

# Origins of the Rule of Law

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*The end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he lists. (For who could be free when every other man's humour might domineer over him?) But a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary will of another, but freely follow his own*

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1. Individual liberty in modern times can hardly be traced back farther than the England of the seventeenth century. It appeared first, as it probably always does, as a by-product of a struggle for power rather than as the result of deliberate aim. But it remained long enough for its benefits to be recognized. And for over two hundred years the preservation and perfection of individual liberty became the guiding ideal in that country, and its institutions and traditions the model for the civilized world.

This does not mean that the heritage of the Middle Ages is irrelevant to modern liberty. But its significance is not quite what it is often thought to be. True, in many respects medieval man enjoyed more liberty than is now commonly believed. But there is little ground for thinking that the liberties of the English were then substantially greater than those of many Continental peoples. But if men of the Middle Ages knew many liberties in the sense of privileges granted to estates or persons, they hardly knew liberty as a general condition of the people. In some respects the general conceptions that prevailed then about the nature and sources of law and order prevented the problem of liberty from arising in its modern form. Yet it might also be said that it was because England retained more of the common medieval ideal of the supremacy of law, which was destroyed elsewhere by the rise of absolutism, that she was able to initiate the modern growth of liberty.

This medieval view, which is profoundly important as background for modern developments, though completely accepted perhaps only during the early Middle Ages, was that "the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law." For centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that had crept in, and not create law. Only gradually, during the later Middle Ages, did the conception of deliberate creation of new law- legislation as we know it- come to be accepted. In England, Parliament thus developed from what had been mainly a law-finding body to a law-creating one. It was finally in the dispute about the authority to legislate in which the contending parties reproached each other for acting arbitrarily- acting, that is, not in accordance with recognized general laws- that the cause of individual freedom was inadvertently advanced. The new power of the highly organized national state which arose in the fifteenth and sixteenth centuries used legislation for the first time as an instrument of deliberate policy. For a while it seemed as if this new power would lead in England, as on the Continent, to absolute monarchy, which would destroy the medieval liberties. The conception of limited government which arose from the English struggle of the seventeenth century was thus a new departure, dealing with new problems. If earlier English doctrine and the great medieval documents, from Magna Carta, the great "Constitutio Libertatis," downward, are

significant in the development of the modern, it is because they served as weapons in that struggle.

Yet if for our purposes we need not dwell longer on the medieval doctrine, we must look somewhat closer at the classical inheritance which was revived at the beginning of the modern period. It is important, not only because of the great influence it exercised on the political thought of the seventeenth century, but also because of the direct significance that the experience of the ancients has for our time.

2. Though the influence of the classical tradition of the modern ideal of liberty is indisputable, its nature is often misunderstood. It has often been said that the ancients did not know liberty in the sense of individual liberty. This is true of many places and periods even in ancient Greece, but certainly not of Athens at the time of its greatness (or of late republican Rome); it may be true of the degenerate democracy of Plato's time, but surely not of those Athenians to whom Pericles said that "the freedom which we enjoy in our government extends also to our ordinary life [where], far from exercising a jealous surveillance over each other, we do not feel called upon to be angry with our neighbour for doing what he likes" and whose soldiers, at the moment of supreme danger during the Sicilian expedition, were reminded by their general that, above all, they were fighting for a country in which they had unfettered discretion to live as they pleased." What were the main characteristics of that freedom of the "freest of free countries," as Nicias called Athens on the same occasion, as seen both by the Greeks themselves and by Englishmen of the later Tudor and Stuart times?

The answer is suggested by a word which the Elizabethans borrowed from the Greeks but which has since gone out of use. "Isonomia" was imported into England from Italy at the end of the sixteenth century as a word meaning "equality of laws to all manner of persons"; shortly afterward it was freely used by the translator of Livy in the Englished form "Isonomy" to describe a state of equal laws for all and responsibility of the magistrates." It continued in use during the seventeenth century" until "equality before the law," "government of law," or "rule of law" gradually displaced it.

