect for human dignity and justice that the human rights framework embraces. In this regard, Calvin Coolidge's statement to the Massachusetts State Senate on January 7, 1914, was quite foretelling of the principles that would be central to the development of human rights laws. More than thirty years before the Nuremberg Tribunal echoed these sentiments, Coolidge said

Men do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority. They must rest on the eternal foundation of righteousness. That state is most fortunate in its form of government which has the aptest instruments for the discovery of law.⁶⁷

Beyond governments at one end of the spectrum of the rule of law and the individual at the other, civil society — the collective of institutions, groups, and individuals who create and express social values and morality — has a role in ensuring the attainment of justice. Civil society and government need to work congruently, with one checking the other's jurisdiction so that neither has nor exercises unbridled power to oppress individuals and suppress individual autonomy and freedoms. They also must work coherently to request and guide necessary changes in the legal structures when moral, social, and civil transformations so require.

V. CRITIQUES OF THE RULE OF LAW

As this work has shown, there are different conceptualizations of the rule of law in different cultures. However, the ideal of a global rule of law is captured by the International Commission of Jurists' definition in its Rule of Law Project. That definition embraces the universality and relativity of the normative and structural frameworks necessary for the

66. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, art. 38 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law. . . .").

67. Calvin Coolidge, Massachusetts Senate President Acceptance Speech, Jan. 7, 1914, available at <http://www.calvin-coolidge.org/pages/history/speeches/sp010714.html> (last visited Oct. 13, 2003).

“rule of law” — not identical but similar norms, institutions and procedures that history and tradition from different parts of the world with different systems of governance and different political structures, cultural histories, and economic backgrounds still consistently show to be basic to the protection of persons from undue and arbitrary government intrusion which enables persons to enjoy their dignity and personhood.⁶⁸

Notwithstanding this ideal, the varied cultural settings in which the rule of law applies has resulted in powerful critiques of the concept. Some view the rule of law as nothing other than a tool of the powerful to maintain the status quo in the legal system. The general consensus is that the status quo, far from being neutral, serves to protect the powerful at the expense of the disempowered.⁶⁹ This lack of neutrality in the rule of law runs contrary to the ideal, traced to Aristotle, that in light of the law every person should be equal; that it is one’s humanity, not one’s status in society, that requires that laws be justly applied.⁷⁰ As one commentator has stated,

[T]here need be no ultimate conflict between the Rule of Law and the Rule of Love . . . we cannot be a nation of equal citizens under a Rule of Equal Laws if only half of us have control over our bodies and our lives, while the other half remain subject to the ultimate control of the state. . . .

[A]ll can at least share . . . the desire to incorporate basic notions of decency and compassion into a strong and principled Rule of Law.⁷¹

A concern with respect to the rule of law’s neutrality relates to the predominance of the “sameness” standard of equality in U.S.

68. See INTERNATIONAL COMMISSION OF JURISTS, *supra* note 10.

69. See Tribe, *supra* note 36, at 726.

[T]he Rule of Law still has precious few sophisticated defenders these days. To some on the left, especially in critical legal studies, the Rule of Law is little more than a mask that hides the legal system’s tendency to protect the rich and powerful at the expense of the poor and the working class. And to some on the right, the Rule of Law is largely an inconvenience, a myth to be winked at, if not openly mocked.

Id.; see also ROBSON, *supra* note 64, at 11, 24, *passim*.

70. Tribe, *supra* note 36, at 727 (noting that “[t]he roots of the Rule of Law go back at least to Aristotle, and to the ideal that, as we face the laws’ commands, none of us should stand taller than any other; what those who govern *think* of you should matter not at all how the *laws* that govern *treat* you. It is your membership in the human race, and not in any privileged circle, that entitles you to have the law applied justly, without any prejudice about your inherent worth or lack of worth.”).

