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## Public Rule of Law

Jeremy Waldron  
*NYU School of Law*, [jeremy.waldron@nyu.edu](mailto:jeremy.waldron@nyu.edu)

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## **PUBLIC RULE OF LAW**

### **Jeremy Waldron**

#### **1. The rule of law—a rough definition**

My subject today is the role of the rule of law in public law and how we should think about the constraints that the rule of law imposes in this realm of statecraft. This is a mundane enough topic. Very roughly, the rule of law involves

- a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;
- a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned; and
- a requirement that there be courts, operating according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved.

In public law, it is usually taken to involve

- the limiting of discretion,
- the subjection of public power to publicly acknowledged rules,
- fair and consistent administration of existing rules by officials dealing with individual cases
- the establishment of procedures that allow people to challenge the legality of official action when it impacts adversely upon their interests

That will serve as a sort of rough walking-around definition. I hope to be able to say one or two new things about the rule of law in public law. In particular I want to criticize views that use the idea of the rule of law to denigrate the role of legislatures and legislative regulation in modern democratic states.

## **2. The World Bank**

For consider the following account of the rule of law. According to James Wolfensohn, who used to be President of the World Bank, the rule of law means that

A government must ensure ... it has an effective system of property [rights], contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system<sup>1</sup>

Ask yourselves: What is missing here? Well, what is missing seems to be large tracts of what you and I would call public law. Public law, where the rule of law doesn't just mean enforcing contracts, protecting investors, and securing property rights, but means (as well) appropriate compliance with and enforcement of legal regulations by business, industry, and commerce. It includes appropriate application of limits and regulations on contracts (for example in labor markets) or on the use of property (e.g. for social or ecological reasons). Respect for legislation, the enforcement of regulations—these aspects of the rule of law are deafening by their silence in James Wolfensohn's definition. Yet they are exactly the issues we need to address if we are to explore the relevance of the rule of law for public law.

## **3. The distinction between public and private law**

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<sup>1</sup> James D. Wolfensohn In his proposal for a "Comprehensive Development Framework" in January 1999. Proposal for a Comprehensive Development Framework, at 10-11 (Jan. 21, 1999), available at [http://web.worldbank.org/archive/website01013/WEB/0\\_CO-87.HTM](http://web.worldbank.org/archive/website01013/WEB/0_CO-87.HTM)

I know some people criticize the distinction between public law and private law. There is just law, they say, and it's all enforced by the state. And perhaps we may infer from their critique that it's possible to have a one-size-fits-all conception of the rule of law as a political ideal, a single conception of the rule of law that applies across the board. And perhaps we should say with Hans Kelsen that in the last analysis all law involves the operation of the state on society and on the people in it; all law is public law in some ultimate sense.<sup>2</sup> So it ought to be possible to state the main principles of the rule of law in such a way that they can be applied without differentiation to criminal law and civil law, to contract and administration, to constitutions and investment treaties, to private law and public law. That ought to be possible in the last analysis. But before we get to the last analysis, there are things to be said about the distinctiveness of what we *ordinarily* call public law and about the distinctive way in which the ideal of the rule of law seeks to discipline and constrain governance in this particular area.

#### **4. The integrity of *public* rule of law**

So that is where I want to begin: with a conception of the rule of law that is oriented frankly and specifically to public law. Waldron's first thesis:

**there needs to be a dedicated conception of the rule of law that can be applied to public law in particular.**

It is true that in public law we must face up to the implications for private individuals and businesses. We have to acknowledge that much of the regulatory activity of the administrative state is going to affect the content and exercise of private rights like contract and property. Still, public law is not necessarily supposed to back down when it faces this prospect. And—and this is my second proposition—it is **not the job of the rule of law in public law to make public law back down in these circumstances.** The role of the rule of law in public law is not just to be representative of private rights. It is

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<sup>2</sup> Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), 282: "The Pure Theory of Law, from its universalistic viewpoint ... sees in the private legal transaction just as much as in an administrative order an act of the state."

not the job of the rule of law, as a political ideal, to stand sentinel for the protection of private property rights in the face of public law regulation.

