

The Law's Own Virtue

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1. The Rule of Law and the Role of Law

We can think of the RoL as a virtue the law should possess. It is one of the main virtues the law should have, and as such exploring it contributes to an understanding of the nature of law, and its role in our life.

The Law is a structure of rules, institutions, practices and the common understandings that unite them, which normally are an aspect of some social organization: state, city, university, corporation. International Law is a possible exception, not being united by its relation to a single organization. When exploring the essential role the law plays in the life of the people whose law it is we study its essential properties, its relations to the organization whose law it is (state etc) and to people's life and thought more generally.

The Rule of Law, as I will understand it, is a specific virtue or ideal the law should conform to. There is no agreement about what it is: This lack of agreement is common to important normative institutions and principles, like freedom of speech. The lack of agreement is often a source of strength – people unite in supporting such institutions and principles in spite of diverse views about their nature. But should we not try to establish which of the views is correct? Often more than one is correct, the disagreement is illusory, an illusion resulting from the fact that the term 'the rule of law' is used to designate somewhat different ideals. There is no point in verbal disputes about which ideals deserve to be called the RoL. However, it may also be important to distinguish the different ideals, as they are likely to differ in at least some of their implications. Hence my proposal, which is an elaboration of one common view.

¹ This is a revised and enlarged version of my Tang Prize Lecture. In general it keeps the style of the lecture. I am grateful to Timothy Endicott for very important comments on an earlier draft.

2. The fundamental importance of the Rule of Law

I will explore the nature of RoL by drawing an analogy with the conditions of individual prosperity: People are born into a society with its culture and norms.

They acculturate, and learn to make their own life, creatively using the opportunities and observing the limits set by their cultural norms: A process that is enabled by familiarity: an understanding of how things work, and predictability: ability to plan and make decisions for the future because one can, within limits, predict their impact. Absent that enabling background: disorientation, loss of sense of one's command of oneself and one's situation, and loss of self-respect ensue.

Now think of the law: governments come to power in an existing social and legal culture and norms whose stability and predictability are essential for the well-being of individuals. The RoL consists of principles that constrain the way government actions change and apply the law – to make sure, among other things, that they maintain stability and predictability, and thus enable individuals to find their way and to live well.

Hence, I will argue, RoL principles are not about the content of the law, but about its mode of generation and application: they require that legal decisions and rules be anchored in stable general legal doctrines, made for publicly available reasons, applied faithfully observing due process etc.

Importantly, these conditions of individual and social prosperity are universal: different societies have different cuisines, different social relations and manners, different economic structures, different religions or none, etc. But all require stability and predictability, and above all they must be intelligible to those subject to them, for people to feel at home within the framework of the law, and to have the confidence and self-reliance to plan their life.

Hence the universality of the RoL. Its principles unite cultures that otherwise differ, thereby providing a crucial framework for mutual toleration, individually and socially, and enabling world-wide cultural and economic exchanges.

Part One: identifying the principles of RoL

3. First attempt

My discussion will apply only to state law. I believe that it can easily be expanded to other kinds of law.

I refer to the RoL as a virtue possessed by a legal system that conforms to the doctrine of the rule of law, and whose public culture resists deviations from it. The doctrine consists of principles united in their rationale, and articulating various aspects of that rationale, various ways in which it ought to be implemented. Some of the principles that belong with the doctrine of the RoL are common to virtually all accounts of the doctrine. They include the following five principles: Government is by law – meaning (1) reasonably clear, (2) reasonably stable, (3) publicly available, (4) general rules and standards, that are (5) applied prospectively and not retroactively.

What is common to these principles? What makes them one doctrine rather than a hodgepodge of principles? One popular view is that they are united in stating conditions whose satisfaction is required to make it possible for those subject to the law to find out what it is, and thereby make it possible for the government (which aims to guide people's behavior) to know how to govern, and for those subject to it to know how they are governed.

Why is this important? The analogy provides the explanation. It is valuable for those who stand to be affected by the law to be able to know how it will affect them and to arrange their own affairs in light of that knowledge.

