
The Rule of Law Under Siege: A Foreword

IAN JOHNSTONE

INTRODUCTION

This volume of *The Fletcher Forum* on the rule of law could not be timelier. It addresses an elusive and surprisingly contested concept, the central premise of which is that no person is above the law, including those who govern. The concept dates back to Greek and Roman antiquity, but the term came into common usage in the nineteenth century when it was associated with the rise of liberal democracies.¹ It is normally used to describe governance at the national level, but in recent years has been applied to global governance as well. It has implications for international relations in two respects: it is seen as an ideal that ought to be promoted within states and as an ideal that ought to govern relations between states.

One need not look beyond the headlines to see that the rule of law is under siege at both levels.² From one perspective, this is not necessarily a bad thing. For many years, law students have been taught that faith in the rule of law as an unqualified good is either hopelessly naive or positively malign. It is either a utopian ideal that no society lives up to—certainly not international society—or it is an instrument by which the powerful perpetuate their power at the expense of the people who are supposed to be protected by the law.

While these critiques help to illuminate the fallacy that law can be separated from politics—or from the exercise of power—if taken too far,

Ian Johnstone served as the dean ad interim at The Fletcher School of Law and Diplomacy at Tufts University from 2018-2019, and serves currently as a Professor of International Law. From 2013 to 2015, he was also the Academic Dean. He has been a faculty member since 2000. Prior to joining Fletcher, he served in the United Nations' Executive Office of the Secretary-General. His most recent books include *The Oxford Handbook on International Organizations* (2016), *Law and Practice of the United Nations*, 2nd edition (2016), and *The Power of Deliberation: International Law, Politics and Organizations* (2011).

they are dangerous. At the national level, when so-called populists are undermining democratic institutions in the name of “ordinary people,” abandoning the rule of law as an ideal is an invitation to arbitrary or, at worst, tyrannical governance. At the international level, when multilateral institutions and principled forms of cooperation are scoffed at, giving up on international law brings us a step closer to Thucydides’ dictum that the strong do what they can and the weak suffer what they must. While critical examination of the rule of law is warranted, in this day and age we must be careful not to let healthy skepticism blind us to law’s virtues.

RULE OF LAW AT THE NATIONAL LEVEL

In a 2019 article, legal philosopher Joseph Raz provides a straightforward explanation of what the rule of law means.³ Acknowledging that there are different definitions of the term, he suggests that the following five principles are common to virtually all accounts of the doctrine: the law must be (1) reasonably clear, (2) reasonably stable, (3) publicly available, (4) generalizable and (5) applied prospectively, not retroactively.⁴ Jeremy Waldron offers a similar definition as a starting point, but adds to the five formal principles the processes by which the principles are administered, the institutions that their administration requires, and—more controversially—certain substantive ideals like the presumption of liberty.⁵

The United Nations has its own definition, first articulated by UN Secretary-General Kofi Annan in 2004:

...the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.⁶

This definition, and expressions of a commitment to it, found their way into various inter-governmental documents.⁷ In a recent speech, UN Assistant Secretary-General Volker Turk claimed the rule of law is a prerequisite for peace, development, and human rights.⁸ He said it is fundamental to the social contract between governments and people and called it an “essential element of building resilient societies.”⁹

How could one object to a concept that has such seemingly beneficial effects? In the academic community, critical theorists argue that the rule of law masks inequities by making important value choices seem apolitical and objective. Morton Horowitz, for example, claims that law might “create formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.”¹⁰ The promotion of procedural justice by devotees of the rule of law “enables the shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage.”¹¹ From this perspective, the law is not an instrument the weak can use against the strong, but a reflection of the existing power structures that enables those with power to preserve a status quo that perpetuates their power, masked behind the seemingly neutral language of the law. According to these critics, the law is inherently indeterminate; most difficult legal questions are a matter of interpretation and the “correct” interpretation cannot be found in the law, but rather is a matter of political choice. The structure of the legal system means the choices are made by political and economic elites, so the rule of law does nothing more than legitimize rule by those elites.

