THE LEGAL HISTORY OF THE RULE OF LAW

The Rule of Law concept has a deep historical lineage, being traced in some scholarly views to the concepts of justice and fairness discussed by Aristotle.[1] But while Greek civilization gave rise to the Western concept of democracy, albeit limited in actual practice in Athens, it was the undemocratic Roman Empire that gave birth to the Western tradition of a well-codified and broadly applied body of law:

> The basic legal institutions of European civilization emerged in a specific cultural environment, that of the early Roman Republic. Roman law grew into a complex procedural system administered by trained jurists in the Roman Empire, the Byzantine Empire, and later European monarchies. Because it never imposed constitutional restraints on the executive, it did not ensure the Rule of Law in the modern sense. Napoleon's famous codes of law and procedure (1804-1811) guaranteed equality before the law and protected private property rights in the tradition of Roman law, but they did not infringe on the prerogatives of the emperor and his spies, censors, and secret police.[2]

The Roman legacy in part was the concept of a codified body of laws widely applied in order to maintain order and sustain a regime. As noted, that legacy did not extend to the idea that the government itself was bound by law. That innovation may be the most important contribution of Western legal thought.

Certainly in the judgment of many, the seminal document in the emergence of the Rule of Law as a fundamental Western legal concept is the Magna Carta, precisely because it embodies that idea:

> Since 1215 in England, and in ensuing centuries in many countries that England has and has not influenced, there has been major progress toward government under the Rule of Law. England's own earliest major advance was King John's acquiescence in the Magna Carta in June of 1215. The final revision of this great charter…was confirmed in 1297

[1] Aristotle, *Politics* (ca. 325 B.C.) cited in cited in John N. Moore, "The Rule of Law: An Overview," (paper presented at the first U.S./Soviet Conference on 'The Rule of Law' held in Moscow and Leningrad, 19-23 March 1990), 7.

[2] Jeffrey D. Sachs (editor) and Pistor, Katharina, *The Rule of Law and Economic Reform in Russia* The John M. Olin Critical Issues Series, (Westview Press, 1987), 25.

> by King Edward I and placed on the first or "great" roll of English statutes…One of its original clauses captures a major feature of the relatively formal theory of the Rule of Law…:
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> "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we (*the King*) proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."[3]

That great document embodied the principle that government itself—in that day, the monarchy—is bound by law, and may not do certain things to ordinary citizens absent a justification grounded either in peer decisions ("lawful judgement of his equals") or established law ("law of the land"). A cornerstone of the Rule of Law is that law rules the government itself. Arbitrary exercise of power not based on law is inherently suspect and worthy of resistance.

While much occurred in the intervening four centuries in the West, the seventeenth and eighteenth centuries were a period of fertile intellectual consideration of the proper forms and bases of government resulting in a flowering both of analysis of government and of popular uprisings that reshaped those governments. The writings and actions of that period are crucial to an understanding of the Western concept of the Rule of Law.

First, the question of the source of legitimacy for governmental action arises. As support for unquestioning adherence to monarchical rule dissolved, scholars debated what exactly it is that provides the basis for governmental authority. John Locke, Jean-Jacques Rousseau and Count Montesquieu provided the most influential contributions. In rough summary, the Englishman Locke's view prevailed: government is based on popular consent, and actions by a government that are not supported by that popular consent (leaving aside the complexities of ascertaining that consent) are not valid, or, as Locke said, are "without authority."[4]

[3] Robert S. Summers, "A Formal Theory of the Rule of Law," Ratio Juris, vol. 6, no. 2 (July 1993), 127.

[4] Jocke, *Second Treatise of Civil Government* (1690) and Rousseau, *The Social Contract* (1762) cited in John N. Moore, "The Rule of Law: An Overview" (paper presented at the first U.S./Soviet Conference on 'the Rule of Law' held in Moscow and Leningrad, 19-23 March 1990), 8.

Second, the question of the proper structure of government arises. Here the ideas of the French aristocrat Montesquieu were most emulated. His writings ushered in an era of constitution-writing, which assumed that constitutions, as original statements of the will of the people to be governed, were necessary to their government. Moreover, his eloquence on the question of the importance of the separation and balance of powers has never been surpassed, except perhaps by the American James Madison.

In the 1748 *L'Esprit des Lois*, Montesquieu wrote:

> When the legislative and executive powers are united in the same person...there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
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> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[5]

Third, the fundamental notion of the rights of individuals emerged. As an antithesis to arbitrary monarchical, theocratic or military power, the belief took hold that individuals are entitled to certain things which neither governments, nor other individuals, can take from them absent some rational reason that is established by a procedurally sound, and fair, mechanism. This notion of individual rights, now usually referred to as human rights, was most eloquently captured in the American Declaration of Independence's statement that all men are equal and that among their unalienable rights are "life, liberty and the pursuit of happiness."[6]

Just one generation after Montesquieu's writings, the flowering of Western constitutionalism and democratic revolution occurred. In the brief period from 1776 to 1791, most of what is worth repeating on the subject of the basis for democracy in the West was written.