4. Problems:

Both the rationale and the 5 principles face difficulties; difficulties rather than outright refutation. But they are sufficient to show that while there may be good sense in the principles and in their explanation, they cannot stand as presented so far.

The principles of the RoL that I listed are vague, allowing of various degrees of compliance. That in itself is no problem. It is true of many principles. The difficulty is that RoL gives no guidance as to the required degree of compliance. How can it be otherwise? There are at least two kinds of principles that allow degrees of conformity. Both of them require

conformity along some dimension(s) such that a greater degree of conformity consists in progressing further or achieving more along that dimension. Principles of one kind require progress up to a certain point, or more likely a certain region, along that dimension.

Achieving that constitutes complete compliance, and going beyond it is not required (it may be good or bad or indifferent). How much progress constitutes complete compliance will be determined by the principle itself. It depends on what it is designed to achieve. The other kind of principle allow that complete compliance is achieving the highest point along the relevant dimension. In many cases there is no such point, and therefore no complete compliance. There are only various degrees of compliance and the further one gets along the relevant dimension the greater the degree.

How far one should, all things considered, comply with a principle depends also on what reasons for actions inconsistent with the principle apply in the circumstances. Principles provide *pro tanto* reasons only, and this is true of the principles of the rule of law as well. Given these clarifications what constitutes complete compliance with the rule of law? I will illustrate the difficulty using one concern only: the principles appear to rule out changes in the law, and reliance on discretion by legal authorities.

The question we are considering at the moment is, however, not how should the authorities use their discretion. It is: how much discretion should they have? It is impossible for them not to have discretion. Discretion in the application and interpretation of laws is inevitable. Is it, however, plausible to think that it would be good, at least in some way, if legal authorities had no discretion at all? That means no powers to make law and no powers to interpret it, and it seems implausible to suppose that there is any advantage in any way at all in a legal system that contains no such powers. So, the question becomes what degree of curtailment of discretionary powers is ideal; what degree of curtailment could be regarded as complete compliance with the rule of law?

I suspect that there is no general answer to this question, that is none that can be derived from the rationale so far identified. One can provide an answer regarding discretionary powers of some organs of government and regarding some matters they deal with. But that does not amount to a general test. The reason is that people can plan and organize their affairs on the basis of partial information, and in the face of risk. Indeed, given that application of the law would be inevitably imperfect, the law itself, however clear in

language, and even in the absence of discretion in interpreting or applying or modifying it, generates uncertainties and risk. On occasions the law deliberately adopts rules that generate risk. We must conclude that while the law aims to guide, its ability to do so is much less securely connected with the rule of law principles I enumerated than is often assumed.

We must realize that the RoL doctrine has been inadequately identified. Perhaps simply only part of it was stated. Without discarding the sensible part of the 5 principles we need to further explore and develop our understanding of the doctrine.

5. Second Stab: Arbitrary Government

We can start again noticing that at least one, commonly agreed, aim of the RoL is to avoid **arbitrary government**. We can take that as a clue, helping with further developing our understanding of the RoL.

First, we note that the 5 principles listed as a first stab do not eliminate the possibility of arbitrary government. E.g., a paradigm case of arbitrary power is the use of public power for the enrichment of those in power or of their friends and relations. The 5 principles mentioned do not exclude self-enrichment, they merely restrict the means by which it can be achieved.² That shows that pursuing this clue may help in enriching our understanding of the RoL.

What is 'arbitrary government'? What is arbitrary action generally? It is action indifferent to the reasons for or against taking it. Arbitrary government is the use of power that is indifferent to the proper reasons for which power should be used.

There is much to clarify here. I have to be content with one point: arbitrary government differs from making random decisions, which could be a proper way of deciding among options when there are conclusive reasons to choose one of them, yet there is no reason or no known reason to prefer one over the others.

² Possibly they exclude enriching my family by naming its members, but allow for indirect discrimination by finding a general condition that in fact few, if any, people, other than my family meet.

