

NON-WESTERN LEGAL TRADITIONS AND THE RULE OF LAW

The tendency in the West too often is to pay little tribute to the existence of other legal traditions, largely because they do not have the hallmarks of the Rule of Law approach that developed in the West. It becomes an unfair tautology that the absence of a Rule of Law heritage suggests an absence of any legal system at all. That is in fact not true.

Indeed, returning to the legacy of Roman law, it is important to remember that it has always been possible to have a well-elaborated legal system the purpose of which is not to protect the rights of the individual citizen or member of the community, but instead to advance the workings of the state or the interests of the entire community. Generally, this concept of law working for the greater good of the community at large, through the direction of a benevolent leader or administrative regime, can be said to characterize a number of other legal systems, notably including those in Asia.

Two points should be made here about the historical bases for Asian suspicion regarding the Western “Rule of Law” approach to legal systems:

First, the experience of colonialism and the search for trade advantage by Europeans necessarily has colored the Asian view of what Westerners intend in practice by their Rule of Law. Asia never colonized Europe; much of Asia was colonized by Europe. The workings of those colonial systems were keyed to achieving mercantile and trade advantage for the “mother” country. Within that context, it is not surprising that Asians historically did not always see European legal systems as the guarantors of individual rights that they claimed to be within the European and North American contexts. Add to that experience the fact that Asians also colonized each other at various points, using law as a tool for imposing the will of the controlling regime, as in the Roman Imperial experience.

Thus it was observed at one of the earlier conferences on the Rule of Law in Asia that:

During the course of his long subjugation to foreign rule, the average Korean found that laws were made by the rulers not with the ultimate purpose of protecting the individual or furthering his interests, but to provide the machinery by which the country could continue to be kept

under subjugation. The result of this attitude towards the law is that the average person, far from considering himself under a duty to obey the law, endeavours as far as possible to evade it.

This attitude towards the law is observable, though perhaps in a far less pronounced form, in several other Asian countries which have been under foreign rule. While the rulers did in many instances make laws in the interests of the people, it would be true to say that the primary object of law-making was the preservation of peace, the protection of the trading interests of the foreign power and the maintenance of the status quo. Of course, the force of this observation would vary depending on how enlightened and how benevolent the foreign ruler was. Many illustrations can be traced of extremely harsh and repressive laws which had been imposed by colonial powers in South-East Asia with a view to protecting their trade monopolies and their trading interests generally, and which were certainly not designed to benefit the local inhabitants.¹

Second, given the sheer magnitude of the realm, and a myriad of other cultural factors, the legal tradition in China evolved as nearly the polar opposite of the Western individual, rights-based reliance on the Rule of Law. Instead, the need for wise and benevolent leaders using law to impose order and achieve the highest good for the whole society was emphasized:

Traditionally, East-Asia—particularly China and countries influenced by Chinese political philosophy—is the centre of the antithesis to the Rule of Law conception of the polity. This position is best presented in the works of Confucian scholars written in opposition to the Legalist School in China. Although he spoke before the Legalist School came into existence, the remarks of the third century B.C. Chinese philosopher Hsun Tsu are typical of these views:

There is a ruling man but not a ruling regulation...Law cannot stand alone and regulation cannot be exercised by itself. By getting the (right) man, it lasts; by losing the (right) man, it perishes. Law is the tip of

¹ International Commission of Jurists, “The Dynamic Aspects of the Rule of Law in the Modern Age” (report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok, Thailand, 15-19 February 1965), 31

government, and the great man is the source of governing. Therefore by having the great man (in control) although the law is incomplete, it will be sufficient to cover everything. Without a great man, even if the law is complete, the sequence of its application will be in disorder and will be unable to meet the change of events, and will lead to disorder.²

In contemporary discussions of the Rule of Law, this skepticism about the actual capacity of Law to “stand alone” and the concomitant preference for a reliance on the “right” man or “great” man as the correct source of good governance remains a strong theme for many Asian theorists and commentators.³

It is a view that deserves careful attention. Indeed, it is clear that no law is entirely self-executing. The “right” or “good” man or woman is required both to know the law and to seek to execute it properly. Venality, selfishness, intemperance or simple stupidity are all frailties within human beings that can result in bad applications of laws, no matter the wisdom or fairness of the laws themselves. In fact, even in the Western system of the Rule of Law, great emphasis is placed on the need for mechanisms to identify the “right” person to place in charge of each component of the legal and political system: the legislative, the executive and perhaps especially, the judiciary.

A hallmark of periodic reform movements in the West has been an emphasis on the concept of merit selection. Whether in filling the ranks of the administrative bureaucracy or selecting judges, a consistent norm within the modern Western legal tradition is that such selection should be based on the merit of the individual, usually as demonstrated by academic achievement and professional experience. Considerations such as wealth, family ties, cronyism or party affiliation (other than for elected officials), at least in theory, are meant to be disfavored.