If this critique of the rule of law gained traction among academics in the Global North—at least in the Anglo-Saxon world—it resonates even more in the Global South. Promotion of the rule of law can quickly start to look like the imposition of forms of governance that are not only alien, but exploitative. At the highest level of abstraction, it legitimizes governance that serves the interests of elites from the Global North *and* South, who benefit at the expense of the broader population. It should not be surprising, therefore, that in a recent UN meeting on “the rule of law at the national and international levels,” a good number of government representatives sought to promote the latter and de-emphasize the former as a priority activity for the UN. The representative of Iran, speaking on behalf of the Non-Aligned Movement, stated “the international community must not replace the national authorities in the task of establishing or strengthening the rule of law at the national level.”¹² China’s remarks were entirely about international law, as were those of India, signifying that both are concerned about the UN getting too deeply involved in internal affairs that promotion of the rule of law at the national level would entail.

That being said, the issue is far from settled. The European Union, not surprisingly, endorsed promotion of the rule of law in post-conflict societies. Cambodia on behalf ASEAN and the Gambia on behalf of the Africa Group spoke of their commitment to rule of law at the national

level. Nigeria's statement referenced democracy and good governance, while highlighting political representation and participation. Indonesia claimed, "there can be no meaningful international relations without rule of law...we commend the roles of the United Nations in capacity-building and technical assistance in upholding the rule of law at the domestic level." The United States made a very brief statement that focused on international humanitarian law but mentioned nothing about the rule of law at the national level. Russia made no statement at all.

This encapsulates why we should be careful about throwing the baby out with the bathwater. At a time when populist leaders are doing an end-run around democratic institutions by appealing directly to "the people" (defined narrowly to exclude minorities and marginalized groups), dismissing the rule of law as an instrument for perpetuating inequities is a recipe for abuse. The notion of an apolitical judiciary may seem far-fetched when we see highly politicized supreme and constitutional courts around the world. But that does not mean we should give up on the idea of an independent judiciary. Holding government leaders accountable may seem like a pipedream when presidential powers get expanded and elections get manipulated. But that does not mean we should give up on the principle of participatory governance. The idea of the rule of law—warts and all—is especially important when democratic norms are being eroded in many parts of the world.

RULE OF LAW AT THE INTERNATIONAL LEVEL

What is the rule of law at the international level? A declaration that came out of the UN's High-Level meeting on the topic in 2012 did little more than reaffirm the main tenets of the UN Charter:

We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, to respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, and to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter.¹³

Framed in that way, what the rule of law means at the international level is fairly clear: public international law. Unfortunately, the theoretical underpinnings of public international law are anything but clear. Natural law theorists, starting with Thomas Aquinas and Hugo Grotius, claimed that the source of all law is “the natural order of things” and, more specifically, the rules and principles needed to preserve society, which humans ‘naturally’ desire because we are social beings. We know what it takes to maintain the social order—in other words we know what the law is—simply by exercising our reason. For example, *pacta sunt servanda*, the principle that one should abide by the agreements one makes, derives from nature because humans, as social beings, had to find some way of making promises and commitments to one another. As Grotius put it, “no other natural method can be found.”¹⁴

Legal positivists reject the view that the law has a metaphysical source—that it can somehow be derived from the natural world through reason. For them, what counts as law is a matter of observable fact. The sources of law are not metaphysical, but social creations. Moreover, positivists separate law from morality, or what the law is from what it ought to be.

One of the early legal positivists, John Austin, defined law as “a command issued by a sovereign, backed by a coercive sanction.”¹⁵ Accordingly, he claimed there could be no such thing as international law because there is no international body superior to nation-states—no higher sovereign who can issue commands or impose sanctions. Later positivists were less skeptical about the possibility of international law because they thought law could exist without a higher authority issuing commands. Moreover—according to H.L.A. Hart—a legal system can function even without sanctions.¹⁶ The root of all international law is sovereign consent, not sovereign command. To put it simply, international law is nothing more or less than a set of rules states have consented to, and they register that consent either by signing and ratifying treaties or through customary practice. How do we know that? Positivist legal theory holds that it can be inferred from the behavior of states. States *use* and seem to accept that principle in how they behave in their dealings with other states. Even the rule that agreements (treaties) are binding emanates from observable practice; they are binding because states customarily behave as if they are binding, not because there is some higher authority telling them they are binding.

Positivism was seen as a more attractive theory than natural law for one obvious reason: it is consistent with the principle of state sovereignty—the notion that there is no higher authority than the state. States themselves are the lawmakers. But the logic of positivism suffers from that fact that, if

it is simply about state consent, then presumably states can withdraw their consent as easily as they grant it. If the law ceases to be binding as soon as states withdraw their consent, then in what way is it binding at all?