What I am denying here, in Waldron's second thesis, is a very common view. Even in the textbooks of public law, the rule of law is commonly understood to imply particular solicitude for private liberty and individual property, and societies in which the rule of law is thought to flourish are characteristically thought of as societies where rights of ownership are protected, contracts enforced, and a predictable environment established for enterprise, investment, and economic activity. But that common view is not one that I hold: in public law, the rule of law is not to be the representative of private law rights, nor is its mission to erect a Montesquieu-ian barricade between the operation of public law and the realm of private rights which is established on a quite different basis. (I'm thinking of the doctrine propounded by Montesquieu in *The Spirit of the Laws* that we should keep private law and public law apart and "[t]hat we should not regulate by the Principles of political Law those Things which depend on the Principles of civil Law.")<sup>3</sup>

Certainly, it is the job of the rule of law to be *alert* to the presence of individual rights, including property and contractual rights, that may be affected by public law regulation, and to stand against any arbitrariness. But this not a way of protecting them from the impact of public law; it is a way of protecting them from the arbitrariness of public law. And we need to develop a sense of the distinction between arbitrary and non-arbitrary state action that can be applied in this domain. That's the work that the rule of law has to do in the realm of public law; it is not just a Trojan horse for private law.

### **5. The publicness of the "private" party**

Now I want to develop a third thesis, which will be a little bit more controversial, and put it to you for your consideration.

Public law impacts on private interests and private liberty. That is often its function to reconcile interests with one another and to avoid the emergence of great public evils from the accumulation or the interaction of

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<sup>3</sup> Montesquieu, *The Spirit of the Laws*, p. 511 (Book 26, Ch. 15).

private decisions. So private interests have to be taken into account and in public law private parties confront state agencies with complaint about arbitrary impact.

Now, when these confrontations take place, I want to say that the private interest present itself in the guise of the interest of a particular *citizen*, one *member of the public*, as opposed to the public en masse. And that gives the private interest a public flavor of its own.

Usually, we contrast public law and private law by saying that private law concerns legal relations between ordinary private persons, whereas public law involves relations where at least one of the parties is a person or entity dedicated specifically to the pursuit of the public interest and authorized officially to act on that basis.<sup>4</sup> We say: public law is about the way the state, its officials, and its agencies carry out the functions of governing. That we say is the distinguishing characteristic. And with this contrast we implicitly concede that the other party in a public law confrontation is a wholly private party, a party of exactly the same kind as we see figuring in private law confrontations. So: private law is private versus private; public law is private versus public.

Well, I want to question that asymmetry. For one thing, public law sometimes concerns relations between different public institutions: between federal and state government, for instance, or between one public agency and another. Or, to take another example, sometimes an individual in a public law case acts as “a private attorney general” (to vindicate some rule of law in the name of the public rather than on the basis of his own private concerns).

But here’s my point: even in disputes that concern the impact of state regulation on individuals and their businesses, we can and we should still consider the “private” party in a public light? After all, the property interests or the liberty interests of particular members of the public are not distinct from the public good; they are what make up or comprise the public good. The public good, after all, is not just the private good of the ruler or his state: it is supposed to relate in an open-ended way to the good of all the people who have lives of their own to lead and who are making a life around here (This is

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<sup>4</sup> Source for this sort of definition? Ulpian

something that has always been stressed in the *republican* political tradition, something I want to return to in a moment.)

So we have public versus public: a public authority on the one hand, and a member of the public, on the other. One—the representative of the public as a whole. The other—a constituent member of the public.

Of course, the non-state party is also trying to vindicate a private right or a private interest; and we should not lose sight of that. Still, his private interest, along with all private interests, is not something alien to the public good. Even apart from its contribution to the interests of others, it is inherently *qua* private interest one of the things that the public authorities exist to protect and promote.<sup>5</sup> The lives and well-being and prosperity of its members make up the good of the public, along with literally public goods like water supply, defense etc. So we can view the vindication of private rights in public law in a sort of public light—in at least two ways:

*First*, as a matter of respect: both parties embody—each in its own way—the dignity of the public. It is important, we sometimes say in public law, to ensure that the state party is treated with the proper dignity as befits its dedication to the public good. But we may also want to emphasize the dignity of individual citizenship.<sup>6</sup> The ‘private’ party is entitled to respect as a constituent member of the public that the state, its agencies, and its officials are supposed to represent. This plays havoc, I think, with the Napoleonic notion that there is an affront to the dignity of the state to be challenged by a mere private person. That formalistic stance sounds much less convincing when it is phrased in terms of there being an affront to the public authority in being challenged by a member of the public.