71. *Id.* at 729–31.

jurisprudence.⁷² Critical legal theorists,⁷³ including feminist theorists,⁷⁴ critical race theorists,⁷⁵ and queer/lesbian theorists,⁷⁶ have highlighted the flaws of the sameness standard noting that, once the norm is defined, those who are seeking to be treated like the normative standard will be judged as similar or on grounds not based on general societal values (and biases), including the values (and biases) of the decisionmaker.⁷⁷ This sameness model may thus result in the hiding or veiling of the moral, psychological, and emotional consequences of norms and raising “question[s] [about] the value of procedural regularity when it denies substantive justice.”⁷⁸ Indeed, [s]ome writers even have argued that a rule of law may be, at times, nothing more than a post hoc rationalization or attempted legitimization of results that may be better explained by extralegal (including, but not necessarily limited to, emotional) responses to the facts, the litigants, or the litigants’ lawyers, all of which may go unstated.⁷⁹

72. See Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2101 (1989) (noting that “the rule of law model trains us — that is, legal personnel — to ‘treat like cases alike,’ and to define relevant similarities generally”).

73. See generally ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983); Stanley Fish, *Fish v. Fiss* 36 STAN. L. REV. 1325 (1984); Peter Gabel, *The Phenomenology of Rights — Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

74. See generally FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 2d ed. 2003); GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Katherine Wing ed., 2000).

75. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al. eds., 1995); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998); A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW: A MULTIRACIAL APPROACH (Timothy Davis et al. eds., 2001); Kenneth Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997); Dennis W. Archer, *A Diverse Directive: We Need More Lawyers of Color to Help Promote the Rule of Law*, A.B.A. J., Oct. 2003, at 8.

76. See generally ROBSON, *supra* note 64; RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* (1998).

77. Robin West, *Is the Rule of Law Cosmopolitan?*, 19 QUINNIPIAC L. REV. 259, 264 (2000); CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987); ROBSON, *supra* note 64, at 67.

78. Massaro, *supra* note 72, at 2110; see also H. Thompson, *The Role of the Rule of Law in the Liberal State*, 1 NATAL U. L. & SOC. REV. 126, 132 (1986) (noting “[liberal critics] identify as the principal shortcomings of the doctrine of the rule of law . . . its tendency to lead to an unbending legalism and its failure to evaluate the substantive content of the law”).

79. Massaro, *supra* note 72, at 2111–12 (footnote omitted).

In sum, for the rule of law to be truly egalitarian and attain justice, rather than simply be geared to the status quo, it must accommodate and embrace social and political changes.⁸⁰

Another challenge to the neutrality of the rule of law is the perceived attempt to universalize a western vision. In this regard, some argue that the exportation of the western rule of law effectively is but a rhetorical trope to legitimize global power differentials.⁸¹ The patterns of the exportation of the rule of law are viewed as fitting neatly into imperialistic practices — some more subtle than others. Sometimes the rule of law is imposed on states overtly; sometimes in a way that is masked by contract and made to appear to be voluntary — evoking the label of “subtle blackmail.”⁸² However, regardless of form, often economically deprived and less powerful states must accept the western rule of law in order to have access to the global market and to engage in economic activity necessary for the states’ survival.

The doctrine of the rule of law is also critiqued as being grounded on capitalistic ideology. For example, Marxists view the rule of law as facilitating the state’s exercise of power on behalf of the interests of the classes that control the means of production.⁸³ To them, law should be working in the interests of society as a whole. Consequently, it is the substantive content and outcome as opposed to the procedural norms that indicate whether the law is being deployed to oppress certain classes.⁸⁴

80. Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 265 (1993) (construing GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* 8–42 (1988), “Walker defines the Rule of Law as a political environment of constraining rules that nevertheless constantly are infused with contemporary social values. Contemporary values do not form fixed and timeless values that define the Rule of Law because they constantly are in flux.”); see also Edward McWhinney, *Western and Non-Western Legal Cultures and the International Court of Justice: A Celebration of the Scholarship and Teaching of Gray L. Dorsey*, 65 WASH. U. L.Q. 873, 878–79 (1987).

[T]he Rule of Law need not be another convenient synonym for perpetuating the political-legal status quo of yesterday, and [] the role of the lawyer and of the judge today consists not merely of mechanically restating the old law but also of assuming responsibility for imaginatively up-dating or re-writing it to correspond with new societal conditions and demands.

Id.