Contemporary positivists have struggled to answer that question. One prominent school of thought in the U.S. academy is transnational legal process. Harold Koh and others seek to explain how a sense of obligation becomes “internalized” by international actors, i.e. states. The main argument is that compliance is not due to external enforcement, but rather internal acceptance of the rules. Though a process of interaction and interpretation, global norms get internalized in domestic legal, political, and bureaucratic routines.¹⁷ In this way, the law acquires “stickiness”—states (i.e. their governments) can withdraw consent, but they do not do so lightly or without considerable disruption to their normal international relations. In other words, compliance is typically easier—and less costly—than non-compliance. It almost becomes a matter of habit. Habits can be broken, but not easily.

Critical legal theorists who write about international law challenge both positivism and natural law. These theorists argue that international law is never “neutral” or objective, yet it seeks to present itself that way. The legal system is built on the pretense that rules can be interpreted and applied without making political choices. But in fact, according to these critics, international law is fundamentally a vehicle for ideology—and the ideology it embodies is that of the dominant states in the system. The ideological choices being made are thus hidden behind neutral sounding legal language.

Moreover, the law is full of contradictions and is therefore indeterminate. If an interpreter tries to interpret an ambiguous rule by referring to deeper principles or purposes that supposedly underpin the rule, they discover that there are often at least two equally powerful principles pointing in opposite directions. So, the interpreter must make a choice between the two, driven not by something inherent in the law, but by their own political preferences. For example, “sovereignty” and “self-determination” are two important legal concepts that potentially conflict (a group’s right to self-determination bumps up against a state’s right to sovereignty and territorial integrity). How does one resolve the conflict? Critical theorists say there is nothing within the law that enables a resolution. The decision is not driven by the law but by value choices, and those value choices are always contestable.

This excursion into international legal theory helps to explain why the edifice on which the international rule of law is built is fragile. The law is rarely enforced through military action or economic sanctions. Powerful

states wield disproportionate influence in making and interpreting the law, and they orchestrate its selective application. Moreover, an internalized sense of obligation is quickly overridden when important matters of national security or identity are at stake. If the critical legal theorists are right, states engage in legal discourse simply as a way of hiding the underlying ideologies and masking the contradictions inherent in the law.

The problem with that line of reasoning is that it understates the communicative function of law and overstates the power of dominant states. The language of law—and its associated institutions—does not resolve all conflicts but rather helps to manage the tensions that permeate any pluralistic society, including international society. International law is inherently intersubjective and its implementation is inherently interactive. To engage in international law formation and interpretation is to engage in a collectively meaningful activity.¹⁸ When disputes arise, the interpretive task is to ascertain what the law means to the parties collectively rather than to each individually. The distribution of material power has a profound influence on the development and implementation of international law, but dominant states cannot simply impose their norms on others; the process requires the offering up of arguments that fit within a wider context of shared understandings about the rules of international life. Those understandings are themselves the product of interaction and contestation among a wide range of governmental and nongovernmental actors. It is unreasonable to assume the “hegemon” can rewrite the law at the stroke of a pen. If new arguments and interpretations reach too far beyond the parameters of accepted discourse, they are not likely to be persuasive, and no amount of material power is going to change that. Even the most powerful states will pay a price if they behave in a manner that is widely perceived to be illegal—typically in the form of the loss of domestic and international support. They may decide the price is worth paying, but that just proves that the law is not an absolute constraint; it does not prove that the law can be broken without consequences. Engaging in legal argumentation does not eliminate the impact of material power but mitigates it. It makes the playing field a little less tilted in favor of the dominant states.

What of the problem of selective application of the law? This critique has to be taken seriously. Consistency is important in international affairs, just as it is in domestic public affairs—it is a fundamental principle of justice that like cases ought to be treated alike. But in the real world of international politics, we cannot expect perfect consistency. Power matters and inequalities in power will inevitably result in inconsistency and double standards; it would be naive to expect otherwise.

But it is also naive to reject international law solely because it is not applied consistently. The international community failed to stop the genocide in Rwanda in 1994. Does that mean that, for the sake of consistent application of the Genocide Convention, it should not seek to prevent genocide anywhere? In fact, a function of legal norms is to help generate consistency. Even when not subject to binding dispute settlement or enforced through sanctions, an international norm is an advocacy tool that can be used to pressure decision-makers to treat like cases alike. Consider the much maligned “responsibility to protect.” The norm cannot compel or prevent action by the UN Security Council, but it can make intervention to stop genocide a little more likely when justified and a little less likely when not—it can be used to push for action when appropriate and to push for restraint when not.