Secondly though, and on the other hand, taking this approach has implications for the way in which the “private” party presents itself. For equally, the bearer of the “private” interest is to hold and maintain the interest he represents in the spirit of a member of the public. I don’t mean that he is to give up his self-interest. But he is not to affect obtuseness with regard to the

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<sup>5</sup> Philip Pettit has suggested something similar in his association of the role of public law in securing the conditions of public life among people who are free and independent.

<sup>6</sup> See Waldron, The Dignity of the Citizen in McCrudden (ed.) *Understanding Dignity*.

actions of those charged with protection of the public interest. He is deemed to understand, for example, that the public interest requires regulation and that it may require intervention from time to time to uphold and modify the regulatory responsibility with which the public authority is invested.

Waldron's third thesis then is this:

**that the “private” party in a public law relation should be thought of and should think of himself as a citizen or member of the public, not just as the bearer of a private interest.**

There is a debt to Jean-Jacques Rousseau here and his doctrine in *The Social Contract* that individuals should not contrast themselves with the sovereign but stand ready to take its perspective, seeing themselves and their interests in the light of the general will, as part and parcel of the sovereignty established in the republic as a whole.<sup>7</sup> No doubt Rousseau exaggerates this with loose and dangerous talk about forcing people to be free in the sense of positive liberty; no doubt he exaggerates people's ability to comprehend the impact of the law upon their own position in the light of their membership of the sovereign that imposed the law and not just in light of their particular interests. But, as I have argued elsewhere, there is more interesting jurisprudence in Rousseau's book than meets the eye.<sup>8</sup> And we should not neglect the important point that he exaggerates: that no conception of republican authority is adequate if it does not relate directly to the well-being of individuals and no conception of republican authority is adequate if it does not relate individuals' understanding of their own well-being back to the concerns that are pursued under public authority in their name.

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<sup>7</sup> Rousseau, *Social Contract*, I.6: “the Sovereign, being formed wholly of the individuals who compose it, neither has nor can have any interest contrary to theirs; and consequently the sovereign power need give no guarantee to its subjects, because it is impossible for the body to wish to hurt all its members. We shall also see later on that it cannot hurt any in particular. The Sovereign, merely by virtue of what it is, is always what it should be.”

<sup>8</sup> See Waldron, *Can there be a democratic jurisprudence?* 58 Emory L.J. 675 (2008-2009).

## 6. Public and *republic*

You will understand that, theoretically, the account I am offering involves something like a *republican* conception of the public good. The public good is not conceived as something separate from the good of individuals, except insofar as it is pursued by the community collectively rather than severally by the individuals themselves, on their own account. It comprises the good of all the individuals who live in the community.

And the thesis I am defending—Waldron’s third thesis, which presents the “private” side of public law relations in a public light—makes no sense on conceptions of state and governance that are inherently opposed to the republican approach.

It does not make sense, for example, on an understanding of rulership that treats the kingdom and everything in it as the patrimony of the sovereign. In certain monarchies, the state, its resources, and its people used to be conceived of as *belonging to the king*. They were part of his patrimony: what was done with them was done in his name, and in the first instance for his benefit; what was done with the state, its resources, and its people was his business. Patrimonial monarchy involves a sort of privatization of the public for the benefit of just one person or family. And accordingly any understanding of public law is just an understanding of the special privileges of this family and its impact on those who are subject to it.

The move that I am making makes little sense on this approach, for by asserting himself against his rulers, an individual cannot be claiming any shared part of his own in the patrimony of the ruler.

The republican idea, by contrast, involves a frank acknowledgement that the business conducted by government is the public business of all the members of the society rather than the patrimony of any privileged individual or family. (This is so whether or not the republic dresses itself up in monarchical costume for the sake of the tourist trade). And, like a number of other theorists—I think, Martin Loughlin in some of his moods<sup>9</sup>—I am interested in elaborating a theory that identifies (or closely associates) the

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<sup>9</sup> Martin Loughlin’s provocative suggestion that there cannot be public law in a monarchy.

word “public” in “public law” with the “public” in “res publica,” that is, in the idea of *a republic* as a particular kind of political form.<sup>10</sup>

More abstractly, people say that public law is about the state and about the public good conceived as the special concern of the state. But if the state is simply conceived as an armed organization that happens to dominate a society and if the public good and public business are understood simply as conditions favorable to the work of that organization whatever it is, then again we do not really have a basis for the sort of conception of public law that I am offering. My approach will not work on any conception of public law that makes public law just a body of law concerning rulership or domination, and the impact of that on the subject. The logic of subjection, the logic of state versus subject is quite different from the logic of republican authority versus citizen, quite different from public authority versus member of the public.