The history of the concept in ancient Greece provides an interesting lesson because it probably represents the first instance of a cycle that civilizations seem to repeat. When it first appeared," it described a state which Solon had earlier established in Athens when he gave the people "equal laws for the noble and the base" and thereby gave them "not so much control of public policy as the certainty of being governed legally in accordance with known rules." Isonomy was contrasted with the arbitrary rule of tyrants and became a familiar expression in popular drinking songs celebrating the assassination of one of these tyrants." The concept seems to be older than that of *demokratia*, and the demand for equal participation of all in the government appears to have been one of its consequences. To Herodotus it is still isonomy rather than democracy which is the "most beautiful of all names" of a political order. The term continued in use for some time after democracy had been achieved, at first in its justification and later, as has been said increasingly in order to disguise the character it assumed; for democratic government soon came to disregard that very equality before the law from which it had derived its justification. The Greeks- clearly understood that the two ideals, though related, were not the same: Thucydides speaks without hesitation about an "isonomic oligarchy, and Plato even uses the term "isonomy" in deliberate contrast to democracy rather than in justification of it. By the end of the fourth century it had come to be necessary to emphasize that "in a democracy the laws should be masters.

Against this background certain famous passages in Aristotle, though he no longer uses the term "isonomia," appear as a vindication of that traditional ideal. In the *Politics* he stresses that "it is more proper that the law should govern than any of the citizens," that the persons holding supreme power "should be appointed only guardians and servants of the law," and that "he who would place supreme power in mind, would place it in God and the laws. He condemns the kind of government in which "the people govern and not the law" and in which "everything is determined by majority vote and not by law." Such a government is to him not that of a

free state, "for, when government is not in the laws, then there is no free state, for the law ought to be supreme over all things. " A government that "centers all power in the votes of the people cannot, properly speaking, be a democracy: for their decrees cannot be general in their extent." If we add to this the following passage in the Rhetoric, we have indeed a fairly complete statement of the ideal of government by law: "It is of great moment that well drawn laws should themselves define all the points they possibly can, and leave as few as possible to the decision of the judges [for] the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them.

There is clear evidence that the modern use of the phrase "government by laws and not by men" derives directly from this statement of Aristotle. Thomas Hobbes believed that it was "just another error of Aristotle's politics that in a well-ordered commonwealth not men should govern but the law, whereupon James Harrington retorted that "the art whereby a civil society is instituted and preserved upon the foundations of common rights and interest . . . [is], to follow Aristotle and Livy, the empire of laws not of men."

3. In the course of the seventeenth century the influence of Latin writers largely replaced the direct influence of the Greeks. We should therefore take a brief look at the tradition derived from the Roman Republic. The famous Laws of the Twelve Tables, reputedly drawn up in conscious imitation of Solon's laws, form the foundation of its liberty. The first of the public laws in them provides that "no privileges, or statutes shall be enacted in favour of private persons, to the injury of others contrary to the law common to all citizens, and which individuals, no matter of what rank, have a right to make use of." This was the basic conception under which there was gradually formed, by a process very similar to that by which the common law grew," the first fully developed system of private law-in spirit very different from the later Justinian code, which determined the legal thinking of the Continent.

This spirit of the laws of free Rome has been transmitted to us mainly in the works of the historians and orators of the period, who once more became influential during the Latin Renaissance of the seventeenth century. Livy-whose translator made people familiar with the term "Isonomia" (which Livy himself did not use) and who supplied Harrington with the distinction between the government of law and the government of men-Tacitus and, above all, Cicero became the chief authors through whom the classical tradition spread. Cicero indeed became the main authority for modern liberalism," and we owe to him many of the most effective formulations of freedom under the law. To him is due the conception of general rules or *leges legum*, which govern legislation, the conception that we obey the law in order to be free, and the conception that the judge ought to be merely the mouth through whom the law speaks. No other author shows more clearly that during the classical period of Roman law it was fully understood that there is no conflict between law and freedom and that freedom is dependent upon certain attributes of the law, its generality and certainty,,and the restrictions it places on the discretion of authority.

This classical period was also a period of complete economic freedom, to which Rome largely owed its prosperity and power. From the second century A.D., however, state socialism advanced rapidly. In this development the freedom which equality before the law had created was progressively destroyed as demands for another kind of equality arose. During the later empire the strict law was weakened as, in the interest of a new social policy, the state increased its control over economic life. The outcome of this process, which culminated under Constantine, was, in the words of a distinguished student of Roman law, that "the absolute empire proclaimed together with the principle of equity the authority of the empirical will unfettered by the barrier of law. Justinian with his learned professors brought this process to its conclusions. Thereafter, for a thousand years, the conception that legislation should serve to protect the freedom of the individual was lost. And when the art of legislation was rediscovered, it was the code of Justinian with its conception of a prince

who stood above the law that served as the model on the Continent.

