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A CONCISE GUIDE TO THE RULE OF LAW

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A CONCISE GUIDE TO THE RULE OF LAW¹

By Brian Z. Tamanaha

Discussions among theorists about the “rule of law” are riven by disagreements over what it means, its elements or requirements, its benefits or limitations, whether it is a universal good, and other complex questions.² These debates are essential, but they can be confusing to non-specialists who seek to obtain a basic understanding of this important notion. This paper will provide an overview of core aspects of the rule of law. It is by no means exhaustive on the subject and does not resolve any of the hard questions; it does not address any philosophical or theoretical disputes about the rule of law. Rather, it is a pragmatic guide to the basic issues, oriented to the circumstances and concerns of societies that are working to develop the rule of law. The topics covered are (in order): Definition, Functions, Benefits, Elements. Several key points will be made about each subject, followed by a few additional comments on limitations or concerns. After covering these subjects, a brief explanation will be provided for why certain notions often associated with the rule of law have not been included. The overview will then close with a few reasons to be wary of the rule of law. The usefulness of this outline as a guide, it is hoped, will outweigh its oversimplifications and lack of nuance.

RULE OF LAW NARROWLY DEFINED

¹ To be published as a Chapter in *Florence Workshop on The Rule of Law*, edited by Neil Walker and Gianluigi Palombella, Hart Publishing Co., forthcoming 2008.

² A full exploration of the issues surrounding the rule of law can be found in Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge Univ. Press 2004), which is the source for the observations made in this Chapter.

The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.

This is the “formal” or “thin” definition of the rule of law; more substantive or “thicker” definitions of the rule of law also exist, which include reference to fundamental rights, democracy, and/or criteria of justice or right. The narrow definition is utilized here because it represents a common baseline that all of the competing definitions of the rule of law share, although a number of versions go beyond this minimum. As will be indicated, this version is amenable to a broad range of systems and societies.

TWO *FUNCTIONS* OF THE RULE OF LAW, WITH PROBLEMS

1. One Function of the Rule of Law is to *Impose Legal Restraints on Government Officials*, In Two Different Ways: A) By Requiring Compliance With Existing Law; and B) By Imposing Legal Limits on Law-Making Power.

Fear of the uncontrolled application of coercion by the sovereign or the government is an ancient and contemporary concern. The rule of law responds to this concern by imposing legal constraints on government officials.

The first type of legal restraint is that *government officials must abide by valid positive laws in force at the time of any given action*. This first restraint has two aspects: government actions must have positive legal authorization (without which the action is improper); and no government action may contravene a legal prohibition or restriction.

Although exceptions or flexibility may exist with respect to the first aspect, the second (prohibitive) aspect is strict. If government officials wish to pursue a course of action that violates existing positive laws, the law must be changed in accordance with ordinary legal procedures *before* the course of action can be pursued.

The fundamental problem with this first type of restraint is enforcement. It requires that the government bind and coerce itself. Hobbes considered this a logical and practical impossibility, remarking that “he that is bound to himself only, is not bound.”³ The solution to this problem lies in the institutionalized separation of government powers, and by distinguishing the person from government office the person occupies. Government officials hence do not coerce themselves, but rather members of one institutionalized part of the government (prosecutors, courts) hold another part or another official legally accountable.

The second type of legal restraint *imposes restrictions on the law itself, erecting limitations on the law making power of the government*. Under this second type of restraint, certain prohibited actions cannot be legally allowed, even by a legitimate law-making authority. Legal restrictions of this sort rank above (control over) ordinary law-making. The most familiar versions of this are: 1) constitutionally imposed limits, 2) transnational or international legal limits, 3) human rights limits, and 4) religious or natural law limits. In different ways and senses, these types of law are superior to and impose restraints upon routine law making.