The underlying point, I suppose, is that different conceptions of rulership are going to make a difference to our understanding of public law and the way it is properly constrained.

And different conceptions of private parties as well. The conception I am advancing will be in trouble to the extent that those who challenge state action cannot take the point of view of the body responsible for the public good or cannot see themselves as full-blooded members of the public.

So for example the integrity of this republican conception will be challenged by rigid class structures, for they undermine the notion of a genuinely common good. It may be challenged too by other divisions and fissures in society, if the public good is subordinated in people’s minds to the triumph of their sector of society or their particular faction.

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<sup>10</sup> In associating public law with the idea of a republic, I won’t be arguing that it is a mistake to invoke public law norms in a monarchy. We can talk about public law in a genuine monarchy if we like; and we can still call the courses in which they are taught in monarchies, public law courses. No one will be confused. Our clients aren’t interested in the label “public law”: they just want their planning application to go through, or whatever. Nevertheless we may also be interested in the normative ideal that is in the offing, so to speak, when the term “public law” is used thoughtfully; just as we are interested in the idea of corrective justice which is in the offing when people pause to reflect on the law of torts.

## 6. Insiders and Outsiders

Still more is this republican conception of the public good and public law in trouble when state action is challenged by an individual or business outside of the society—an individual or business that sees itself as, at most, an investor in the society, and perhaps an extractive predatory investor at that, looking to the society and the interests of its members just for what it can get out of them.

I mention this because—unfortunately—this is often the perspective from which the rule of law is understood. Organizations like the Center for Financial Stability produce country rule-of-law indexes. And according to Harvard economics professor Robert Barro,

The general idea of these indexes is to gauge the attractiveness of a country’s investment climate by considering the effectiveness of law enforcement, the sanctity of contracts, and the state of other influences on the security of property rights.<sup>11</sup>

“The attractiveness of a country’s investment climate”—Barro means its attractiveness to foreign investors. And Barro adds that “the willingness of [such] customers to pay substantial amounts for this information is perhaps some testament to their validity.”<sup>12</sup> But perhaps for this very reason we should be nervous about the integrity of these indexes, if they are skewed too much weight to the protection of the interests of outsiders. For then we lose or loosen our grip on the idea that the person challenging public authority in a rule-of-law confrontation is himself a member of the public.

I mentioned James Wolfensohn before and the curiously laissez faire conception of the rule of law that he seemed to be championing—a conception of the rule of law that looked just to private law issues such as security of property, enforcement of contracts, corporate law, and so on. Some go further. An organization called the Center for Financial Stability offers a reading of the rule of law which measures as one key factor the “Burden of Government Regulation,” a measure obtained by asking businesses: “How

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<sup>11</sup> R Barro, “Determinants of Democracy,” (1999) 107 *Journal of Political Economy* S158, at S173.

<sup>12</sup> *Ibid.*

burdensome is it for businesses in your country to comply with governmental administrative requirements (e.g., permits, regulations, reporting)?”<sup>13</sup>

Again it seems to me that this is the best understood as the perspective of an outsider, interested only in what can be extracted from a given society, rather than the perspective of someone who lives in the society and who cares about changes in the quality of life (and changes in the distribution of the quality of life among his or her fellow inhabitants) that markets and property rights are supposed to contribute to. Responsiveness to these changes and willingness to express concern about them is the hallmark of the responsible citizen, and we should be wary of adopting any conception of the rule of law that is designed to sideline or discredit that. We should be especially wary when such conception is advocated from an external or predatory point of view. And Waldron’s fourth thesis, if you will countenance so many, is this:

**that the perspective of a foreign investor is not an appropriate perspective from which to develop a conception of the rule of law for a given society.**