81. See Ugo Mattei, *A Theory of Imperial Law: Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 386 (2003).

82. *Id.* at 388; see also TAMANAHA, *supra* note 40, at 124 (noting “‘voluntary’ is not the same as ‘by choice’ rather than ‘out of necessity’”).

83. See Thompson, *supra* note 78, at 130.

84. See *id.* at 128.

There is also a cultural component to the critique of the rule of law. For example, Asian scholars have three main criticisms of the western rule of law that is being exported wholesale. One is that its virtues are overstated — a criticism that dovetails with the critiques about the disjointedness between the notion of the rule of law and true justice. A second criticism, which also parallels other critiques discussed above, is that it is a thinly veiled attempt to impose the economic market goals of the United States on the world. The third criticism is an interesting twist on the cultural critiques as it posits that the rule of law is simply a proxy for establishing a global system that reflects the U.S. legal culture of “legalism and litigiousness.”⁸⁵

More extreme critics claim that “[t]he liberal paradigm has destroyed the rule of law.”⁸⁶ The rationale behind this statement is that, considering the real state of the world, many equate the rule of law with legality. However, this is a flawed equation as “[l]egality simply means that there are laws and says nothing about the quality of those laws.”⁸⁷

Yet other critics reject the formalistic notions of the rule of law in favor of a goal of justice.⁸⁸ Examples of laws that are anathema to notions of justice are “laws that enshrine irrational prejudice, such as the miscegenation laws . . . or the racial bias . . . or the irrational animus toward gay[s]. . . . [These] are not laws at all.”⁸⁹ In this regard, then, such laws could be deemed to be illegitimate laws and the rule of law idea would warrant that they not be followed. This critique, like the one that differentiates between the rule of law and legality, notes that the traditional

85. Barry M. Hager, *The Rule of Law: Defining It and Defending It in the Asian Context*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM*, 1, 2 (The Mansfield Center for Pacific Affairs, 2000).

86. Capaldi, *supra* note 56, at 553.

87. *Id.*

88. Randy E. Barnett, *Foreword: Can Justice and the Rule of Law Be Reconciled?*, 11 *HARV. J.L. & PUB. POL’Y* 597, 597–98 (1988) (construing JEROME FRANK, *LAW AND THE MODERN MIND* (1963)).

Jerome Frank . . . rejected the rule of law values of generality and uniformity in legal precepts in favor of justice . . . according to [his] view, the formal requirements of the rule of law are either redundant or pernicious. Where justice in the particular case and the tenets of the rule of law correspond, the rule of law is redundant. Where justice in the particular case and the rule of law diverge, the rule of law is pernicious to the extent that it detracts from achieving justice.

Id.

89. Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 *GEO. L.J.* 139, 192 (1998) (citations omitted).

ideal of the rule of law means simply that there are substantive and procedural norms to guide outcomes which may trump justice's goals.

In his critique of the rule of law, Morton Horwitz rejected its classification as "an unqualified human good" because, although the law "restrains power . . . it also prevents power's benevolent exercise. It creates formal equality — a not inconsiderable virtue — but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, process from outcomes."⁹⁰ The goal of the rule of law ought to be to enable full personhood, human flourishing. Any law that does not do so cannot be part of the rule of law. Human rights becomes a check on the rule of law idea(l) and, thus, must become an integral part of a truly universal formulation of the rule of law.⁹¹

VI. THREE KEY OBSERVATIONS ABOUT THE RULE OF LAW

This section seeks to articulate linkages between the rule of law and other legal concepts that affect its essence. First, the essay joins the rule of law idea with the human rights idea and shows that human rights form the outside parameters or limitations on flexibility of the rule of law. Second, this section notes the interplay of local and global visions of the rule of law. Finally, the piece engages the relationship between trade and human rights and illustrates how human rights place similar limitations on private or public trade conduct as human rights do on the exercise of sovereign power.

90. Morton J. Horwitz, *Book Reviews: The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1976–1977) (reviewing DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975), & E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)) (emphasis added); see also Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U. L. REV. 363, 453–54 (1993). Harris notes that, in the United States,

[a]s [the] great reform movements [slavery, feminist] illustrate, there can be no certain protection of individual dignity or liberty based on moral relativism. There is no right that cannot be rationalized away, no tradition that cannot be minimized, no political trend that cannot be forgotten or replaced. Power becomes the only safety and the rule of law becomes the rule of five votes.