The first two versions share a quality described above in that the limits they impose can be changed by legal bodies, but they are nonetheless distinct in that alterations usually cannot be made in the ordinary course by the government subject to

³ Thomas Hobbes, *Leviathan*, edited by J.C.A. Gaskin (Oxford: Oxford Univ. Press 1996) 176-77.

the limitation. Constitutionally imposed limitations and transnational or international legal requirements are often more difficult to modify than ordinary legislation—as when a higher threshold must be overcome or changes must be effectuated by a different law making body. Constitutional amendments, for example, may require a supermajority vote while ordinary legislation requires only a majority vote, or must be made by a special body with a constitutional mandate; changes in transnational or international law rules must be effectuated by transnational or international institutions, and thus are beyond the power of the nation state to unilaterally alter. These heightened hurdles enhance the efficacy of the legal limits.

The third and fourth limits, in contrast, are often perceived to be completely beyond the law making power of state or international law making bodies. Human rights declarations, while embodied in positive laws, are widely thought to preexist or exist apart from the documents that recognize them and would thus survive even if the documents were altered or abolished. Natural law principles and religious principles, similarly, are generally thought to exist independent of any human law making agency (although religious authorities have a say in the latter). Owing to this quality, they establish limits on state law that no government or law maker can alter.

Several interrelated problems arise with the second type of legal limitation on government. This type of limitation is frequently controversial because it frustrates the ability of government officials to take actions or achieve objectives. These are the main problems:

*In democratic societies, it is criticized for overruling or restricting democratic law making; in authoritarian states, it hampers the ruling authority from using the law to

do as it desires. In both cases, when the motivation is sufficiently compelling, there will be attempts to circumvent or ignore the higher legal limits.

*Very difficult questions will arise over the scope, meaning, and application of said legal limits, often raising disputable questions of interpretation.

*A crucial matter is the designation of the institution or person with final say over interpretation—often courts, but not necessarily. In theory, the authority to interpret the legal limits should not be vested in the same body authorized to make the ordinary law, for that would potentially vitiate the limitation. When this power is allocated to courts, and the clauses being interpreted are open-ended and the decisions have political implications, objections may be raised that courts are engaged in the judicialization of politics in so far as their decisions restrict or override political authorities.

*Another crucial issue, parallel to the first type of limit above, is whether the limits imposed by these decisions can be enforced. This problem arises because law sets limits on the government law making power. When the limits are internal to the system—like constitutionally imposed limits—the institutionalized separation described previously can solve the problem. When the limits are external—as with transnational law, human rights, natural law, and religious limits—the cooperation of the government being limited must be secured, either voluntarily or through the threat of sanction. Human rights norms and religious norms, in particular, come up against the reality that governments can ignore their dictates with relative impunity.

2. A Second Function of the Rule of Law is to *Maintain Order and Coordinate Behavior and Transactions Among Citizens.*

This aspect of the rule of law holds that a framework of legal rules governs social behavior. People must generally behave in a fashion that does not breach legal rules. Transgressions of legal rules or social disruptions—whether treated as criminal or civil (societies draw different lines)—will provoke a response from legal institutions charged with enforcing legal requirements and resolving disputes consistent with applicable legal norms.

Satisfaction of this second function does not entail that the entire realm of social behavior must be governed by state legal rules. That is neither possible nor desirable. Multiple normative orders exist within every society, including customary norms, moral norms, religious norms, family norms, norms of social etiquette, workplace norms, norms of business interaction, and more. Sometimes the norms from these various orders overlap, but often they are different in orientation, extension, scope, penetration, and efficacy. The presence, scope and penetration of state law vary by society and region. Some societies or regions are thickly governed by law, where serious disputes are resolved by well developed state legal institutions. In other societies or regions, state law has a marginal or negligible role in social ordering—usually when state law is relatively weak—and disputes are resolved primarily through social institutions. To be consistent with the rule of law, the law need not cover everything, but what the law does cover should be largely adhered to by the citizenry.

PRIMARY *BENEFITS* OF THE RULE OF LAW, AND PROBLEMS IN
CONNECTION WITH EACH BENEFIT

1. Enhances *Certainty, Predictability, and Security* in Two Arenas: Between Citizens and the Government (Vertical), and Among Citizens (Horizontal).