## 7. Constraints on legislation

If we take seriously this business of “the burden of government regulation,” what seems to follow is that a society’s score on a Rule-of-Law index should be diminished by the effective enforcement or self-application of regulatory legislation. What people have in mind here is environmental legislation, legislation favorable to labor, limitations on freedom of contract, restrictions on investment or on profit-taking, legislation nationalizing assets or industries, price restrictions, and so on. Legislation as a medium through which regulatory or public policy goals are pursued is inherently subject to suspicion from the point of view of the property rights and investment opportunities which the rule of law is supposed to frame and guarantee.<sup>14</sup>

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<sup>13</sup> <http://www.centerforfinancialstability.org/rli.php>

<sup>14</sup> For example, see Shihata, “Relevant Issues,” 205: “An over-regulated economy undermines new investment, increases the costs of existing ones and leads to the spread of

The rule of law, on this view, seems to require that such legislation will be kept to a minimum.

Is there any respectable thought behind this idea—I mean any thought other than the hope of fostering a legal ideology conducive to extractive investment?

Well, maybe it is this. Some commentators draw a distinction between the Rule of Law and what they call rule *by* law.<sup>15</sup> They celebrate the one and they disparage the other. The one is supposed to lift law above politics. The other—rule by law—indicates the instrumental use of law (legal forms and legal procedures) as a tool of political power. Now these people will say that, at best, enacting legislation and putting it into effect represents rule *by* law rather than the rule *of* law. Legislative enactment is all-too-human to count as the rule *of* law. It represents the rule of the politicians who inhabit our parliaments and congresses rather than the rule of law. To get the rule *of* law in to the picture, at the very least we need to introduce some sort of controls on legislation, so that the politicians are constrained by law rather than the other way around.

Maybe constitutional constraints will count—although these are usually few and negative and they mostly leave regulatory discretion unabated; and anyway, constitutional constraints are as human in their positive origins as any other body of law: they are framed by human framers and elaborated and applied by human judges.<sup>16</sup> Once we go down this line of condemning various

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corruption. Multiplication of laws and regulations often reduces their quality and the chances of their enforcement.”

<sup>15</sup> For examples of the use of this distinction, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p. 3. See also Jeffrey Kahn, “The Search for the Rule of Law in Russia,” *Georgetown Journal of International Law* 37 (2006), 353, at p. 368; Charles Lugosi, “Rule of Law or Rule by Law? The Detention of Yaser Hamdi,” *American Journal of Criminal Law* 30 (2003), 225, at pp. 266 ff.; David Dyzenhaus, “Schmitt v. Dicey: Are States of Emergency inside or outside the Legal Order,” *Cardozo Law Review* 27 (2006), 2005, at pp. 2018 ff.

<sup>16</sup> I am not particularly convinced either that the requirements of the rule of law are satisfied by constitutional framework, which limits or controls ordinary legislation. (a) often negative and restrictive – so still leaves legislature with massive discretion (if discretion is supposed to be the problem). (b) empowers the judiciary – which is just another form of rule by men, albeit men in black robes.

governance arrangements as ultimately rule by men rather than the rule of law itself, we are going to back ourselves into a corner.

Mostly, those who take this line want to establish a principle of more or less unconditional respect for private property rights, and they use this to define a suitably constrained environment for legislatures to operate in, so that the constraints they impose on legislation can be represented as the rule of law that underpins the property rights rather than as the rule of men.

Me, I'm not at all sure that constraints based on property can escape the corrosive concern about agency. I believe that the establishment and operation of property rights and markets represents as much the work of public law as the autonomous operation of private law.

Be that as it may, we also have to insist that this is *not* an account of the rule of law that is oriented to the special mission of public law. (Deliberately so). It brings us back to Waldron's first thesis: we need to think in terms of a distinctive theory of the rule of law for public law, even when there is an impact on private rights. And a theory of the rule of law for public law cannot be a theory that eschews human or governmental agency. Certainly there is no public law without human agency.

I am enough of a positivist to say there is no law at all without human agency. This is one of the ways in which we contrast law with morality, even positive morality. This something I learned from Ch. 8 of H.L.A. Hart's book, *The Concept of Law*. Morality can change but it can't be the direct subject of deliberate or intentional change. The introduction of law by contrast in to a society is the deliberate introduction of the possibility that changes may be made intentionally in the way that a society is ordered. That's part of the what law means, on Hart's account; the union of primary rules of conduct, which may once have been immemorial, with secondary rules that empower a society to take responsibility for the primary order, adapt it flexibly to changing social conditions, and keep track of and monitor the changes that stand in the name of us all through a rule of recognition. That's what law essentially is and the principle we call the rule of law can't in its essence be antagonistic to that. It is essential to law that it is susceptible to deliberate change, and though the Rule-of-Law ideal may patrol that and discipline it, it cannot be understood as an ideal designed to preclude such change.