4. In England, however, the wide influence which the classical authors enjoyed during the reign of Elizabeth helped to prepare the way for a different development. Soon after her death the great struggle between king and Parliament began, from which emerged as a by-product the liberty of the individual. It is significant that the disputes began largely over issues of economic policy very similar to those which we again face today. To the nineteenth-century historian the measures of James I and Charles I which provoked the conflict might have seemed antiquated issues without topical interest. To us the problems caused by the attempts of the kings to set up industrial monopolies have a familiar ring: Charles I even attempted to nationalize the coal industry and was dissuaded from this only by being told that this might cause a rebellion.

Ever since a court had laid down in the famous Case of Monopolies that the grant of exclusive rights to produce any article was "against the common law and the liberty of the subject," the demand for equal laws for all citizens became the main weapon of Parliament in its opposition to the king's aims. Englishmen then understood better than they do today that the control of production always means the creation of privilege: that Peter is given permission to do what Paul is not allowed to do.

It was another kind of economic regulation, however, that occasioned the first great statement of the basic principle. The Petition of Grievances of 1610 was provoked by new regulations issued by the king for building in London and prohibiting the making of starch from wheat. This celebrated plea of the House of Commons states that, among all the traditional rights of British subjects, "there is none which they have accounted more dear and precious than this, to be guided and governed by the certain rule of law, which giveth to the head and the members that which of right belongeth to them, and not by any uncertain and arbitrary form of government.... Out of this root has grown the indubitable right of the people of this kingdom, not to be made subject to any punishment that shall extend to their lives, lands, bodies, or goods, other than such as are ordained by the common laws of this land, or the statutes made by their common consent in parliament".

It was, finally, in the discussion occasioned by the Statute of Monopolies of 1624 that Sir Edward Coke, the great fountain of Whig principles, developed his interpretation of Magna Carta that became one of the cornerstones of the new doctrine. In the second part of his Institutes of the Laws of England, soon to be printed by order of the House of Commons, he not only contended (with reference to the Case of Monopolies) that "if a grant be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that grant is against the liberty and freedom of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter"; but he went beyond such opposition to the royal prerogative to warn Parliament itself "to leave all causes to be measured by the golden and straight mete-wand of the law, and not to the incertain and crooked cord of discretion".

Out of the extensive and continuous discussion of these issues during the Civil War, there gradually emerged all the political ideals which were thenceforth to govern English political evolution. We cannot attempt here to trace their evolution in the debates and pamphlet literature of the period, whose extraordinary wealth of ideas has come to be seen only since their re-publication. We can only list the main ideas that appeared in recent times more and more frequently until, by the time of the Restoration, they had become part of an established tradition and, after the Glorious Revolution of 1688, part of the doctrine of the victorious party.

The great event that became for later generations the symbol of the permanent achievements of the Civil War was the abolition in 1641 of the prerogative courts and especially the Star Chamber which had become, in F. W. Maitland's often quoted words, "a court of politicians enforcing a policy, not a court of judges administering the law." At almost the same time an effort was made for the first time to secure the

independence of the judges. In the debates of the following twenty years the central issue became increasingly the prevention of arbitrary action of government. Though the two meanings of "arbitrary" were long confused, it came to be recognized, as Parliament began to act as arbitrarily as the king," that whether or not an action was arbitrary depended not on the source of the authority but on whether it was in conformity with pre-existing general principles of law. The points most frequently emphasized were that there must be no punishment without a previously existing law providing for it, that all statutes should have only prospective and not retrospective operation," and that the discretion of all magistrates should be strictly circumscribed by law." Throughout, the governing idea was that the law should be king or, as one of the polemical tracts of the period expressed it, *Lex, Rex*.

Gradually, two crucial conceptions emerged as to how these basic ideals should be safeguarded: the idea of a written constitution, and the principle of the separation of powers. When in January, 1660, just before the Restoration, a last attempt was made in the "Declaration of Parliament Assembled at Westminster" to state in a formal document the essential principles of a constitution, this striking passage was included: "There being nothing more essential to the freedom of a state, than that the people should be governed by the laws, and that justice be administered by such only as are accountable for maladministration, it is hereby further declared that all proceedings touching the lives, liberties and estates of all the free people of this commonwealth, shall be according to the laws of the land, and that the Parliament will not meddle with ordinary administration, or the executive part of the law: it being the principle [sic] part of this, as it hath been of all former Parliaments, to provide for the freedom of the people against arbitrariness in government." If thereafter the principle of the separation of powers was perhaps not quite "an accepted principle of constitutional law," it at least remained part of the governing political doctrine.