Id. (footnote omitted).

91. See Cicchino, *supra* note 89, at 193 (noting that "[t]he ultimate justifications [constitutional morality] recognizes take human flourishing as their final end, and human experience as their source and guide, and return to human experience in a never ending process of refinement and revision," and also positing that "[a] statute or government policy whose end is not rooted in human flourishing, and is not accessible through human experience, lacks the minimum degree of reasonableness required by the Equal Protection Clause and represents a radical departure from the rule of law.").

A. Human Rights

The first connection this work addresses is the rule of law and human rights. Flowing from Nuremberg, the observance, protection, and enforcement of human rights are the most basic components of the rule of law.⁹² The human rights linkage comprises two interrelated ideas. One is that a state is not absolutely sovereign; how it treats persons is not without limits.⁹³ Those limits are human rights — rights that persons have because of their existence as human beings. The other is that human beings are the true actors in the international world; not solely objects, but also the subjects of the laws.⁹⁴ As the famous phrase from the Nuremberg judgment reminds us “laws are broken by men not states,” making it appropriate in the international realm to punish men for violating those international norms.⁹⁵ In this regard, human rights concerns are not identical everywhere. We live in a gendered, multiethnic, racially and religiously diverse society. In considering rule of law, these diversities must be taken into account, thus requiring a flexible approach to the rule of law that does not sacrifice justice.⁹⁶

B. International and Local Linkages

The second observation concerning the rule of law is that there are connections between the international and the local rule of law ideas. This notion flows seamlessly from the human rights connection that emphasizes

92. *International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946*, 41 AM. J. INT’L L. 172 (1947) [hereinafter *Nuremberg Judgment*].

93. *Id.*; Berta E. Hernández-Truyol, *Globalized Citizenship: Sovereignty, Security, and Soul*, in LAW AND GLOBALIZATION FROM BELOW (Boaventura de Sousa Santos & Cesar Rodriguez eds., forthcoming 2004); Hernández-Truyol, *supra* note 53; Berta E. Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare “Reform,”* 71 S. CAL. L. REV. 547 (1998).

94. Hernández-Truyol, *supra* note 53.

95. *Nuremberg Judgment, supra* note 92.

96. *See, e.g.,* INTERNATIONAL COMMISSION OF JURISTS, *supra* note 10 (defining rule of law considering different traditions and experiences in different countries); West, *supra* note 77, at 279.

A rule of law that accords her equal respect does not simply honor her choices and the individual she becomes by virtue of them. It honors her needs, interests, pleasures, pains, ties to others, and passionate desires as well. It reflects and respects her particularity, both cultural and individual, as well as her universality, rationality, and potential freedom. It is mindful of her universal needs — needs that are neither individually chosen nor traditionally or culturally constructed — for a clean environment, a supportive culture, loving and safe intimacy, and respectful institutions.

Id.

the equality of all persons. At the core of the international rule of law is the principle of the equality of all states.⁹⁷ Moreover, it is neither disputed nor disputable that both the international and the local rules of law are limited by human rights and that local sovereignty and the exercise thereof is limited by the international rule of law. For example, the international rule of law expressly outlaws the use of force.⁹⁸ This prohibition protects against abuse of the vulnerable by the powerful and establishes an international order to engage the principles of peace and security — all with the well-being of individuals at its heart.⁹⁹ Indeed, it is precisely the safety and well-being of individuals that allows the legal exercise of force, but even then only in two instances: in self defense,¹⁰⁰ or in the maintenance of peace and security as authorized by the U.N. Security Council.¹⁰¹ A third emerging justification for the use of force is that of

97. U.N. CHARTER art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”).

98. *Id.* art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

99. *Id.* pmbl.

We the Peoples of the United Nations [d]etermined to save succeeding generations from the scourge of war, . . . and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, . . . to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, . . . [h]ave [r]esolved to [c]ombine our [e]fforts to [a]ccomplish these [a]ims.