## 8. The tasks of legislation

That's a very abstract point, but we can state it also more substantively. Legislation is partly a matter of a society responding to circumstances, for the sake of social justice and for the sake of the health, safety, and environmental and human well-being, of all those committed to a government's care. In republican terms, it is a matter of people taking control of their lives together and of the conditions under which those lives are led.

Much of this legislation necessarily involves regulating our actions and our businesses, and the way we use human, natural and manufactured resources, *including resources committed to us and to our private use as owners.*

In the world we live in, it is inevitable that the detail of property rights will be affected over time by changes in circumstances, both in their character and in their distribution. The exploitation of land and other natural resources in a way that ignores public goods or the prospect of great public evils is not always tolerable. And the pace of our recognition of this is going to have to accelerate in breadth and intensity over the next fifty years if decent conditions of life are to have any chance of surviving man-made changes in climate that are presently afflicting us.

That matters like these may need collective attention from time to time is not a cranky or anomalous position; it is not Bolshevik or socially destructive; *it is the ordinary wisdom of human affairs.* No conception of governance, no conception of law or the rule of law that fails to leave room for changes and adjustments of this sort can possibly be tolerable. And it seems to me that any conception of the rule of law which denigrates the very idea of such changes and which treats their enactment and application as an inherent derogation from the rule of law has to be wrong.

True—any particular proposal for change will no doubt have its opponents, and sometimes the opponents will be right. They may be right because a proposed environmental regulation proves unnecessary or hysterical, or because a given piece of social legislation represents nothing more than cynical rent-seeking by one faction exploiting another. These are enduring possibilities in the sordid and shabby circumstances of human politics. But the opponents are not necessarily right.

Certainly, they are not right simply on the ground that once property rights have been established, any change or regulation is out of the question. That, it seems to me, cannot be the perspective of someone thinking as a member of the public. I don't mean an apparatchik. I mean the perspective of someone who lives in the society and who cares about changes in the quality of life (and changes in the quality and distribution of the quality of life among his or her fellow inhabitants. Responsiveness to these changes is the hallmark of the responsible citizen, and we should be wary of adopting any conception of the rule of law that is designed to sideline or discredit it.

### **9. The expectations of the citizen**

With this talk of responsible citizenship, we circle back round to the theme I introduced earlier. I think that both the idea of public law and the rule of law in public law have implications for how the private party regards itself.

Considered purely as a private person or business-owner, an individual might expect that his property rights will always remain unchanged and secure, available for his use and exploitation at any time on the same basis that they were available when he acquired them. And from a purely private law point of view, it might seem that the function of the rule of law is to underpin this expectation with legal certainty. But as a public person, as one who owns property as a citizen in a property-owning democracy, these expectations must be leavened with a sense of civic responsibility.

As a citizen, as a member of the public, the citizen/owner understands that there is such a thing as a public agenda, and such a thing as a changing world and evolving ideas, that are bound to affect the environment in which property rights are held and exercised, contracts enforced, and investments secured. He understands also the fact of physical, social, ethical and political changes that necessitate changes in the legal environment from time to time. That is the stance of a responsible member of the public so far as public law is concerned. And I don't think that we should put up with conceptions of the rule of law that are so oriented to purely private law concerns that they offer a respectable-looking cloak for irresponsibility in this regard.

### **10. *Lucas v South Carolina Coastal Council* (1992)**

I hope you won't mind if I spend the last eight or nine minutes of this lecture illustrating these points with an American case. In the third of the Hamlyn lectures that I gave in England in 2101, I used a particular case—an American case—to illustrate some of these ideas.<sup>17</sup> The case was a 1992 decision of the US Supreme Court in *Lucas v. South Carolina Coastal Council*.<sup>18</sup> In 1986 a property developer called David Lucas paid \$975,000 for some oceanfront real estate on the Isle of Palms, which is a barrier island off the coast of South Carolina, near Charleston. Lucas intended to develop it as residential property for resale. He had developed a lot of beachfront property in those parts.

