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Exporting the Rule of Law

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Exporting the Rule of Law

John V. Orth[†]

The Rule of Law is routinely prescribed these days for what ails the post-Communist world.¹ The new democracies of Central and Eastern Europe, particularly Russia, are advised to develop a stable property regime, a reliable means of contract enforcement, and an impartial judiciary. The market economies of East Asia, particularly China, are urged to implement the Rule of Law in the civil and political rights area as well as in the economic domain.² Failure to adopt the Rule of Law will be punished, it is said, not only by the discipline of the market but also by international, political, and economic sanctions.

From the law and legal history point of view, these policy prescriptions, however well-intentioned, risk sounding banal, naive, or both. The achievement of the Rule of Law in Western Europe and North America came at a great cost, involving wars and revolutions, and took place over centuries and decades, not months and weeks.³ Furthermore, modern lawyers have difficulty assigning the Rule of Law operational meaning outside the

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¹ See, e.g., Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 95; Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov.-Dec. 1997, at 22.

² See, e.g., Elizabeth Rosenthal, *Ideas for Legal Reform to Be Explored*, N.Y. TIMES, June 25, 1998, at A8 (describing “a ‘rule of law’ initiative” offering “Chinese scholars and officials American expertise as Beijing pursues ongoing legal reforms”).

³ See J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 24-26 (Greek perception of the Rule of Law), 69-70 (Roman concept of Rule of Law), 99-100 (the Rule of Law in the Early Middle Ages), 131-34 (the Rule of Law in the High Middle Ages), 176-79 (the Rule of Law in the Renaissance and the Reformation), 232-36 (the Rule of Law in the seventeenth century), 282-83 (the Rule of Law in the eighteenth century), 409-13 (the Rule of Law in the twentieth century) (1992); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-201 (7th ed. 1908) (the Rule of Law in England).

specific norms and institutions of a given jurisdiction. A few lawyers, mainly academic, have come to question the possibility, even the desirability, of the Rule of Law.⁴ Finally, theorists who emphasize the role of civilizations in shaping world order suggest that the Rule of Law is uniquely Western and that it may not be “for export.”⁵

I. The Concept of the Rule of Law

Although the general idea of a rule-based state is as old as the Romans, the specific phrase “the Rule of Law” was first popularized only in the last half of the nineteenth century by A.V. Dicey, Vinerian Professor of English law at Oxford from 1882 to 1909.⁶ In the first edition of his immensely influential and often reprinted *Introduction to the Study of the Law of the Constitution*, Dicey confidently declared: “Two features have at all times since the Norman Conquest characterised the political institutions of England.”⁷ The first of these venerable features was the supremacy of the central government.⁸ Since 1688, that supremacy rested with Parliament.⁹ The second feature, “closely connected with the first,” was the Rule of Law.¹⁰ As Dicey defined it, the Rule of Law had three meanings in England: (1) no one can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law;¹¹ (2) everyone’s legal

⁴ See *infra* notes 38-40 and accompanying text.

⁵ See, e.g., SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 68-72 (1996).

⁶ See RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* (1980), reviewed by John V. Orth, *On the Relation Between the Rule of Law and Public Opinion*, 80 MICH. L. REV. 753 (1982).

⁷ DICEY, *supra* note 3, at 179; see also H.W. Arndt, *The Origin of Dicey’s Concept of the “Rule of Law,”* 31 AUSTRALIAN L.J. 117 (1957) (tracing the concept to the Australian lawyer W.E. Hearn); Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 149 (1958) (“In Anglo-American legal philosophy at least, ‘the rule of law’ is forever associated with Dicey . . .”); see COSGROVE, *supra* note 6.

⁸ See DICEY, *supra* note 3, at 179.

⁹ See *id.*

¹⁰ *Id.*

¹¹ See *id.* at 183.

rights and liabilities are determined by the ordinary courts of the realm;¹² and (3) everyone's individual rights are derived from the ordinary law of the land, not from a written constitution, so that the English Constitution is the product of the ordinary functioning of the courts and not the source of the courts' jurisdiction.¹³

Dicey's formulation was highly specific. The Rule of Law was not a cultural attribute common to the West, but rather it was local to England, a distinctive product of English history and legal institutions. Dicey's Rule of Law distinguished the English legal system from the French across the English Channel, where *droit administratif* meant separate laws and courts for government officials, as well as from the Americans across the Atlantic Ocean, where written state and federal constitutions reigned supreme.¹⁴