What are the reasons that should guide governments, and that indifference to which is arbitrary government? Well, governments are constituted by law and in creating them the law, explicitly or implicitly, identifies their purposes. It is in their nature, as governments, that they ought to follow and to apply the law, though the law may create exceptions, exempting governments from having to obey some laws. Why is it a virtue of governments to obey the law? Remember that by its nature the law claims to possess moral legitimacy and by their nature governments are the laws' instrument for their application and development.

So, in as much as the RoL requires governments to be faithful to the law it is a moral doctrine. But not all legal systems are morally legitimate: does it follow that the RoL does not apply to them, for there is no moral virtue in applying their law? Not quite. What does follow is that its application is more modulated, and that regarding some laws there may be no reason at all to apply them. But for the most part, as the analogy with conditions of individual prosperity with which I started shows, there is still reason to follow the law in most cases, even if in some it may be overridden.

Two crucial points should be borne in mind. First, not every failure of the government to be guided by the law is a breach of the RoL. For the most part such failure is due to mistakes and incompetence. Even the most conscientious and qualified government is liable to fail in such ways. And such failure does not manifest indifference to the reasons that should guide the government.

Second, it would be a mistake to think that obeying the law, narrowly understood, is the only guide for governmental action. For one thing, governments have considerable discretionary powers, and for another thing, in interpreting the law, as they must do, they are guided by certain reasons and must avoid others.

Is there a general way to characterize which reasons should and which should not guide them? Determining what ends to pursue in the exercise of discretionary powers, or in the interpretation of the law, is the stuff of ordinary politics, and the RoL does not review the success of politics. But the very nature of government as government provides a clue to the purposes it may pursue.

Furthermore, while arbitrariness by governments is indifference as to whether their actions accord with their purposes, and this seems to be a simple and helpful idea, difficulties in

understanding the idea arise, forcing us, while accepting that the RoL excludes arbitrary government, to realize that we have further questions to answer.

Here is the difficulty: what constitutes indifference by the government as to whether it pursues an aim that governments may legitimately pursue both in interpreting the law and in exercising discretionary powers? It cannot depend entirely on the government's claims. Let me give an example: Imagine government by a sole hereditary ruler, call him Rex. Rex has ordered the purchase of a very expensive diamond ring for his lover. He claims that he was entitled to do so because his lover would be very pleased with the gift. His is a good reason for gifts between lovers, using their private property for the purpose. Rex's mistake is failing to realize that even though he controls the public purse, he does not own it. Rex appears to lack the conceptual distinction between the rights and powers of governments and the rights and powers of private owners. Perhaps in his country the distinction does not apply. In which case the RoL does not apply to his country. If the constitution of his country does recognize the distinction then his act is against the RoL for he cannot claim to have acted in pursuit of a purpose which could be the purpose of a government.

The difficulty is that on the one hand, he cannot be said to have acted arbitrarily, that is in indifference to reason: he thought that he had a good reason for his action. On the other hand, his mistake is more basic than an ordinary mistake about the purposes that governments should pursue. It is a mistake in thinking that he has the rights of a private owner.

So, indifference to reason, arbitrary use of power, is only one way in which one can offend against the RoL.³ Another is acting for a purpose which is clearly not one that governments are entitled to pursue. Doing so is not being indifferent to reason, but is not something that **any** government can legitimately do. It is excluded by the very nature of government.

Therefore, saying that it is excluded is not a matter of taking sides on which purposes this or that government should pursue. It is no more than insisting that it should act as a government.

³ Here is another example to show that avoiding arbitrariness is not enough: Imagine that Rex properly distinguishes public from private purposes. But he believes that the loss to the public will be small and outweighed by the pleasure to his lover. Therefore, he believes that his action is justified. He is not acting arbitrarily. But he is acting, it is commonly accepted, against the RoL.