5. All these ideas were to exercise a decisive influence during the next hundred years, not only in England but also in America and on the Continent, in the summarized form they were given after the final expulsion of the Stuarts in 1688. Though at the time perhaps some other works were equally and perhaps even more influential, John Locke's *Second Treatise on Civil Government* is so outstanding in its lasting effects that we must confine our attention to it.

Locke's work has come to be known mainly as a comprehensive philosophical justification of the Glorious Revolution, and it is mostly in his wider speculations about the philosophical foundations of government that his original contribution lies. Opinions may differ about their value. The aspect of his work which was at least as important at the time and which mainly concerns us here, however, is his codification of the victorious political doctrine, of the practical principles which, it was agreed, should thenceforth control the powers of governments

While in his philosophical discussion Locke's concern is with the source which makes power legitimate and with the aim of government in general, the practical problem with which he is concerned is how power, whoever exercises it, can be prevented from becoming arbitrary: "Freedom of men under government is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man." It is against the "irregular and uncertain exercise of the power" that the argument is mainly directed: 'the important point is that "whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the forces of the community at home only in the execution of such laws. Even the legislature has no "absolute arbitrary power," "cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by

promulgated standing laws, and known authorized judges," while the "supreme executor of the law ... has no will, no power, but that of the law". Locke is loath to recognize any sovereign power, and the Treatise has been described as an assault upon the very idea of sovereignty. The main practical safeguard against the abuse of authority proposed by him is the separation of powers, which he expounds somewhat less clearly and in a less familiar form than did some of his predecessors. His main concern is how to limit the discretion of "him that has the executive power," but he has no special safeguards to offer. Yet his ultimate aim throughout is what today is often called the "taming of power": the end why men "choose and authorize a legislative is that there may be laws made, and rules set, as guards and fences to the properties of all the members of society, to limit the power and moderate the dominion of every part and member of that society."

6. It is a long way from the acceptance of an ideal by public opinion to its full realization in policy; and perhaps the ideal of the rule of law had not yet been completely put into practice when the process was reversed two hundred years later. At any rate, the main period of consolidation, during which it progressively penetrated everyday practice, was the first half of the eighteenth century. From the final confirmation of the independence of judges in the Act of Settlement of 1701, through the occasion when the last bill of attainder ever passed by Parliament in 1706 led not only to a final restatement of all the arguments against such arbitrary action of the legislature but also to a reaffirmation of the principle of the separation of powers, the period is one of low but steady extension of most of the principles for which the Englishmen of the seventeenth century had fought.

A few significant events of the period may be briefly mentioned, such as the occasion when a member of the House of Commons (at a time when Dr. Johnson was reporting the debates) restated the basic doctrine of *nulla poena sine lege*, which even now is sometimes alleged not to be part of English law: "That where there is no law there is no transgression, is a maxim not only established by universal consent, but in itself evident and undeniable; and it is, Sir, surely no less certain that where there is no transgression there can be no punishment." Another is the occasion when Lord Camden in the *Wilkes* case made it clear that courts are concerned only with general rules and not with the particular aims of government or, as his position is sometimes interpreted, that public policy is not an argument in a court of law. In other respects progress was more slow, and it is probably true that, from the point of view of the poorest, the ideal of equality before the law long remained a somewhat doubtful fact. But if the process of reforming the laws in the spirit of those ideals was slow, the principles themselves ceased to be a matter of dispute: they were no longer a party view but had come to be fully accepted by the Tories." In some respects, however, evolution moved away rather than toward the ideal. The principle of the separation of powers in particular, though regarded throughout the century as the most distinctive feature of the British constitution became less and less a fact as modern cabinet government developed. And Parliament with its claim to unlimited power was soon to depart from yet another of the principles.