More than a mere defining national characteristic, the concept of the Rule of Law also had political uses: as a limitation on parliamentary supremacy or at least a standard by which to evaluate the exercise of that supremacy. By the time Dicey published *The Law of the Constitution*¹⁵ in the late nineteenth century, the English Reform Acts had placed control of Parliament in hands he could not trust.¹⁶ In particular, he feared the rising power of the trade unions and later, specifically, deployed his constitutional concept against the Trade Disputes Act of 1906.¹⁷ The Act exempted labor organizations from liability in tort, to which Dicey remarked: "An enactment which frees trade unions from the rule of equal law stimulates among workmen the fatal delusion that workmen should aim at the attainment, not of equality, but of privilege."¹⁸ Implicitly, Dicey was adding the

¹² See *id.* at 189.

¹³ See *id.* at 191.

¹⁴ See *id.* at 324-401 (comparing Rule of Law with *droit administratif*) and 140-42 (contrasting the unwritten English Constitution with the written federal constitution).

¹⁵ DICEY, *supra* note 3.

¹⁶ England's First Reform Act, 1832, 2 & 3 Will. 4, ch. 45, extended the right to vote to middle-class males, and the Second Reform Act (The Representation of the People Act), 1867, 30 & 31 Vict., ch. 102, greatly enlarged the electorate by extending the vote to working-class males.

¹⁷ 6 Edw. 7, ch. 47.

¹⁸ A.V. DICEY, LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY xlvii (2d ed. 1914).

requirement of uniformity to his earlier definition of the Rule of Law: Everyone's legal rights and liabilities ought to be the same.

The assertion that aspirations of the working class were antithetical to the ideal of the Rule of Law became commonplace in English academic legal circles. Sir William Holdsworth, one of Dicey's successors as Vinerian Professor and author of a multi-volume history of English law, repeated the charge in the 1920s: "It is not till these last days that Parliament itself has allowed exemptions from the rule of law in favour of the supposed indefeasible rights of turbulent Trades Unions, conscientious churchmen, and conscientious objectors, to the great detriment of the peace and stability of the state."¹⁹ Similarly, years later in 1980, *The Oxford Companion to Law* flatly stated: "The rule of law does not apply in modern Britain which, despite the forms and some appearances of liberal democracy, when a Labour government is in power, is a dictatorship headed by a group of trade union leaders and their political servants."²⁰ The general acceptance of this charge may have contributed to the Labour Party's repeated electoral losses, until, of course, Tony Blair's recent creation of New Labour.

In America today, the Rule of Law lacks even the meager definition supplied by Dicey and is invoked most often for purely hortatory purposes, as in "ours is a government of laws, not of men."²¹ A written constitution supplies more specific guarantees, making recourse to general principles less necessary. That point was expressly made in a colloquy between two U.S. Supreme Court Justices as early as 1798.²² Justice Samuel Chase grandly declared: "An Act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot

¹⁹ 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 446 (3d ed. 1923).

²⁰ DAVID M. WALKER, *THE OXFORD COMPANION TO LAW* 1094 (1980).

²¹ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 106 (1977) (dismissing the Rule of Law as used in America in the 1950s as one of several "cheerfully meaningless slogans"). Recently, an attempt has been made to raise the level of American discourse. See, e.g., Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 *COLUM. L. REV.* 1 (1997).

²² See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

be considered a rightful exercise of legislative authority.”²³ Justice James Iredell, in reply, denied that judges can be guided by so uncertain a rule: “The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject”²⁴

As Iredell foresaw, the existence of a written constitution led to a judicial approach to constitutional decision-making in America that routinely began with the text, a supposedly “fixed standard,”²⁵ rather than with “great first principles.”²⁶ However, the inclusion in the text of another vague English legal phrase, “due process of law,” meant that the judges were eventually able to apply many natural law principles, as well as some of their own personal predilections.²⁷ Today’s due process jurisprudence, although supposedly based on a constitutional text applicable only to America, and partly expressed in terms specific to American legal institutions, resembles to a degree Dicey’s Rule of Law.²⁸

Inherent in both American and English constitutionalism is the view that even legitimate power is dangerous. In other words, “power corrupts.”²⁹ “The great difficulty,” as James Madison

²³ *Id.*

²⁴ *Id.* at 399.

²⁵ *Id.*

²⁶ *Id.* at 388; *supra* note 23 and accompanying text.