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[5] Montesquier, L'Esprit des Lois, 1748.

[6] Declaration of Independence, 1776.

The American Declaration of Independence on July 4, 1776, endorsed John Locke's view of the basis for the legitimacy of government: "We hold these truths to be self-evident, that all men…are endowed by their Creator with certain unalienable rights…to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[7]

In 1780, the state of Massachusetts adopted its Constitution, incorporating a provision that is a useful statement both of the concept of the Rule of Law and of the link between separation of powers and the Rule of Law:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[8]

By 1789, the concepts of government being limited by the consent of the governed, of separation of powers as a potent mechanical device to protect against any violation of popular consent and of the existence of inherent, and inalienable, personal rights had become entrenched. The U.S. Constitution, down to its very structure, reflected the notion that power must be divided among three branches, each with a capacity to check the other against the arbitrary use of power. And both the French Declaration of the Rights of Man and the Citizen of 1789 and the U.S. Bill of Rights in 1791 articulated with precision the concept that individual human rights must be protected from the potential tyranny of the state by mechanisms that prevent the sovereign from the arbitrary use of power.[9]

An interesting point is that the actual term "the Rule of Law" is not widely found in these historical documents, including the U.S. Constitution. As Professor George P. Fletcher has pointed out:

> Unlike typical European constitutions, the basic charter of the United States says nothing about a commitment to the Rule of Law. The closest constitutional analogue is the phrase prohibiting the depri-vation of "life, liberty, or property without due process of law."[10]

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[7] Declaration of Independence, 1776.
[8] Massachusetts Constitution, Article 30, Part the First.
[9] U.S. Bill of Rights; French Declaration of the Rights of Man and the Citizen.
[10] George P. Fletcher, Basic Concepts of Legal Thought (Oxford University Press, 1996), 13.

Indeed, the concept of "due process" has become, in American law, the most vigilant guarantor of the set of procedural rights and remedies available to individual citizens, which we usually mean when we refer to the Rule of Law.

Other linguistic terms arose that more closely track the "the Rule of Law" formulation, notably the *Rechtsstaat* of German law and the *Etat de droit* in French thought. In both cases, the fundamental concept of the Rule of Law, which emerged when the Magna Carta was extracted from the English monarch at Runnymede, is clear: government itself is bound by law.

The modern European *Rechtsstaat*, or 'state based on the Rule of Law,' rested on Roman legal procedures but also grew out of the tradition of checks and balances created by the estates and their representative assemblies in the late medieval period. In the words of Barrington Moore, Jr.:

> The most important aspect was the growth of the notion of the immunity of certain groups and persons from the power of the ruler, along with the conception of the right of resistance to unjust authority. Together with the conception of contract as a mutual engagement freely undertaken by free persons, derived from the feudal relation of vassalage, this complex of ideas and practices constitutes a critical legacy from European medieval society to modern conceptions of a free society. This complex arose only in Western Europe.[11]

Yet as Professor Fletcher has also pointed out, something more is intended by the words used in European legal traditions than simply saying that governments too are bound by the laws that govern individuals:

> There are in fact two versions of the Rule of Law, a modest version of adhering to the rules and a more lofty ideal that incorporates criteria of justice. We shuffle back and forth between them because we are unsure of the import of the term "law" in the expression "the Rule of Law." To explicate a rarely perceived ambiguity in English, we turn to a distinction between two concepts of law that is widely recognized in other languages but ignored in English.

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[11] Sachs, op.cit., p. 25.

Continental European languages, for example, use one term for law that expresses the idea of laws enacted—laid down, legislated—by an authoritative body. Thus Germans use the term *Gesetz*, French *loi*, Spanish *ley*…All these languages also contain a second word for law that expresses a higher notion of Law as binding because it is sound in principle. This alternative conception of law is expressed in the Continental European languages as *Recht* in German, *droit* in French, *derecho* in Spanish…the closest translation of these terms in English would be 'Right,' an archaic expression for Law…The connotation of Right (or Law with a capital L) is typically that of good or just law, which is binding on us because it is good or just…

In many modern European languages…the term for Law in this higher sense is used to refer to personal rights in the plural (*Rechte, droits, prava, derechos*). The appeal to human rights, therefore, is an indirect appeal to the same word 'Right' that in European languages signifies Law in a higher sense. When we speak today of protecting human rights, such as the rights to life, liberty, and dignity, we always have in mind rights that appeal to us because they are just as a matter of principle.