With respect to the government, citizens benefit by being apprised in advance of the government's likely response to their actions. This is an important aspect of liberty, whereby citizens know the full range of conduct they can engage in without fear of being subjected to government interference or sanction. Anything not prohibited by the law can be done by the citizen without fear. Without this assurance, one always acts at one's peril.

Although such predictability is critical to liberty, it is important to recognize that this benefit in itself does not guarantee to citizens any particular area of free action. The scope of action allowed can be quite narrow or oppressive, yet comply with the rule of law in the "thin" sense defined at the outset.

With respect to fellow citizens, people are able to interact with one another knowing in advance the rules that will be applied to their conduct should a problem or dispute occur. Such predictability furthers their ability to make choices and to engage in conduct with others. This includes acting with the appropriate (legally established) degree of care and responsibility when interacting with other people or their property, and when engaging in transactions with strangers or acquaintances.

When evaluating the horizontal and vertical benefits just described, it is important to remember that both assume substantial knowledge and foresight about the law on the part of citizens. The reality, however, may be that citizens are poorly informed about the law or give nary a thought to it before they act.

2. *Restricts Discretion* of Government Officials, Reducing Willfulness and Arbitrariness.

A common worry of citizens is that government officials may be unduly influenced in their government actions by inappropriate considerations—by prejudice, by whim, by arbitrariness, by passion, by ill will or a foul disposition, or by any of the many factors that warp human decision making and actions. The rule of law constrains these factors by insisting that government officials act pursuant to and consistent with applicable legal rules. The law operates in two ways to obtain this benefit. First, government officials are required to consult and conform to the law before and during actions. Second, legal rules provide publicly available requirements and standards that can be used to hold government officials accountable during and after their actions.

The main negative consequence that comes with this second benefit is that under many circumstances it may be useful or necessary that government officials exercise discretion or make situation specific judgments. Legal rules are general proscriptions that cannot anticipate every aspect of every situation in advance, and legal rules can become obsolete as social views and circumstances change. The application of existing rules to unanticipated situations or changed circumstances can have harmful or unfair consequences or lead to socially undesirable outcomes. In such contexts, allowing the decision maker to use her expertise, wisdom, or judgment may produce better results than insisting that she comply with the legal rules. In some circumstances, moreover, strictly following legal rules in a fashion that produces a winner and a loser can exacerbate conflict, while finding a compromise that bypasses the rules might achieve a consensus. When applied in these and other situations, abiding by the rule of law may be

detrimental. Underlying this benefit of the rule of law is fear of potential abuse at the hands of government officials, but every functional polity must accord some degree of trust and discretion to government officials.

3. *A Peaceful Social Order is Maintained Through Legal Rules.*

A peaceful social order is marked by the absence of routine violence, and by the presence of a substantial degree of physical security and reliable expectations about surrounding conduct. These are the minimal conditions necessary for a livable social existence.

The relationship between social order and legal rules is extremely complex and variable. It is important to keep in mind that the legal rules in the books do not necessarily correspond to, or reflect, or maintain, the social order (nor is it the case that legal officials and institutions always enforce the rules in the books). In virtually all social arenas, moreover, social norms largely shape and govern daily existence; legal norms may be largely irrelevant to the bulk of routine social conduct. Legal rules can conflict or clash with prevailing social norms. For these reasons, it must not be assumed that law is the main (or even a major) source of social order.

Furthermore, legal rules and institutions can impose an oppressive social order, as in totalitarian societies. Although such societies are not marked on the surface by routine violence, and therefore qualify as “peaceful” and ordered, the social order can nonetheless be experienced as intolerably restrictive.