Unfortunately (or fortunately depending on your point of view), his plans for development were thwarted by new environmental regulations intended to protect the Isle of Palms coastline. Responding to concerns about recent erosion of the beaches, the authorities drew a new line in the sand, whose effect was to establish a more or less complete ban on the construction of any habitable improvements on Lucas's land. So far as Mr. Lucas's plans for development were concerned, this rendered his property worthless.

So he sued the state authority under the Fifth and Fourteenth Amendments of the U.S. Constitution, which prohibit the taking of private property for public use without fair compensation. He sued on the ground that the regulatory restrictions deprived his property of all or almost all of its value, amounting therefore in effect to a taking of property by the state.

The case went to the Supreme Court of the United States and in 1992, the Supreme Court held in Mr. Lucas's favor. It was then remanded to the South Carolina courts which required South Carolina to pay Lucas \$850,000 for the two lots, just slightly less than he had bought them for.

I used this case in the Hamlyn Lectures because it provided an interesting proving ground for the relation between the rule of law and the security of private property rights, and for the way we think about the attitude with which private parties should think about their particular

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<sup>17</sup> Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge University Press, 2012)

<sup>18</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

interests when they confront regulatory legislation. I am not interested in contesting the decision in *Lucas*, but I am interested in something important that Justice Kennedy said in his concurrence. He said that “the Takings Clause does not require a static body of state property law....” and that “[t]he State should not be prevented from enacting new regulatory initiatives in response to changing conditions.”

The interesting thing about the *Lucas* case was that there was a whole series of statutory and regulatory measures. A federal law, the Coastal Zone Management Act of 1972, provided a general framework of law and policy for measures of this kind, for the protection from erosion of coastlines and beaches. In 1977 the South Carolina legislature enacted state law under these auspices—making provision for the regulation of coastal areas in the interest of the environment, setting up administrative agencies, and providing a framework for the specification of areas where land was to be zoned and where permits were to be required for development. In 1988, pursuant to the finding of a Blue-Ribbon Commission that some of the beaches on the barrier islands were in a critical state, South Carolina enacted further legislation called the Beachfront Management Act, authorizing the South Carolina Coastal Council to draw new lines delineating where seaward development would be prohibited or restricted. The council subsequently drew a line in the sand on the landward side of Mr. Lucas’s property, in effect prohibiting him from building on the land that he owned.

It seems to have been a careful and scrupulous process, both at the various legislative stages and at the administrative stage. True, Mr. Lucas bought his property in 1986, a year or three before the new legislation came into force. But he was not a neophyte in these matters. He was already part of a larger “Wild Dunes” conservation consortium, abutting the two lots in question, and like all its members he was almost certainly thoroughly attuned as a matter of fact to the legislature’s interest in and concern about beach erosion. Moreover the property he purchased in his own name was “notoriously unstable,” as Justice Blackmun pointed out in his dissent in the *Lucas* case:

In roughly half of the last 40 years, all or part of petitioner's property was flooded twice daily by the ebb and flow of the tide. ... In 1973 the

first line of stable vegetation was about halfway through the property. ... Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. ... Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots.

In other words, Mr. Lucas was not exactly sand-bagged by the Council's eventual intervention to safeguard the eroding beaches in the immediate vicinity of his property.

To me, it seems that the whole business was conducted lawful and with proper legislative propriety. The legislative purposes were good ones and they are very clearly articulated in the statutes, there were phases of legislative deliberation, there were public commissions, there was the usual notice-and-comment period for agency rule-making, and there is no indicating at all that the Coastal Council's determination as to the line that was to be drawn landward of Mr. Lucas's property was anything other than an impartial and reasonable (and, from a procedural point of view, perfectly regular) application of the statute, fully responsive to its articulated concerns.

From the public law point of view, good-hearted citizens with minds might say that if legislation is properly drafted (if it is clear and intelligible and expressed in general terms) and it is properly enacted—prospectively—and properly promulgated, and if the regulations issued under it are properly made, following the procedures laid down in the statute and in administrative law generally, and if those regulations are then published and applied subsequently in an impartial way to individual cases without fear or favor according to their terms, then that counts as an entirely appropriate exercise under the rule of law. Indeed that's what we mean by the rule of law: people being governed by measures laid down in advance in general terms, and enforced equally according to the terms in which they have been publicly promulgated.