CONCLUSION

To conclude, the power and impact of international law is a function of how—and how much—it is used. If it falls into disuse, then its demise becomes a self-fulfilling prophecy. If states give up on the idea of the rule of law and cease seeking to justify conduct in legal terms, then we will have moved a step closer to Thucydides’ world—not because that world is an immutable reality, but because it is one we will have chosen to create. Hopefully, this issue of *The Fletcher Forum of World Affairs* makes a small contribution towards preventing that from happening. *f*

ENDNOTES

- 1 A.V. Dicey, *Introduction to the Study of the Law and Constitutions* (8th edition, 1915).
- 2 The World Justice Project’s 2019 Rule of Law Index indicates that more countries declined than improved in overall rule of law performance for the second year in a row, continuing a negative slide toward weaker rule of law around the world. <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>> (accessed December 19, 2019). At the international level a) U.S. withdrawals from the Paris Agreement on climate change, the Joint Comprehensive Program of Action on Iran’s nuclear program, and the Intermediate Nuclear Forces Treaty; b) withdrawals of Burundi and the Philippines from the International Criminal Court; c) the failure of the UN Group of Governmental Experts to reach a consensus on cyber norms; d) violations of humanitarian law in Afghanistan, Syria and Yemen; and e) closed border policies on refugees and vulnerable migrants all signify a declining commitment to international law.
- 3 Joseph Raz, “The Law’s Own Virtue”, *Oxford Journal of Legal Studies* Vol. 39(1) Spring 2019, pp. 1-15.
- 4 *Id* at p. 4.
- 5 Jeremy Waldron, “The Rule of Law”, *Stanford Encyclopedia of Philosophy*, first published on June 22, 2016.

- 6 Report of the UN Secretary-General 2004.
- 7 World Summit Outcome document (2005), UN Document A/RES/60/1, 24 October 2005; Declaration of the High-Level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels, UN Document A/RES/67/1, 30 November 2012. Sustainable Development Goal 16, Transforming our world: the 2030 Agenda for Sustainable Development, UN Document A/RES/70/1, 21 October 2015, pp. 25-26.
- 8 Volker Turk, Remarks at the Sixth Committee Debate on the Rule of Law, October 11, 2019. <<https://papersmart.unmeetings.org/media2/21998420/-e-asg-for-strategic-coordination-volker-turk.pdf>> (accessed December 19, 2019)
- 9 The World Justice Project's 2019 Rule of Law Index ranks countries on the basis of eight factors, including constraints on government powers, absence of corruption, openness of government and respect for fundamental rights. The top 5 countries in 2019 were Denmark, Norway, Finland, Sweden and the Netherlands. The US ranked 20th. Brazil was 58th; India 68th, China 82nd, Russia 88th, Nigeria 106th and Venezuela came last among those ranked at 126th. <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019>> (accessed December 19, 2019).
- 10 Morton Horowitz, "The Rule of Law: An Unqualified Human Good?", *Yale Law Journal* Vol. 86(3) 1977, pp. 561-66. See generally, Morton Horowitz, *The Transformation of American Law 1870-1960*. See also Judith Shklar, "The Liberalism of Fear", in Nancy Rosenblum ed, *Liberalism and the Moral Life* (Harvard University Press, 1989).
- 11 Horowitz, "The Rule of Law", p. 566.
- 12 For the statement of Iran on behalf of the Non-Aligned Movement and other statements at the October 2019 debate in the 6th Committee of the UN General Assembly, see <<http://statements.unmeetings.org/media2/21998012/iran.pdf>> (accessed on December 19, 2019).
- 13 Declaration of the High-Level Meeting on the rule of law, *supra* n. 7.
- 14 Hugo Grotius, "Prolegomena", in Robert Beck and Anthony Clark Arend, *International Rules: Approaches from International Law and International Relations* (Oxford University Press, 1996), p. 42.
- 15 John Austin, *The Province of Jurisprudence Determined* (1832)
- 16 H.L.A. Hart, 1994, *The Concept of Law* (2nd edition, Oxford: Clarendon Press).
- 17 Harold Koh, "Why do Nations Obey International Law?," 106 *Yale Law Journal* 2599 (1997)
- 18 For a more fully developed discussion of law as an intersubjective practice, see Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organization* (2011), pp. 40, 52-54.