Two problematic situations bear mention. When law has been transplanted from elsewhere—either by imposition or through voluntary borrowing—the social norms and the legal norms may clash, reflecting different social, cultural, and moral world views. A

clash may also occur when a society consists of distinct groups (cultural, ethnic, religious), while the law represents only one. In both situations, the norms and values of the law will not match the norms and values of many of the citizens. In a few contexts (often post-colonial), the language of the law is different from the common vernacular of groups within society, which heightens the clash, and gives the law an alien and obscure feel. In many of these situations the law has a weak role in preserving social order.

3. *Economic Development* is Facilitated by Certainty, Predictability, and Security, For Two Basic Reasons.

As indicated at the outset, the rule of law enhances certainty, predictability, and security. In addition to enhancing liberty, it is widely thought that market-based economic systems benefit from these qualities in two different respects, the first related to contracts and the second to property. First, economic actors can better predict in advance the anticipated costs and benefits of prospective transactions, which enables them to make more efficient decisions. One can enter into a contract with some assurances of the consequences that will follow if the other party fails to live up to the terms of the contract. This encourages the creation of contracts with strangers or parties at a distance, which expands the range and frequency of commercial interactions, increasing the economic pie.

Second, the protection of property (and persons) conferred by legal rules offers an assurance that the fruits of one's labor will be protected from expropriation by others. This security frees individuals to allocate the bulk of their efforts to additional productive activity, and to enjoying its benefits, rather than expending time and effort on protecting existing gains.

These economic benefits conferred by the rule of law have been identified in connection with capitalism on local and global levels. One must examine both the law and the relationship between the law and the system of economic exchange in a given situation to determine whether and to what extent these claims are borne out. When law and legal institutions are obscure, inefficient, costly, or unreliable, commercial transactions and economic development might be inhibited by the legal system, and economic actors may prefer to resort to other institutions in situations of dispute (like private arbitration), avoiding the legal system entirely. In certain contexts, moreover, other mechanisms, like norms of reciprocity or long term social or business relationships, can effectively provide predictability and security in transactions, rendering the law secondary or superfluous.

5. *Fundamental Justice* of the Requirement That the Rules Must be Applied Equally to Everyone According to Their Terms.

The equality of application of law, an aspect of the rule of law, is a component of fundamental justice. It is widely considered unfair and unjust when the identity or status of a person affects how legal officials apply or interpret the law. No one should be unduly favored or ill-treated by legal officials. This requirement does not prohibit laws from drawing distinctions among people or groups, as occurs with laws that treat men and women differently, or that impose graduated tax rates; it only requires that the law be applied in accordance with its terms no matter who it is being applied to (president or citizen, celebrity or common person, rich or poor).

This essential aspect of justice, known as formal equality, can also have negative consequences, especially in situations with substantial social inequalities. Applying laws

equally to everyone according to their terms may have one-sided effects or serve to perpetuate an unjust social order. A law that forbids the rich and poor alike from sleeping on a park bench, for example, may be applied equally to all, but it will have consequences mainly for the poor.

BASIC *ELEMENTS* IN ESTABLISHING THE RULE OF LAW, AND PROBLEMS IN CONNECTION WITH EACH

1. Widely Shared Orientation Within Society—Among Citizens and Government Officials—That the *Law Does Rule and Should Rule*.

For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary, proper, and existing part of their political-legal system. This attitude is not itself a legal rule. It is a shared political ideal that amounts to a cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations, surviving episodes in which the rule of law is flouted by government officials. When this cultural belief is not pervasive, however, the rule of law will be weak or non-existent.

Cultural beliefs are not subject to human control, so it is no easy matter to inculcate belief in the rule of law when it does not already exist. A specific problem is that in many societies the government is distrusted and state law is feared or avoided. This tends to be the case in societies where the law has a long or recent history of enforcing authoritarian rule, or where legal officials are perceived to be corrupt or inept, or where legal professionals are widely distrusted, or where the content or application of the law is seen to be unfair or is identified with particular interests or the elite. In

situations where the legal rules and systems have been transplanted from elsewhere, as indicated earlier, many people will not identify with (or even know) the law, making it much harder to develop a cultural orientation that the law should rule, although this can change over time. Moreover, when society consists of distinct cultural, religious, or ethnic groups, and the law—either its norms, or the people who monopolize legal positions—is identified with one group but not others, people from the groups left out may well see the law as a threat, and are unlikely to embrace the notion that the law should rule.