Id.

100. *Id.* art. 51.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id.

101. *Id.* art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”); *id.* art. 42.

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Id.

humanitarian assistance, again directly for the protection of the individual.¹⁰²

To establish that the international rule of law trumps a local desire to act to the contrary, one simply needs to cite to Nuremberg.¹⁰³ At Nuremberg, the global judgment of justice overrode any local claim to sovereignty. Hitler and his rule of terror in Germany could not deprive Germans of life on German soil without accountability in the global stage. Nor could Hitler do so to persons in other states that his forces had overpowered. The norm that emerged is that what a state does vis-à-vis human rights is, in fact, the whole world's business. How a state treats persons within or without its borders, citizens and non-citizens alike, is an international, not a purely local, matter.

So this connection of the international/local rule of law is part of the balancing of power that provides a safety net constituting an international (or regional) mechanism of accountability of states. In looking at the Americas, the inter-American system has made inroads into effecting justice. The states that utilize this system respect its decisions — decisions that are made by the commission or the inter-American court, decisions which are starting to create a regional check on the local protecting the vulnerable or historically subordinated.¹⁰⁴

C. Trade and Human Rights

The third and last connection I want to make with the rule of law is the linkage of trade and human rights. Conversations about this linkage, much like the origins of these fields of law, take place in separate spheres and in different tongues. This is a curious development as I see these areas as inextricably intertwined.

102. See Helen Duffy, *Responding to September 11: The Framework of International Law*, 16-17 (Oct. 2001), at <http://www.interights.org/about/Projects.asp> (last visited Oct. 15, 2003).

103. *Nuremberg Judgment*, *supra* note 92.

104. See generally Christina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FLA. J. INT'L L. 195 (2004).

If one looks at the origins of the formal development of trade law,¹⁰⁵ and of human rights law,¹⁰⁶ one sees a virtually identical cast of characters — the same players on the world stage having conversations about developing norms for interaction. These same players were the architects of robust systems of norms that have developed along parallel tracks, as if they were wholly separate and independent — worlds apart while occurring in the same small world, occluding their interconnectivity and interdependence.

Trade and human rights are the two cutting edge and hugely active areas in global and local existence. There are, in today's world, two main locations of vivid intersection — some might call them conflict — between trade and human rights: labor and the environment. No trade agreement discussions occur without some consideration of the impact of the contemplated engagement on the environment — be it the preservation of the Amazon, air pollution, or compromising of water quality — and on labor.¹⁰⁷ The relationship of human rights and trade becomes patently evident in globalization discourses. Significantly, whenever and wherever World Trade Organization (WTO) meetings are held — reflecting the trade aspect of the binary — there also are labor and environmental group protests evidencing the human rights intersection with trade.¹⁰⁸

105. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT was signed in October 1947 by 23 nations, with eight almost immediately agreeing to apply the agreement (Austria, Belgium, Canada, France, Luxemburg, the Netherlands, the United Kingdom and the United States — all market economies with democratic governments). Initially, the GATT was to be the steppingstone to the establishment of the International Trade Organization (ITO) which was to replace the GATT and be a U.N. agency regulating world trade relations. Efforts for the ITO were halted when it became apparent that the U.S. Congress would not ratify its Charter. See generally ROBERT E. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1990) (setting out the history of the ITO and the GATT).

106. See Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (111). Three years before the Havana Charter for the ITO was completed, the U.N. Charter entered into force on October 24, 1945, which placed human rights center-stage in international relations. The Universal Declaration was ratified by 48 states, with 8 states — Canada, USSR, Ukraine, Poland, South Africa, Yugoslavia, and Saudi Arabia — abstaining.

107. *A Survey of Globalisation*, THE ECONOMIST, Sept. 29, 2001, at 3-30.