Each of those two terms for law generates a distinct conception of the Rule of Law. If someone argues that 'the Rule of Law' simply means that 'the government is bound by rules fixed and announced beforehand,' they would be content with having the rules laid down by an authoritative lawgiver or legislature. This is what the Germans would call a *Gesetzesstaat* or the Communists once labeled 'socialist legality…' The rules are binding whether they are good or bad.

Those who think that the Rule of Law is an ideal for good government stress the dimension of Right in the Rule of Law.

The vision of a state based on ideal law is captured in the German notion of a *Rechtsstaat.* The European notion of "the Rule of Law" is based always on the term for Law in the higher sense. [12]

[12] Fletcher, op.cit., pp. 11-12.

In the American legal tradition, that appeal to Law "in the higher sense" frequently is grounded in the doctrine of constitutionalism. Based on the writings of Montesquieu, the era that saw the beginnings of electoral democracies in Europe and the United States two centuries ago was an era that placed great faith in the power of a written constitution to order society and guarantee liberty. Beyond that, a constitution was seen as a method of actually articulating that higher law which, by the consent of the governed, should rule the affairs of the nation.

Even though the term "the Rule of Law" is not contained in the U.S. Constitution, it could be said that the concept of the Rule of Law was clearly on display in what is perhaps the most important Supreme Court case ever decided—*Marbury v Madison.*

Just 14 years after the writing of the Constitution, Chief Justice John Marshall wrote the opinion that established with finality what was not at all evident based on a plain reading of the Constitution: that the Court (*i.e.*, the judicial branch established in Article 3 of the Constitution) had the power of judicial review; that using that power, the Court, relying on the Constitution, could set aside an act of the legislature (the Congress) as invalid, even though that Act had been passed by proper procedures and on its face was a valid Act of a duly constituted Congress.

The Court's 1803 reasoning is worth recalling, since it bears not only on the manner in which the concept of the Rule of Law became further entrenched in the American legal tradition, but because it also deals with one of the more difficult aspects of the practical application of the Rule of Law concepts: how to resolve disputes where there is a conflict between laws, each of which has a claim to validity:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void….
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> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
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> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.[13]

Thus, even though the term "the Rule of Law" was not widely deployed at the time, it can be said that by the beginning of the nineteenth century, the Rule of Law was firmly entrenched as a guiding legal principle in the democracies of the United States and Europe. Its hallmarks were a faith in constitutionalism as the tangible proof of the consent of the governed, the belief that government itself is limited by law and cannot engage in arbitrary exercises of power, and that individuals are endowed with certain rights that are inalienable, even by action of legitimately constituted governments.

It should go without saying that the political realities of the time did not live up to the lofty concept of the Rule of Law, so stated. Virtually every society in the West, certainly including the United States, engaged in some form of inhumane treatment of segments of its own population. Slavery and serfdom stretched from the United States to the Russian edge of Europe. Women had full political rights in few, if any, of these nations. As the nineteenth century wore on, colonialism and the European attempt to subjugate non-Europeans expanded, rather than contracted. The industrial revolution introduced new forms of economic exploitation which in turn gave rise to political movements that found the contemporary reality of democratic government wholly lacking in a sufficient commitment to human rights or the Rule of Law.

The twentieth century saw Europe itself fall into a period of savage disregard for law and human rights, as the threat of violent conquest by one nation over all the others on the continent was accompanied by an unprecedented assault on the very existence of one ethnic group. The simultaneous conflict in Asia likewise

[13] *Marbury v Madison,* 5 U.S. 137 (1803).

trampled widely on human rights. By the time the Second World War was over, the need seemed urgent to create peacekeeping supranational institutions and to restate the consensual commitment to human rights and the Rule of Law.

The 1948 Universal Declaration of Human Rights did so. Its preamble stated "…it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."[14]

In the past fifty years, the concept of the Rule of Law has become more firmly entrenched and its virtues more broadly defined. The use of the term itself has become nearly ubiquitous in discussions of good government, and the Rule of Law has been advocated as a necessary precondition for two quite separate achievements widely pursued by Western governments: the development of Western-style democracies throughout the world and the equally widespread emergence of free market economies. Both of these rationales for promoting the Rule of Law are discussed in more detail below, but it is useful first, in the context of this quick survey of Western legal history and of the origins of the commitment to the Rule of Law, to briefly review other legal and governmental traditions where the Rule of Law has been greeted more skeptically.

[14] Universal Declaration of Human Rights, Preamble.