This is an essential element of the rule of law, and it is the hardest to achieve. Above all else, for this cultural belief to be viable, people must identify with the law and perceive it as worthy of ruling. General trust in law must be earned, and it takes time to become what is tantamount to a cultural view about law passed on through socialization.

2. Presence of an Institutionalized, *Independent Judiciary*.

An institutionalized, independent judiciary is crucial to both functions of the rule of law: it is an important means to hold government officials to the law (vertical), and to resolve disputes between citizens according to the law (horizontal). Judges individually and as a group must be committed to interpreting and applying the law to everyone (including government officials) according to its terms, fairly and without bias or outside influence.

An independent judiciary is difficult to establish and preserve. At a minimum, it requires the allocation of adequate material resources: functional buildings, competent staff, access to legal resources, reasonable salaries, and job security. Because judiciaries typically lack direct authority over police or other enforcement agencies, an essential

condition of the independence of the judiciary is that other government officials respect the independence of the judiciary and comply with court rulings. Returning to the first element above, for an independent judiciary to exist there must a strong cultural ethic that courts should not be interfered with, and that their legal decisions must be obliged. An independent judiciary also depends upon the existence of a legal profession committed to upholding the law. Judges are recruited from the profession and must be indoctrinated in the values of the rule of law; the profession must also actively support an independent judiciary, and be willing to defend it when threatened.

3. Existence of a *Robust Legal Profession and Legal Tradition* Committed to Upholding the Rule of Law.

A well developed legal profession and legal tradition committed to upholding the law is necessary for several reasons: to develop the body of legal rules in a coherent and accessible fashion that helps achieve predictability and certainty in the law; to provide the legal services required to insure compliance with the law (in vertical and horizontal terms); to help fill the ranks of government legal positions (including regulators, prosecutors, and judges) with the orientation that the law must rule; and to rise to the defense of the rule of law when it is under pressure. Without a body of lawyers committed to the law and to the rule of law, there can be no rule of law, for the knowledge, activities, and orientations of lawyers as a group are the social carriers of the law—they are the group whose collective activities directly constitute the law. Building a robust legal profession and legal tradition requires a legal education system that transfers legal knowledge and inculcates legal values in those it trains, and it must attract and reproduce people who are committed to the law and to developing legal knowledge.

A potential problem for this element exists in societies where only people from wealthy classes or selected groups have access to legal education or to positions of authority in the legal system because this raises the risk that they will develop and utilize the law to advance the interests of their own at the expense of others, producing a bent and bias in the law. Citizens will perceive the law as tilted, which weighs against the first element above, making it harder to develop a general cultural belief that the law should rule.

None of the above three elements is easy to establish when it is lacking, but the situation is further complicated because each element in various ways depends upon the others. They are distinct and yet intermeshed, and each relies upon a myriad supportive economic, political, and cultural conditions. These are social, cultural, and institutional underpinnings of the rule of law, and they are not entirely subject to human design or control. All of this makes it extraordinarily difficult to put the elements of the rule of law in place, and nigh impossible to do so quickly. A lengthy period, perhaps generations, is required to build up a general cultural belief that the law does and should rule, to build an independent judiciary, and to build a legal profession and legal tradition committed to upholding the rule of law. The good news is that, when it comes about, this interconnectedness makes the rule of law resilient.

WHAT WAS *NOT MENTIONED* AS A CORE ASPECT OF THE RULE OF LAW

1. *Democracy* is a mechanism for selecting political leaders. Many societies use democratic means to determine who has the authority to make law (voting for legislators)

and to create valid laws (voting on proposed laws). Democracy also serves as a legitimating ideal which establishes the obligatory force of law: because the people or their representatives create the law (at least in theory), they thereby consent to it, and are bound by it. Nothing within the thin understanding of the rule of law requires democracy, however. Undemocratic systems can satisfy everything set forth in this Chapter.