²⁷ In form, the Supreme Court has adopted the views of Justice Iredell and ruled that it only may invalidate acts of the legislative and executive branches of the federal and state governments on the basis of specific provisions of the Constitution. In substance, however, the beliefs of Justice Chase have prevailed as the Court continually had expanded its basis for reviewing the acts of other branches of government.

JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 426 (2d ed. 1983).

²⁸ See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (demonstrating that due process jurisprudence is not directly tied to the text of the Constitution).

²⁹ The phrase “power corrupts” is generally attributed to Lord Acton, but is, of course, a commonplace observation:

Lord Acton has acquired a reputation for oracular wisdom for his trite observation, in a letter to Bishop Creighton, in 1887, that power corrupts and absolute power corrupts absolutely. From the reverential care always taken to ascribe this sentiment to Acton (“as Lord Acton said”) one would assume that by some miracle it had hitherto escaped the observation of mankind.

observed in *Federalist 51*, is giving the government enough power "to control the governed," while forcing the government "to control itself."³⁰ One solution, worked out in some detail in the U.S. Constitution, is the system of checks and balances. The separation of powers into legislative, executive, and judicial branches is made self-enforcing by giving the officers in each branch constitutional means and personal motives to resist encroachments by the others. Individual psychology is made to serve public purposes. As Madison said: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."³¹ As applied to the judiciary, the principle has meant linking personal esteem and professional reputation to the successful performance of official duties, among them, making decisions concerning the correct roles of the other branches. In the decision of individual cases, the judges sometimes express their own power by limiting the power of the government. In the common law tradition of England and America, strong judges, drawn from successful practitioners and politicians, have served at once their personal ambition for recognition, the needs of the judicial branch, and the Rule of Law.

II. The Reality of the Rule of Law

The law in action, as has often been observed, is not the same as the law in books. Legal systems, even those supposedly well-grounded in the Rule of Law, occasionally break down, sometimes spectacularly. For example, Judge Jeffreys, notorious for his conduct of the "Bloody Assizes" in England in 1685, became the personification of the unjust judge and Star Chamber became synonymous with institutionalized tyranny.³² Corruption also

BERGEN EVANS, *DICTIONARY OF QUOTATIONS* xiii (1968).

³⁰ *THE FEDERALIST* No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

³¹ *Id.*

³² George Jeffreys (1648-89), was chief justice of the King's Bench from 1683 to 1685 and Lord Chancellor from 1685 to 1689. *See* WALKER, *supra* note 20, at 661. He has been characterized as "the worst judge that ever disgraced Westminster Hall," and "he was notorious for bullying, invective, coarse and overbearing conduct." *Id.* He presided at the so-called "Bloody Assizes" of 1685, described as "exemplars of

threatens every legal system. In the 1960s, the Oklahoma Supreme Court was shaken by the revelation of criminal acts by no less than three of its justices.³³

Not only do legal systems sometimes fail to measure up to the requirements of the Rule of Law, they also sometimes tolerate, even for long periods of time, rules and practices that hardly comport with the ideal. For centuries, the common law refused to allow criminal defendants to be represented by counsel, a rule changed in America (at least with respect to federal prosecutions) by the Sixth Amendment.³⁴ For centuries, too, the common law denied aliens the right to inherit land, a rule that survived the American Revolution and was only slowly eliminated from the laws of the states.³⁵ At the present time, the so-called Diplock courts in Northern Ireland operate with a single judge and no jury, a practice justified by a "state of emergency" that has now lasted over twenty-five years.³⁶

Despite persistent lapses, the Rule of Law as an ideal has commanded near universal support; the very generality with which it is usually stated has made it a convenient rallying cry. The Rule of Law itself, however, has not been completely immune from criticism, even from within the legal academy, as a bizarre exchange twenty years ago demonstrates. The late E.P. Thompson, Marxist historian and anti-nuclear protester, concluded

injustice." *Id.*

Star Chamber was an English court of extraordinary jurisdiction that at first was used to handle especially difficult cases, but later was abused by the government. It became "a synonym for a tribunal of arbitrary tyranny." *Id.* at 1174.

³³ See *Johnson v. Johnson*, 424 P.2d 414, 416 (Okla. 1967) (describing bribetaking of Justice Nelson S. Corn and two other justices).

³⁴ See U.S. CONST. amend. VI.

³⁵ See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 53-54 (O.W. Holmes, Jr. ed., 12th ed., Little, Brown, and Co. 1873) (describing as a "well settled rule of the common law" that "an alien cannot acquire a title to real property by descent"). Today a few states have statutes that prohibit inheritance by a nonresident alien if a United States citizen could not inherit under the law of the alien's country. See, e.g., N.C. GEN. STAT. § 64-3 (1997). Doubts have been expressed about the constitutionality of such statutes. See PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 28 (2d ed. 1994).