108. See, e.g., *After Seattle, A Global Disaster*, THE ECONOMIST, Dec. 11, 1999, at 19-21; William Greider, *Global Agenda, After the WTO Protest in Seattle, It's Time to Go on the Offensive. Here's How*, THE NATION, Jan. 31, 2000; John Zebrowski, *WTO Protest Leaders Plan Disruptions in D.C., Los Angeles Activists Buoyed by Seattle Success*, SEATTLE TIMES, Mar. 4, 2000, at A1; Evelyn Iritani, *WTO Talks Could Derail in Cancun; Negotiators Face a Backlash Against the U.S. and a Widening Rift Between Rich and Poor*, LOS ANGELES TIMES, Sept. 7, 2003, at 1.3; Susan Ferriss, *Rich, Poor Countries Face Off at Start of World Trade Talks*, ORLANDO SENTINEL, Sept. 11, 2003, at A17.

Both human rights and trade depend on the notion of the rule of law. The rule of law elements that are pertinent to trade and economic development include private property protection; freedom of contract; norms governing market exchanges; legal enforcement of private arrangements; equality under the law; and fair, efficient, and predictable dispute resolution mechanisms.¹⁰⁹ Significantly, international trade agreements also incorporate protection of human rights, such as Article XX of the GATT which provides, in pertinent part,

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- ...
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. . . .¹¹⁰

[Indeed, t]he values underlying WTO law — such as protection of legal freedom, property rights, non-discrimination, rule of law, access to courts, economic welfare and national sovereignty to pursue non-economic policy objectives that are considered more important than liberal trade — mirror corresponding human rights principles. Even though WTO law nowhere explicitly refers to human rights, it serves manifold “human rights functions” across frontiers.¹¹¹

109. See Hager, *supra* note 85, at 41.

110. GATT, *supra* note 105, art. XX; see also Ernst-Ulrich Petersmann, *Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration Law for Global Integration Law*, Jean Monnet Working Paper 7/01, available at <http://www.jeanmonnetprogram.org/papers/01/012301.html> (last visited Oct. 15, 2003).

111. Petersmann, *supra* note 110, at 38-39. He continues
 [i]n contrast to most human rights treaties, the WTO guarantees of freedom, nondiscrimination, and rule of law go far beyond national constitutional guarantees in most countries which tend to limit economic freedom to domestic citizens and, for centuries, discriminate [sic] against foreign goods, foreign services, foreign investors and foreign consumers (e.g., by permitting export cartels). By extending equal freedoms across frontiers

Thus, one commentator has observed that although the formulation of WTO rules is as rights and obligations of governments, “they serve *human rights functions* for protecting individual liberty, nondiscrimination, rule of law and welfare-increasing cooperation among domestic and foreign producers, investors, traders and consumers across frontiers.”¹¹²

However, notwithstanding these human rights functions that the WTO seems to fulfill,

[t]here are several areas in which developments in the WTO have caused concern among human rights advocates. These include the right to health, the right to food, the right to education, women’s rights, indigenous peoples’ rights, and labor rights. Critics from within and outside the WTO have also frequently raised general concerns about equity, democracy, and transparency.¹¹³

The trade regime did not come into life in a vacuum. Rather, it comes into a world with preexisting rule of law obligations at the global and local levels. Trade agreements that have been made possible by the WTO and NAFTA structures cannot fly in the face of local controls of, say, securities regulations or labor laws. Similarly, such agreements cannot contravene global controls such as a prohibition against slave labor or racial discrimination. Indeed, as seen above, Article XX of the GATT expressly recognizes this and allows exceptions for public laws and morals, slave labor, and health concerns — all basic human rights principles.

Recent events in Cuba confirm that human rights principles are the parameters within which trade can and should operate. There is a fairly strong move in Congress to alleviate the over four-decade old embargo.¹¹⁴ This movement was supported by an interesting and broad coalition of both conservative mid-western state legislators frustrated at the elimination of a natural and convenient market for their food production enterprises and liberal and libertarian congresspersons who found the travel

and subjecting discretionary foreign policy powers to additional legal and judicial restraints ratified by domestic parliaments, WTO law serves “constitutional functions” for rendering human rights and constitutional restraints more effective in the trade policy area.

Id. at 35.

112. *Id.* at 36; see also Caroline Dommen, *Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies*, 24 HUM. RTS. Q. 1 (2002).