Yet in the Western legal tradition, it is precisely the Rule of Law that is needed to ensure such merit-based selection. If formal, rules-based selection procedures are not in place, open and known to all, and generally adhered to, then there is little if any means of ensuring the selection of the “right” man, consistent with other democratic principles.

² Ibid., 31-33.

³ The first in a series of conferences on the Rule of Law, co-sponsored by the Mansfield Center for Pacific Affairs and the Global Forum of Japan, was held in Tokyo, 27-28 May 1999. That discussion, among others, was characterized by intense exchanges on this point. *The proceedings of that conference are in a forthcoming Mansfield Center publication.*

That is, one alternative means of identifying the “right” man is reliance on the monarch/nobility model, which assumes that the “best” people are so, and can be identified as such, by dint of birth. That assumption is not compatible with the egalitarian principles of democracy (nor, one might add, with empirical experience). Another alternative means of stocking the pool of rulers is strictly ideological: adherence to State or Party doctrines and evidence of ideological zeal can be the test for admission to political, administrative or judicial power. Again, such an approach is not easily reconciled with principles of democracy. If the only means of proving oneself to be the “right” person for governance is to adhere to a particular party or ideology, then ideological zeal is sufficient. The rule, not of Law but of the Party or the State or some restricted elite thereof, necessarily comes into play, and that must be considered inconsistent with participatory democracy.

True, popular elections in democracies determine who will be the legislators and key executive branch officials (in some cases, judges too are popularly elected) and of course, elections entail ideological choices. But the major premise of elections is that in a democracy the people generally, not an elite party or select state group, have a right to participate in the selection of the leaders of their government. Moreover, elections are periodic in nature, affording the public a chance to change its collective mind or nullify a prior ideological choice.

Adherence to the Rule of Law ensures that the results of such choices by the electorate are honored. Once an election is held, it is the essence of the Rule of Law concept that the election results must be honored. Losers depart office willingly. In a very important sense, being the “right” man to rule must include, in a democracy, having been chosen to rule by free and fair election of the general public. No matter how “right” one may be, in some technocratic or meritocratic sense of one’s ability, the democratic mandate to govern is a necessary element in determining that an individual is the “right” person for governing.

Spotlighting the other alternative means for identifying the “right” man to govern may make the point best: the venerable concept of the enlightened despot assumes that it is possible to have the best governance from a leader who holds power by despotic means, but possesses the requisite wisdom to govern. In theory such a ruler is possible, and there are cases of societies ruled by unelected leaders that are well governed, in certain technocratic senses. Yet, such a basis for exercising governmental power is in direct conflict with the premise at the heart of both the Rule of Law and of democracy: a government is only legitimate when it governs with the consent of the governed.

Another non-Western legal tradition, which is relevant to some Asian reactions to the Rule of Law concept, is the development of Russian law from medieval times through the recent dissolution of the Soviet Union. As contemporary economic reformers have described that legal history:

The standard definition of Russian autocracy ... has two components. The primary meaning relates to foreign affairs, as a ruler who has no foreign overlord enjoys autocratic power, literally 'ruling by oneself.' In the absence of internal checks and balances, the term connotes absolute power as well. By the end of Tatar rule, conventionally dated in 1480, the grand principality of Muscovy had made the transition to this system. Over the centuries, in medieval Muscovy, the Russian Empire, and the Soviet Union, the autocratic government required personal service from most if not all of its subjects, issued a host of arbitrary laws, and remained immune from constitutional restraints on its executive power.

A distinction must be drawn between the Rule of Law and rule *through* law. The vast number and complexity of the laws promulgated by Russian autocrats had nothing to do with the defense of human rights or limits on the power of the tsar. The enormous *Polnoe sobranie zakonov* (Complete Collection of Laws 1649-1913, hereinafter PSZ) and its supplement, the *Sobranie uszakonenii i rasporiazhenii pravitel'stva* (Collection of Governmental Statutes and Decrees 1863-1917, hereinafter SURP) together with the various codes of laws issued from 1497 onward, indicated the vigor with which tsarist bureaucrats sought to regiment society by means of statutory compulsion and restriction. The law functioned as an administrative device, not as a set of rules to be obeyed by state officials ... For centuries, the Russian state pursued the goal of expanding its dominion over the huge Eurasian plain. To this end, it placed the highest priority on equipping the largest armed force in Europe. Such military strength in turn required the imposition of state service, heavy taxation, state control of key industries, and, above all, the destruction of any countervailing political forces.⁴

Given the influence of Soviet thinking on a number of Asian leaders during the initial post-colonial period of the 1950s through the 1970s, it is not surprising

⁴ Sachs, op. cit., pp. 24-25.