³⁶ See generally JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT JURY: DIPLOCK TRIALS IN THE ADVERSARY SYSTEM (1995).

a book on eighteenth-century English legal history with an impressive tribute to the Rule of Law, which he proclaimed “an unqualified human good.”³⁷ Reviewing Thompson’s book in the pages of the *Yale Law Journal*, Harvard Law School Professor Morton J. Horwitz, a leader of the critical legal studies movement, attacked Thompson for praising the Rule of Law: “By promoting procedural justice it enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations.”³⁸ More recently “critical race theorists,” on the faculty of almost every major American law school, have questioned whether the Rule of Law is possible when different races are involved.³⁹

Radical critique of the Rule of Law is not new; it has been a persistent, if minor, theme of the Western moral tradition. Adam Ferguson, product of the Scottish Enlightenment, made the trenchant observation in 1773 that “many of the establishments which serve to defend the weak from oppression, contribute, by securing the possession of property, to favor its unequal division, and to increase the ascendant of those from whom the abuses of power may be feared.”⁴⁰

Legal history can teach humility and assist in the formulation of realistic expectations for others’ adherence to the Rule of Law. Not only must the concept be clarified, but realistic measures of success must be established. Also, the product must not be oversold. The Rule of Law is difficult to maintain in the best of times. Once established, it can long co-exist with contradictory practices. For all its unquestionable value, it creates a system that permits abuse by the well-informed and perpetuates inequality. Candid acknowledgment of these facts will focus attention on the

³⁷ E.P. THOMPSON, *WHIGS AND HUNTERS* 266 (1975).

³⁸ Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561, 566 (1977).

³⁹ See Neil A. Lewis, *Black Scholars View Society with Prism of Race*, *N.Y. TIMES*, May 5, 1997, at B9. But see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997) (criticizing critical race theory).

⁴⁰ ADAM FERGUSON, *ESSAY ON THE HISTORY OF CIVIL SOCIETY* 151 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1773).

real challenge (reduction of the risk of abuse) and on the real benefits (long-term stability and legitimacy). For the successful export of the Rule of Law, a policy framework and a specific goal are recommended.⁴¹

III. Policy Framework

1. **Be clear.** The requirements of the Rule of Law are not easy to specify with exactness in any particular legal system.⁴² As norms of universal application, they must necessarily be stated in terms of great generality.

In terms of procedure, certain institutional arrangements are required: (1) regular availability of tribunals for resolving disputes; (2) impartial decision-makers; and (3) prompt and effective implementation of decisions.⁴³ Around these core concepts cluster others of almost equal importance, such as adequate record-keeping, fair trial practices, the publicity of proceedings, reasoned explanations of results, and the right of appeal.

No particular substantive law is generally required, but it is essential that disputes be decided by reference to known pre-existing rules (no retrospective laws). In commercial law, stability is particularly important so that business planning may go forward with confidence that the rules will not be abruptly changed. As the great English judge, Lord Mansfield, observed more than two centuries ago: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."⁴⁴ In non-commercial cases, more flexibility may be permitted as equitable concerns may qualify the application of general rules to particular cases. Even in such cases, however,

⁴¹ Pessimism has been expressed towards current programs aimed at exporting the Rule of Law. See Carothers, *supra* note 1, at 95.

⁴² See WALKER, *supra* note 20, at 1093-94 (describing the Rule of Law as "a concept of the utmost importance but having no defined, nor readily definable, content").

⁴³ Cf. Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 (1958) (listing open courts, an independent judiciary, and a reasoned justification for decisions).

⁴⁴ Vallejo v. Wheeler, 98 Eng. Rep. 1012, 1017 (K.B. 1774).

reference to known pre-existing norms must be required in order to permit verification of results.

2. **Be resolute.** The demand for the Rule of Law, as defined in general terms, should not be negotiable. At this level of abstraction, the Rule of Law is not culturally conditioned any more than scientific procedures, basic business practices or, for that matter, rules of play in international sports. Nevertheless, in many instances, the Rule of Law can be shown to connect with local traditions either in religious legal systems or in historical practices. The Islamic *sharia* and the Confucian magistrate are cases in point.⁴⁵

The Rule of Law is demonstrably in the interest of every modern nation. While avoidance of legal norms may seem expedient in the short run, it has insupportable costs in lost efficiency and legitimacy in the long run. Put crudely, the Rule of Law is in the enlightened self-interest of ruling elites everywhere.