113. Dommen, *supra* note 112, at 13.

114. The United States imposed against Cuba an economic embargo on exports in 1960 and on imports in 1962. In an effort to strengthen the impact on Cuba the United States passed the Cuban Democracy Act of 1992 and the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996. Cuban Democracy Act of 1992, Pub. L. 102-484, 22 U.S.C. § 6001 (1992); Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996, Pub. L. 104-114, 22 U.S.C.A. § 6021 (1996).

restrictions an affront to individual liberties and freedoms.¹¹⁵ This pro-trade liberalization move, however, has come to a screeching halt. Why? Because the trade liberalization idea has been trumped by the outrage over Castro's most recent human rights abuses, including the rounding up of some seventy-five Cuban writers and dissidents and sentencing them to up to twenty-eight years in prison after what one reporter called "quickie show trials worthy of Stalin."¹¹⁶

Another factor in the ceasing of trade liberalization talks was the April 11, 2003, summary execution by firing squad of three men who had hijacked a passenger ferry on April 2.¹¹⁷ There is no question that they committed a criminal act for which they should have been tried and sentenced, but only after a fair trial, with the assistance of defense counsel, and with an outcome that imposes a punishment proportional to the crime.

The problem that the Cuban example poses is an opportunity to explore the linkages to the rule of law discussed above. The issue is not that there are no laws in Cuba, but, rather, that the laws that exist may be arbitrary, that they may be capriciously applied, and that the processes of their application may be deficient per international human rights norms — both substantive and procedural.

Thus, this example presents the importance of all three connections discussed. The supremacy of human rights and the nexus between trade and human rights resulted in the cessation of any conversations about liberalizing trade once the state of Cuba was perceived to violate rights of the dissidents and hijackers. The condemnation of the local process which ostensibly failed to comport with international expectations shows connection between local and international rules of law.

VII. CONCLUSION

The rule of law is an idea(l) about law, justice, and morality. It considers what laws, norms, rules, procedures, systems, and structures should be and what they should not be. Norms should be proclaimed publicly by the peoples and/or their appropriate representatives. All the people who will be bound by the norm, and not just an elite group, must have a voice in norm creation. The public nature of the process informs

115. David Gonzalez, *Cuban Crackdown on Critics Stalls a Drive to Ease U.S. Embargo*, N.Y. TIMES, Apr. 13, 2003, at A18; see also *Despite Crackdown in Cuba, Senators Push to Lift Travel Ban*, AGENCE FRANCE PRESSE, Apr. 30, 2003.

116. Ann Louise Bardach, *A Purge With a Purpose*, N.Y. TIMES, Apr. 13, 2003, at § 4.13.

117. Peter Eisner, *Cuba Executes 3 in Failed Hijacking of Ferry*, WASH. POST, Apr. 12, 2003, at A13.

those who are bound by the law as to what the rules are. The idea(l) also suggests that laws, norms, and regulations need to be clear so that people understand what rules are to be followed, and they need to be predictable in their application so that persons know what behavior is appropriate.

Inherent in this formulation are three realities. One is that the law governs people as well as the government itself. Next, persons should obey the law. Third is that the norms we call law need to be obeyable — not only in the sense of being known, knowable and predictable, but in the deepest sense of being just.

Therefore, to be just and justly applied, predictable, understandable, and obeyable, laws need to be both universal and culturally contingent. We do not have, nor do I think want, a homogenized world; we do want an ordered and peaceful world in which there is human progress, thriving of peoples and cultures, and economic development. The limitations on the rule of law are not universality or cultural contingency although there may be cultural parameters within which a rule of law paradigm may be deployed. The universal should not be used as pretext to decimate just and viable local norms and the local should not be used as pretext to impose a reign of corrupt, irrational, arbitrary, abusive, and discriminatory power. So while law should be congruent with social values, neither social values nor law can violate a higher order of justice either locally or internationally.

Central to the rule of law idea(l) is that we, as humans, should be able to conduct our lives without surprises, without governmental interference that we cannot calculate because of its unpredictability or arbitrariness, and with dignity. Key to this observation is the recognition of individuals' existence within society as both autonomous individuals and community members, free beings with dignitary rights because of their humanness.