2. The thin conception of the rule of law does not impose any requirements with respect to the *content* of the law. This openness with respect to content renders the rule of law amenable to all sorts of cultures, societies, and political systems. It does not specify the kinds of law a society must have; nor does it indicate any particular limits on the law. It requires only that government officials and citizens are bound by and must act consistent with the law, whatever the law might require. This also means that oppressive or immoral rules laws can be enacted—for example, imposing slavery, apartheid, and religious or caste distinctions—without running afoul of the requirements of the rule of law.

3. The account of the rule of law set out in this Chapter does not itself require a regime of *human rights*. Enforcement of human rights may be an aspect of the rule of law within a given system, as indicated earlier, but all of the elements discussed herein can be established without necessarily protecting human rights.

A fair number of scholars who write about the rule of law include one or more of these three aspects as integral to the rule of law. They are not an aspect of the thin understanding of the rule of law. A narrower approach is taken here because it hews to common ground and it applies to the broadest range of systems. Many societies do not

embrace liberal values, and a number do not embrace democracy. A state and society may develop the thin version of the rule of law without necessarily adopting the political arrangements or values of liberal democracies.

The rule of law, at base, is about government officials and citizens acting in accordance with legal rules. This is an essential idea with manifold implications, but it cannot solve every problem or be the repository of everything valuable.

REASONS TO BE *WARY* OF THE RULE OF LAW

One reason to be wary of the rule of law follows from the preceding discussion that the rule of law does not, in itself require democracy, respect for human rights, or any particular content in the law. Developing the rule of law does not insure that the law or legal system is good or deserves obedience. In situations when the law enforces an authoritarian order, or when the law imposes an alien or antagonistic set of values on the populace, or when the law is used by one group within society to oppress another, the law can be a fearsome weapon. Fidelity to the rule of law in these circumstances serves to enhance legally enforced oppression. It is important to remember that the rule of law is necessary but not sufficient to a fair and just legal system.

A second reason to be wary is that support for the rule of law can shade subtly into (or be wrongly interpreted as) support for the extension of the reach of law ever further into the social, economic, and political realms. This spreading insinuation of law—sometimes called the juridification of the life world—does not follow from the rule of law itself. To insist that government officials must act consistent with the law, and to say that the populace should abide by the law, does not suggest that the law must or

should rule everything. The appropriate reach of the law can only be determined following an examination of the circumstances of each social arena. As the earlier discussion indicated, in various situations the extension or application of legal rules can be detrimental to social relations, and to the law itself (by fostering rampant disobedience of the law). Specifically, when legal norms or institutions clash with lived social norms or institutions, it is prudent to be cautious in the subjects and functions the law undertakes.

A third reason to be wary of the rule of law is the risk that it may devolve to the rule of judges (or lawyers). An increasing assertiveness by judges in rendering decisions that infringe upon political authorities, especially when interpreting broad clauses like human rights provisions, has been noted in many systems. When this occurs, the judiciary may become the target of political attacks and efforts at political influence, resulting in the politicization of judicial appointments and judging. The judicialization of politics hence leads direct to the politicization of the judiciary, which in turn reduces the autonomy of the judiciary and diminishes the rule of law. A delicate balance is required in which judges strive to abide by the law and render decisions with an awareness of the proper (limited) role of courts in a broader polity.

The final reason to be wary of the rule of law—or more accurately, wary of *talk* about the rule of law—is that many abuses of the law have been conducted by states and government officials who claim to embrace and abide by the rule of law. The rule of law is a powerful legitimating ideal. As such, it provides cover for cynical political leaders who mouth pieties in favor of the rule of law while violating it. This behavior tarnishes the rule of law ideal, as people come to cynically view talk about the rule of law. The

only solution to this problem is to vigilantly hold government officials to account for their behavior in accordance with legal standards, and to not be fooled by false posturing.