3. **Be realistic.** Adherence to the Rule of Law is demonstrated by the fair resolution of many, if not most, cases; its absence is shown by the reverse, not by failure in one or a few individual cases. No legal system resolves all disputes properly, and celebrated cases are often poor demonstrations of a system's integrity, as witness *The People v. O.J. Simpson*. Losing parties will often equate their loss with the failure of the Rule of Law. Even in Britain and the United States with well-founded legal traditions, the demise of the Rule of Law has been frequently and loudly proclaimed.⁴⁶

4. **Be patient.** The Rule of Law has been a slow growth in the West. The accumulation of appropriate constitutional norms, professional cultures, and personal characteristics took time. There is no reason to expect that other regions can force these

⁴⁵ *Sharia*, Islamic law, differs from Western law in that it is, in theory, based on divine revelation, but it has inevitably been developed by the interpretations of scholars and jurists in a manner similar to Western law. See H.A.R. GIBB, *MOHAMMEDANISM: AN HISTORICAL SURVEY* 88-106 (2d ed. 1953).

Confucianism, the state religion of pre-Communist China, was based on a system of ethical precepts for the harmonious management of society. The Confucian magistrate was to set a moral example for society. See H.G. CREEL, *CHINESE THOUGHT FROM CONFUCIUS TO MAS TSÊ-TUNG* 126-28 (1953).

⁴⁶ See *supra* notes 32-41 and accompanying text.

developments overnight.

IV. Policy Goal

The Rule of Law depends on judges willing to decide cases in accordance with principle, despite occasionally incurring official displeasure, and sometimes at real personal risk. While the consistency and stability of statutory law and the regular operation of law enforcement are powerful adjuncts of the Rule of Law, they are the responsibility of the political branches of government, which is primarily responsive to their constituents. Little can be done externally to encourage proper performance except sustained and sincere efforts to convince the most influential constituent groups that the Rule of Law is in their material self-interest.

With the judiciary, however, the accountability is at least in part professional. Foreign lawyers, speaking a different language and operating in a distinct historical and legal culture, cannot directly influence outcomes, but they can assist in the development of indigenous legal culture. Legal officials must be encouraged to make their decision process as transparent as possible. The judges must know someone is watching, but the scrutiny must be principled and fair. Decisions must be examined with respect to consistency with pre-existing law, adequacy of the factual record, and correct application of the law to the facts. The judicial decision-maker must expect criticism for mistakes, but also praise for correct and heroic decisions. Critics must operate within a professional culture that values and supports honest opinions, even (or especially) those with which they disagree.

The American legal community can assist the project by paying attention to foreign judicial decisions. American law schools can invite foreign judges to visit and can provide regular recognition for distinguished judicial performance. American legal journals presently publish an enormous number of articles and comments on recent cases, almost all of them decisions of the U.S. Supreme Court and many of them analyzed in great and repetitive detail. Consideration of foreign cases will add welcome diversity. Knowledge of foreign languages and cultures is, of course, indispensable, so part of the effort must include more cosmopolitan training of American lawyers, which will have other benefits in a globalized economy. The American judiciary, at the

federal and state level, can encourage exchanges with foreign judges and can engage in candid discussions of decision-making, including the decision of real or hypothetical cases. Bar associations, not only at the national level, can also participate. Care must obviously be exercised to prevent the appearance of officious intermeddling. In addition to receiving outside support, judges who serve the Rule of Law must be heroes in their own countries. Foreign accolades cannot substitute for local recognition.

Encouraging the development of local legal culture is more important in the long run than improving foreign observation. Legal culture is not so readily exportable as scientific culture, in which the medium is the universal language of mathematics and experiments are reproducible abroad. Law is inevitably more local. However, the Rule of Law does have some cross-cultural regularities. Judicial independence everywhere is not only institutional, it is also psychological. Not only must the relevant constitutional arrangements permit it, but the individual judge's ambition for recognition and advancement must be linked to the impartial administration of the Rule of Law. The goal must be the creation of a strong local legal culture that supports and encourages judicial independence. To paraphrase Madison, the judges' ambition must be made to counteract the corrupt, selfish, and short-sighted ambition of other government officials.⁴⁷ The successful export of the Rule of Law means the end of the need for threats and blandishments; once fully functional, the Rule of Law is self-perpetuating and self-policing.

⁴⁷ See *supra* notes 30-31 and accompanying text.