7. The second half of the eighteenth century produced the coherent expositions of the ideals which largely determined the climate of opinion for the next hundred years. As is so often the case, it was less the systematic expositions by political philosophers and lawyers than the interpretations of events by the historians that carried these ideas to the public. The most influential among them was David Hume, who in his works again and again stressed the crucial points and of whom it has justly been said that for him the real meaning of the history of England was the evolution from a "government of will to a government of law." At least one characteristic passage from his *History of England* deserves to be quoted. With reference to the abolition of the Star Chamber he writes: "No government, at that time, appeared in the world, nor is perhaps to be found in the records of any history, which subsisted without the mixture of some arbitrary authority, committed to some magistrate; and it might reasonably, beforehand, appear doubtful, whether human society could ever arrive at that state of perfection, as to support itself with no other control, than the general and

rigid maxims of law and equity. But the parliament justly thought, that the King was too eminent a magistrate to be trusted with discretionary power, which he might so easily turn to the destruction of liberty. And in the event it has been found, that, though some inconveniencies arise from the maxim of adhering strictly to law, yet the advantages so much overbalance them, as should render the English forever grateful to the memory of their ancestors, who, after repeated contests, at last established that noble principle.”

Later in the century these ideals are more often taken for granted than explicitly stated, and the modern reader has to infer them when he wants to understand what men like Adam Smith and his contemporaries meant by "liberty." Only occasionally, as in Blackstone's Commentaries, do we find endeavors to elaborate particular points, such, as the significance of the independence of the judges and of the separation of powers, or to clarify the meaning of "law" by its definition as "a rule, not a transient sudden order from a superior or concerning a particular person; but something permanent, uniform and universal."

Many of the best-known expressions of those ideals are, of course, to be found in the familiar passages of Edmund Burke. But probably the fullest statement of the doctrine of the rule of law occurs in the work of William Paley, the "great codifier of thought in an age of codification." It deserves quoting at some length: "The first maxim of a free state," he writes, "is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and the judicial character be kept separate. When these offices are unified in the same person or assembly, particular laws are made for particular cases, springing often times from partial motives, and directed to private ends: whilst they are kept separate, general laws are made by one body of men, without foreseeing whom they may affect; and, when made, must be applied by the other, let them affect whom they will.... When the parties and interests to be affected by the laws were known, the inclination of the law makers would inevitably attach to one side or the other; and where there were neither any fixed rules to regulate their determinations, nor any superior power to control their proceedings, these inclinations would interfere with the integrity of public justice. The consequence of which must be, that the subjects of such a constitution would live either without constant laws, that is, without any known preestablished rules of adjudication whatever; or under laws made for particular persons, and partaking of the contradictions and iniquity of the motives to which they owed their origin.”

"Which dangers, by the division of the legislative and judicial functions, are in this country effectually provided against. Parliament knows not the individuals upon whom its acts will operate; it has no case or parties before it; no private designs to serve: consequently, its resolutions will be suggested by the considerations of universal effects and tendencies, which always produce impartial, and commonly advantageous regulations."

8. With the end of the eighteenth century, England's major contributions to the development of the principles of freedom come to a close. Though Macaulay did once more for the nineteenth century what Hume had done for the eighteenth and though the Whig intelligentsia of the Edinburgh Review and economists in the Smithian tradition, like J. R. MacCulloch and N. W. Senior, continued to think of liberty in classical terms, there was little further development. The new liberalism that gradually displaced Whiggism came more and more under the influence of the rationalist tendencies of the philosophical radicals and the French tradition. Bentham and his Utilitarians did much to destroy the beliefs which England had in part preserved from the Middle Ages, by their scornful treatment of most of what until then had been the most admired features of the British constitution. And they introduced into Britain what had so far been entirely absent—the desire to remake the whole of her law and institutions on rational principles.

The lack of understanding of the traditional principles of English liberty on the part of the men guided by the ideals of the French Revolution is clearly illustrated by one of the early apostles of that revolution in England,

Dr. Richard Price. As early as 1778 he argued: "Liberty is too imperfectly defined when it is said to be 'a Government Of LAWS and not by MEN.' If the laws are made by one man, or a junto of men in a state, and not by common CONSENT, a government by them is not different from slavery." Eight years later he was able to display a commendatory letter from Turgot: "How comes it that you are almost the first of the writers of your country, who has given a just idea of liberty, and shown the falsity of the notion so frequently repeated by almost all Republican Writers, 'that liberty consists in being subject only to the laws?'" From then onward, the essentially French concept of political liberty was indeed progressively to displace the English ideal of individual liberty, until it could be said that "in Great Britain, which, little more than a century ago, repudiated the ideas on which the French Revolution was based, and led the resistance to Napoleon, those ideas have triumphed." Though in Britain most of the achievements of the seventeenth century were preserved beyond the nineteenth, we must look elsewhere for the further development of the ideals underlying them.

1. Hayek, F. A. *The Constitution of Liberty*. University of Chicago Press, 1960 pp 162-175

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