6. Final suggestion: government as a custodian

What is it to act as a government? Governments are there not to promote their own interest, but that of Various suggestions appeal but I will stop with the most obvious one: the interests of the governed. Understood broadly, e.g., to include their moral interests, this seems plausible. The justification of rules of law and of governmental actions should be that they are, as we say, "in the interests of the governed".

Several ideas coalesce around this core:

- 1) **the interests of all** the governed should be given their proper significance and importance.
- 2) **Custodianship**: The governed, broadly understood, include anyone directly impacted by government action. But the government may have special duties to look after the interests of some people, because it is their government in a special way. Governments are custodians of the public interest of those whose governments they are. They should be mindful of the interests of others too. But where those others have their own custodians, their own government, responsibility is shared. Their custodians have special standing to decide how to protect and advance their interests. Our government may not take over the role of their government. So, the duty to those whose government it is, is special. Implementing this is complex, context sensitive and bound to be controversial.
- 3) Governments conform to the RoL when they act and exercise their power according to law: Governments claim to be morally legitimate in part because they are constituted by a legitimate system of law, and that law provides reasons that bind the government that it constitutes. The government acts arbitrarily when not trying to follow the law.

Manifest intention: the test of conformity to the RoL is acting with manifest intention to serve the interests of the governed, as expressed by the law and its morally proper interpretation and implementation. I will call that the core idea.

7. Enriching the requirements to fit the core idea

The doctrine of the rule of law, so understood, requires conformity to what we know as the main features of public accountability.

- (6) The reasons for which decisions are made should be publicly declared.

This may strike people as excessive: Surely the reasons for some decisions need not be made public. True, but all RoL principles state *pro tanto* reasons which can be overridden by conflicting considerations.

(7) the process of reaching the decision should be fair and unbiased.

(8) It should also allow proper opportunities to consider relevant arguments and information (various degrees of representation and hearing are involved).

(9) The decisions should be reasonable, relative to their declared reasons. Unreasonable decisions raise doubt whether they were taken for the declared reasons.

(10) Presumptive conventions: the burden of establishing that government actions were undertaken in the belief that they serve the interests of the governed is a heavy one. In practice the RoL requirements are met by officials conducting legal business according to conventions of how to do so (how to legislate, adjudicate, issue executive orders etc.). The conventions are based on the local legal culture of the country concerned, and they do of course conform to the other requirements of the RoL. These conventions raise a double rebuttable presumption: that observing them serves the interest of the governed, and that the officials who follow them act in the interests of the governed, as they see it.

(11) The doctrine of the RoL and its main implications should be part of the public culture, embedded in education and public discourse and taken as obvious and vital by all. The principles it embodies should be above political controversy, though their detailed implementation will not be.

Part Two: Defending the principle

8. The need for a defence

You will remember that the phrase 'RoL' is used in a variety of ways. Possibly people use it to express several distinct principles. So, I am not claiming that using the expression in other ways is mistaken. Nor am I claiming that other alleged principles going under the name of the RoL are all misguided. But I would like to argue that the doctrine that I articulated is sound and that it expresses a thought central to the tradition of thinking about the rule of law. I will not spend much time defending it against the large number of misguided

criticisms, addressed against views like mine.⁴ But by rejecting one common criticism we help to explain why some rival accounts fail to express any principle at all.

I have in mind the often-repeated observation that the rule of law, in versions similar to mine, does not guarantee that the law is good, or just. That is, that a legal system that conforms to the rule of law principles offered can nevertheless be unjust, or fail in some other significant way, e.g. that it can fail to respect some human rights.

The observation is correct, and true of my own account of the doctrine. The problem is that as it stands it does not amount to a criticism of the principle it is meant to criticize. For example, it is no criticism of the principle of freedom of expression that a legal system may respect it while not being just, or while violating another human right, such as the right to health.

But do not the principles of the rule of law guarantee that the law is just, respectful of human rights, and so on? Not only did I not make that claim, I do not believe that there is any principle or any normative doctrine that on its own guarantees that. The law should conform to a variety of moral principles and display a number of distinct moral virtues. The rule of law is one of them, but not the only one. Nor is there any other principle or doctrine conformity to which on its own assures us that the law is just etc.