that elements of each of these views of legal systems (Confucian and Tsarist/Soviet, as well as the experience with colonialism) have influenced Asian attitudes toward the Western Rule of Law. Current discussions about progress in Asia toward the Rule of Law reverberate with these themes of the tension between the Rule of Law and the Confucian reliance on enlightened leaders serving the broader social interests. In China, the alleged intent of the State (Party) apparatus and its bureaucrats to achieve rule “by” (or “through”) law rather than rule “of” law has made Chinese Rule of Law and legal reform efforts contentious both within China and in the West.⁵

The Chinese legal tradition in particular poses more of a challenge to Western Rule of Law concepts, because it is an alternative, affirmative view of how to achieve a well-ordered society. Again, in the analysis of a prominent group of Asian jurists first looking at the future of the Rule of Law in Asia:

This line of reasoning [Chinese political philosophy such as that of Hsun Tsu], while it did not deny the need for some law to order society, assumed that the emphasis ought to be placed on creating a special class of virtuous rulers who should be allowed to direct society as they felt best without being hamstrung by an extensive body of rules passed down from ages past. It was very much a philosophy of the rule of men and not of law; its ideals were rendered incarnate in an intellectual elite of benevolent philosophers. The states which attempted to realize these Confucian principles were characterized by:

- (A) Relatively few statutes or similar materials; such as there were, were couched in broad general language, which tended to be an injunction to comply with certain ethical principles ...
- (B) Non-publication of administrative materials circulated internally within the government between officials.
- (C) A bureaucracy, assumed to be drawn from the intellectual elite, which occupied one of the highest if not the highest prestige positions within the society.

⁵ James V. Feinerman, “The Rule of Law...with Chinese Socialist Characteristics,” *Current History* (September 1997): 278-281.

- (D) Unification of the judicial and legislative functions in the hands of the executive.
- (E) A general dislike for litigation felt by the people and a corresponding lack of “rights consciousness” fostered by active policies of the government. Use of unofficial means of resolving disputes, such as mediation, was encouraged in place of recourse to courts.
- (F) Non-existence of a legal profession. Those who sought to argue principles of law while representing the interests of parties were looked upon as pettifoggers and parasites and as making no useful contribution to society.⁶

With the possible exception of the final point in that list, given the popular disrepute in which lawyers are held even in societies characterized by Western Rule of Law precepts, this list of characteristics of Confucian/Chinese-inspired legal and governmental systems is a remarkably precise counterpoint to the list of necessary core elements of the Rule of Law as it is generally construed in modern Western practice.

The negative view of lawyers in the Confucian tradition is linked to a more profound difference in thinking between the Western Rule of Law approach to a well-ordered society and major Asian philosophical and religious strains. The Rule of Law view stresses individual rights, while other philosophies emphasize communitarian duties or responsibilities. As Professor Fletcher has written:

In this abstract [Western] world of higher law, conflicting claims are ordered and resolved. The just triumph, and wrongdoers suffer ...

As the market reconciles the demands of buyers and sellers, the Right orders and resolves the conflicting claims that drive the legal system ... The courts may have to frustrate some claimants, but our commitment to justice convinces us that this frustration is properly borne by the party in the Wrong.

The system that I have outlined, the one that we cultivate in the West, is based on competition, conflict, and resolution by an abstract impersonal

⁶ “The Dynamic Aspects of the Rule of Law in the Modern Age,” *op. cit.* pp. 31-32.

mechanism. Yet there is another way to think about law—one that I associate in general terms with the Japanese word *Hō* signifying the path, the way we must travel together. The radical for *Hō*, the three lines on the left, imply an analogy between law and a waterway. As rivers flow in a constrained channel, the society too, as a collective entity, has a path to travel. Failing to join the cooperative venture of following the correct way is properly thought of not as a sin, but as a failed performance.⁷

Likewise, in the Islamic tradition, the focus is on collective welfare, not on individual rights:

In Islamic doctrine, the individual is considered a limb of a collectivity, which is the *umma*/ community of believers. Furthermore, rights are entitlements and are different from duties. In Islam, Muslims, as believers, have duties /*fara'id* vis-a-vis the community /*umma*, but no individual rights in the sense of entitlements

This worldview becomes clear when the individual-istic character in the Western concept of human rights is juxtaposed with the pre-modern Islamic heritage.⁸

As we will discuss later, the Western Rule of Law by no means dismisses these communitarian values that are elevated in various Asian traditions. Rather, it assumes first of all that those communitarian values include respect for individual rights, and second that the best method of maximizing the communal interest is through the protection and vindication of individual substantive and procedural rights.

We turn now to the core concepts and practices that most practitioners and scholars of the Western Rule of Law view as critical in order to have a governmental system that can be said to adhere to the Rule of Law.

⁷ George P. Fletcher, “*Hō* and Halakha.” Article published in *S’vara: A Journal of Philosophy and Judaism* (Winter 1990).

⁸ Bassam Tibi, “Islamic Law/Shari’a, Human Rights, Universal Morality and International Relations,” *Human Rights Quarterly*, vol. 16, no. 2 (May 1994).