Also it was well known to everyone, including Mr. Lucas, that the legislature and the agencies working under the auspices of its enactments were reacting to changing circumstances. There was a certain periodicity in

the legislative provision that had to be made, as new conditions emerged and more sophisticated findings were developed. We must remember too that the rhythm of change that these factors imposed needed to be matched with the rhythm of politics, because it is not easy to develop a platform and assemble and sustain a coalition for change all the way through this process.

And this it seems to me is part of civic responsibility. We need to understand the rule of law in public law in relation to the rhythms of these regulations in an ordinary well-functioning democratic state. We should avoid any idea of the rule of law in public law that ignores the importance of legislation and the ordinary rhythms of legislation for the rule of law. And equally we should avoid any perspective on the rule of law in public law that affects indifference to these rhythms. Of course people are entitled to a stable economic environment. But when Mr. Lucas was thinking about his private rights in the beachfront lots that he had purchased, he should not demand an extent of settlement and certainty which belies his understanding of the changing conditions and his best sense of what a good-faith legislature was likely to do in response to those conditions. That's what I mean about taking up a public perspective on his private situation.

I don't think I am making a case for the sort of flexibility that is characterized by peremptory or ill-considered legislation. I am a great believer in legislative due process (not just judicial or courtroom due process, but due process in legislative procedure).

Legislation is not the same as the issuing of a decree; it is a formally defined act comprising a laborious process. In a well-structured legislature that process involves public consultation and the commissioning of reports and consultative papers; as well as the informal stages of public debate, it includes also successive stages of formal deliberation in the legislature, deliberation and voting in institutional settings where the legislative proposal is subject to scrutiny at the hands of myriad representatives of various social interests. These procedural virtues—legislative due process, if you like—are of the utmost importance for the rule of law. Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates,

successive layers of deliberation inside and outside the chamber, and the sheer time for consideration—formal and informal consideration, internal and external to the legislature—that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment’s eventual status as law (for the purposes of our thinking about the rule of law).

To wish to be subject to the rule of law is to wish to be subject to enactments that have been through processes like these. When we say, for example, that the rule of law requires that no one should be punished except pursuant to the violation of some rule that was laid down before he offended—*nulla poene sine lege*—we don’t just have in mind an edict or a decree issued in advance. We have in mind that the prohibition which he is accused of violating is one that was enacted in advance through the laborious solemnity of the legislative process, enacted as law not just given out as notice.

True, legislation is sometimes adopted in haste or under urgency; and that is something that should be criticized in the name of the rule of law. No doubt these requirements of legislative due process mitigate the pace of legal change if they are properly observed, and this may go some way to addressing the concerns that property-owners have about the security of their expectations. But I don’t think it is possible to go much further than that. In public law, the specific discipline of the rule of law must be oriented to a reasonable conception of legislative responsibility. It can’t be predicated on a notion of immutable property rights secured beyond reach of social modification.

And if that means abandoning the distinction between rule *by* law and the rule of law in the public law area so be it. I am imagining that Lucas and his supporters are willing to concede that the administrative enforcement of a duly enacted environmental statute in the Isle of Palms represents rule by law. Though the environmentalists were politically in the ascendant in South Carolina, they didn’t just dictatorially *impose* their preference for beach conservation on the barrier islands; they had at least the good grace to go to the trouble of getting the legislature in Columbia to enact legislation, and they proceeded rigorously to make regulations in the proper form under the

powers conferred in that statute. That is rule by law—rule by these men and women in South Carolina using law for their own purposes—and it is certainly better than a Mugabe-style invasion of property that has no legal credentials at all.

And this is not nothing. Many people say that public governance is, in the 21<sup>st</sup> century largely bereft of any substantive legal dimension. The enactment and application of laws, they say, has been superseded by the administration of things. [Get some language from Loughlin]. The rule of law in the realm of public governance acts as a powerful normative corrective to that. It is a demanding standard (only: it is not a private standard).

Beyond that, however, there may be no way in which we can talk of laws ruling *by themselves* in this domain without human agency. Public law is about people organized in political institutions attending to the demands of the common good often under changing conditions. Those are the circumstances of public law. The rule of law demands that they do so in legal form, not just by edict and action. That's a demanding and respectable requirement. But it cannot be thought to require that things be left to themselves to resolve, nor should it be read as validating attitudes of essential irresponsibility so far as the public enterprise is concerned.