Let me explain with the help of Lord Bingham's important and influential discussion of the rule of law.⁵ He argued that the rule of law encompasses 8 principles:

- 1) The law must be accessible, intelligible, clear and predictable.
- 2) Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
- 3) Laws should apply equally to all.
- 4) Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
- 5) The law must afford adequate protection of fundamental Human Rights.
- 6) The state must provide a way of resolving disputes which the parties cannot themselves resolve.
- 7) The adjudicative procedures provided by the state should be fair.

⁴ For a detailed and cogent exposure of some common mistakes see J. Gardner, *Law as a Leap of Faith*, Chapter 8: 'The supposed formality of the rule of law', 2012 Oxford University Press.

⁵ Tom Bingham, *The Rule of Law*, 2010. Many writers follow a similar path. One example is Judge Barak's *The Judge in a Democracy*, 2006 Princeton University Press, p. 54.

- 8) The rule of law requires compliance by the state with its obligations in international as well as national laws.

There is a considerable overlap between these and my list. But two glaring omissions in mine are the inclusion of adequate protection of fundamental human rights and requiring compliance by the state with its obligations in international law.

There are various reasons to dissent from Lord Bingham's list. For current purposes the important one is that it is not a principle or a doctrine but an assembly of diverse principles, with diverse rationales behind them.

In supporting Lord Bingham's understanding of the rule of law The Right Honourable Dominic Grieve Q.C. (then the Attorney General for England and Wales) explained:

By observing these 8 principles, and in particular the fifth, affording adequate protection of fundamental human rights, we avoid the dilemma identified by Professor Joseph Raz in his 1979 work 'The Authority of Law'.

Professor Raz argued that, seemingly, within the framework of the rule of law, there can exist societies which oppress minorities, condone slavery, and support sexual inequalities - all of which would be abhorrent to liberal democracies. And yet, by adhering to strict legal structures and procedures such societies could still legitimately claim to excel in their conformity to the rule of law.⁶

As you understand, I did not point to a dilemma, but to the simple fact that the law, to be just or legitimate, or fundamentally good, should conform to more than one moral principle or doctrine. Nothing is achieved and much is lost, by simply listing them all as though they share a rationale or are of similar importance or are otherwise alike. Clarity in practice and theory is achieved in recognising their diversity.

9. Misunderstanding international documents

As I have already remarked, there is no uniformity in understanding the rule of law, and that this is true of official documents as well as scholarly discussions. This section provides some examples to illustrate the point. Furthermore, as will be shown, sometimes the claim that in legal practice the so-called thick understanding of the rule of law (roughly that the rule of law means the rule of good law) prevails is based on misreading the documents concerned.

⁶ The Right Honourable Dominic Grieve, The Rule of Law and the Prosecutor, 2013. <https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor>

The Preamble to The Universal Declarations of Human Rights includes the words ‘Whereas 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...’.⁷ It is the only mention of the rule of law in the declaration, and unfortunately it is sometimes cited in support of the view that the doctrine of the rule of law includes conformity to human rights. In fact it is clear authority to the contrary: the rule of law is separate from human rights, but should be used to protect them.

Many of the fundamental human rights treaties do not mention the rule of law at all (e.g. International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights). Sometimes the rule of law is given an extensive definition.

Typical is the report of the Secretary-General of the U.N. on ***The rule of law and transitional justice in conflict and post-conflict societies (23/8/04)***. It states that the rule of law

‘refers to 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, as well, measures to ensure adherence to the principles of supremacy of 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’ (par. 6)

Yet the text of the report repeatedly implies that the rule of law does not include justice (repeated references to justice and the rule of law as separate items in par. 11, 12, 13, 14, 17, 19, 20, 23, 37, 49, 56, 57). Sometimes the rule of law is equated with ‘law and order’ (par. 29, 32, 52, 53), and similarly the report distinguishes it from democracy and human rights. Here are a few examples:

- 1) ‘In doing so, it [the UN] has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.’ (Par. 38)
- 2) ‘the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law’ (par. 34)

⁷ http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf

- 3) 'urgent action to restore human security, human rights and the rule of law cannot be deferred' (par. 27)
- 4) 'The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law' par. 25).

In brief: the use of the term 'the rule of law' by the Secretary General contradicts his own explicit definition of the term.

10. The doctrine defended

Conformity to the doctrine and its principles has some obvious advantages.

- (1) The doctrine applies to all branches of the law, establishing a common style of law-making, and legal application and enforcement, facilitating planning and co-ordination, and a common language and approach shared by legal practitioners.
- (2) By making the reasons for the law visible, relatively speaking, it facilitates discussion of the merits of law.
- (3) And improves the chances of sensible reform.
- (4) It mandates and encourages the gathering of information through reasoned law-enforcement procedures, and it encourages gradual change through interpretation.
- (5) It is a universal virtue of the law as law. Therefore, it facilitates international co-ordination and co-operation. It helps developing mutual understanding across borders, through similarity in the principles that underlie legal institutions.
- (6) The most important point has to do with the complex relationship between the rule of law, itself a moral doctrine, and other moral principles. I think that it can be described as a two-way street: the rule of law borrows from other moral principles and it also contributes to the generation of new – derivative – moral principles. How does it borrow? I mentioned that the implementation of the doctrine requires reliance on conventions which may vary with time and background. Now, where there is a moral principle of some weight, so that its violation, even by legal institutions, is rarely justified, and if it deals, among other things, with the way institutions work then it makes sense to incorporate it into the rule of law doctrine as one of its conventions. '*Audi alteram partem*' may be a case in point: there are general reasons of fairness to listen to a person who might be disadvantaged by a decision. These reasons are pro tanto only. I do not have to listen to everyone who may be disadvantaged by something

I do, though I have reason to do so when this would be practicable. It makes sense that the requirement that courts and other organs of the law should do so is generally taken to be as one of the principles of the rule of law: that is, it is a rebuttable presumption that action of some legal organs is arbitrary (and thus a violation of the rule of law) as well as perhaps unfair, if it violates the '*audi alteram partem*' principle. There are, of course other examples.

But the rule of law also contributes to morality and generates derivative moral principles. This may happen in various ways, the most common is due to the fact that when observed the rule of law generates expectations that its principles will be observed, and people often justifiably rely on them being observed in various individual cases, and through the principle of respecting justified expectations the conventions of the rule of law acquire an independent moral force, independent that is of the rationale for the doctrine as I explain it.

I must add two caveats: First, my remarks emphasised some benefits of similarity in the application of the doctrine to various branches of the law, and to the law of different countries. But the principles through which the rule of law is applied allow considerable room for flexibility and adaptability: their application to banking law may differ in suitable ways from their application to dealing with juvenile delinquency, and their application in common law jurisdiction may differ from their application in civil law jurisdiction, without compromising the rationale which underlies them. The rule of law can be observed, while respecting significant variations between countries that express their local traditions.⁸

It is easy to see the flexibility in application of the doctrine when we consider that it applies not only to the law of states but also to the law of, say, voluntary associations. Their law, the law of associations, is also meant to serve some common good, and should not be arbitrary or self-serving. Yet we would not expect that the rule-making ways of associations, or their method of dispute resolution, would conform to precisely the same principles that we insist must apply to the law of states.

Besides, the fact that the implementation of the rule of law is mediated by conventions that establish rebuttable presumptions gives plenty of room for adaptability to local traditions.

⁸ Needless to say, it will not be compatible with all possible traditions.

So, e.g., in some countries disputes of certain kinds are settled by litigation in front of judge and jury. Deviation is a violation of the rule of law. In other countries juries are unheard of, and disputes are settled by panels of experts. In them deviation from this procedure is a breach of the rule of law.

I emphasised the adaptability of the rule of law to local traditions, for it is a condition for it qualifying as a universal moral doctrine, and helps refute criticism that it is a manifestation of one culture imposing its norms on others. But it is time to mention, briefly, my second caveat. While conformity to the rule of law has clear moral benefits it does not guarantee that justice, democracy and respect for human rights prevail. To avoid injustices and other moral blemishes the law has to possess a number of distinct virtues.

Long ago I have remarked that the rule of law protects us from risks that the existence of the law creates. The law is used to secure various valuable conditions, whose nature varies with circumstances, and with the views of those in power. The rule of law does not directly contribute to success in achieving them. But, while the law can be used to achieve much that is good, its existence also creates opportunities for much evil. We all know that. The law is a powerful structure, and those who control it have power, which, like all power, can be abused. The rule of law helps to protect us from some of those risks.

11. The doctrine defended: from by-products to virtue

And this is the reason for its great value. All the advantages of conforming to the rule of law that I mentioned are by-products of the main virtue: acting with a manifest intention to protect and advance the interests of the governed.

Based in the main on only two premises, that governments may act only in the interests of the governed, and that honest mistakes about what that is, and what it entails are the stuff of ordinary politics, and honest mistakes about this do not violate the rule of law, I concluded that the virtue of the rule of law lies in tending to secure that the government acts with the manifest intention of serving the interests of the governed.

A few clarifications:

- 1) It would be nice if everyone agreed to the premises. It would solidify understanding of and respect for the rule of law. But not everyone does. My defence of the

doctrine of the rule of law depends on the soundness of the premises, not on everyone's agreement with them. Still, the doctrine as I understand it does serve to protect the concerns of people who dispute its premises. E.g., if one deeply believes that the only purpose of the law is to do god's will then respecting his convictions serves his interest, and the law in serving people's interests will serve that interest as well as others. This does not eliminate the disagreement about the purpose of the law, and there will remain practical disagreements about legal policies, but it facilitates peaceful co-existence.

- 2) It would be foolish to claim that conformity to the rule of law can completely eliminate arbitrary use of power, or other forms of abuse of legal power. It merely helps to do so.
- 3) Perhaps more disturbingly, sometimes action in breach of the rule of law can in fact serve the interests of the governed well. Sometimes, violation of the rule of law is the only way in which important interests of the people can be protected. The rule of law is an important moral doctrine. But on occasion its violation may be morally justified.
- 4) Does the rationale for the rule of law, as explained here, help with the criticism of the naïve listing of the first 5 principles of the rule of law which constituted my first stab at understanding the doctrine? I think that it does. The criticism was that the 5 principles can be implemented to various degrees, not all of them desirable, but that we lack any criteria by which to judge what they really require. The doctrine I developed provides two tools: first these principles are implemented by different conventions in different countries and indeed in different branches of the law. Different constitutional doctrines of separation and allocation of powers mean that different bodies are subject to different styles of judicial processes, that different rules for the delegation of power from higher to lower organs prevail etc. Second, each convention is interpreted and its normative force is assessed in light of the rationale, i.e. in light of what is needed to establish that the action in dispute, the one on the borderline of the convention, or which contravenes it, but may nevertheless be justified, is plausibly taken in the interests of the governed.

To conclude, the rule of law protects us from arbitrary use of power, and from similar abuses of power. That makes it a moral doctrine of great importance. Confidence that the law observes it is a condition of confidence in the law and the government generally, and thus a condition of their ability to govern well. So, while the rule of law does not secure conformity to the other principles the law should conform to, it is close to being a condition for the law's ability to conform to them. That view is recognised in innumerable international documents which urge that securing the rule of law is a condition for respect for human rights, for principles of justice and more.

Perhaps not surprisingly, precisely the fact that the rule of law protects us from wrongs for which the law's existence creates opportunities, makes it the specific virtue of the law as law, a universal doctrine applying to all legal systems; the law's own virtue, respect for which is needed for the law to have any other virtue.