Mohamed Boudiaf University M'sila
Faculty of Law and political sciences
Master 1 Field - section 2

English Legal Terminology
Lexus Metandus Program
Teacher Dr Debih Hatem

Doc 2

THE RULE OF LAW PRINCIPLE

The phrase "*The Rule of Law*" has to be distinguished from the phrase "*a rule of law*". The latter phrase is used to designate some particular legal rule like the rule against perpetuities or the rule that says we have to file our taxes by a certain date. Those are rules of law, but the Rule of Law is one of the ideals of our political morality and it refers to the **ascendancy** of law as such and of the institutions of the legal system in a system of governance.

The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed. The formal principles concern the generality, clarity, publicity, stability, and **prospectivity** of the norms that govern a society. The procedural principles concern the processes, by which these norms are administered, and the institutions like courts and an independent judiciary that their administration requires. On some accounts, *The Rule of Law* also comprises certain substantive ideals like a presumption of liberty and respect for private property rights *PPR*. But these are much more controversial. And indeed as we shall see there is a great deal of controversy about what *The Rule of Law* requires.

Rule of law and rule by law

Some theorists draw a distinction between *The Rule of Law* and what they call rule by law. They celebrate the one and **disparage** the other. *The Rule of Law* is supposed to lift law above politics. The idea is that the law should stand above every powerful person and agency in the land. Rule by law, in contrast, connotes the instrumental use of law as a tool of political power. It means that the state uses law to control its citizens but tries never to allow law to be used to control the State. Rule by law is associated with **the debasement** of legality by authoritarian regimes, in modern China for example,

Thomas Hobbes may be seen as a theorist of rule by law. In a society whose members disagree about property, he thought it conducive to peace for the sovereign of a society "to make some common rules for all men, and to declare them publicly, by which every man may know what may be called his, what another's". But ***Hobbes*** also thought that it would **undermine** peace-indeed it would undermine the very logic of sovereignty-for the ultimate law-maker to be bound by the laws he applied to his subjects.

However, the distinction may not be so clear-cut. Even rule by law seems to imply that rulers accept something like the formal discipline of legality. Unless the orders **issued** by the State are general, clear, prospective, public, and relatively stable, the State is not ruling by law. So this thin version of legality does still have moral significance in the respect it pays to the human need for clarity and **predictability**. Rule by law "can be a way a government stabilizes and secures expectations". Even if its use remains instrumental to the purposes of the State, it involves what ***Lon Fuller*** called a bond of **reciprocity** with the purposes of those who are governed: the latter are assured that the promulgated rules are the ones that will be used to evaluate their actions.

Some jurists who maintain the contrast between *The Rule of Law* and rule by law have a more ambitious agenda. They take seriously the ancient idea that we might be ruled by laws and not by men. One may ask: how is that supposed to happen? After all, law is made by people, interpreted by people and applied by people. It can no more rule us by itself, without human assistance, than a cannon can dominate us without an iron-monger to cast it and an artilleryman to load and fire it. The jurists who contrast *The Rule of Law* with rule by law believe they can make this work by focusing on laws whose human origins are in some way diffuse or immemorial.

We are not necessarily talking here about natural law, but perhaps about something like customary law or common law, law that is not so evidently a top-down product of powerful human law-makers. Common law grows and develops under its own steam, and need not be conceived as a device by which some identifiable humans rule over others. No doubt there is a lot of mythology in this. A more realistic view of common law identifies it with the deliberate and arbitrary rule of an entity ***Jeremy Bentham*** that called "**Judge & Co**" . But it remains true that the human element is diffuse in this sort of system, and at any given time the law that emerges is a resultant of the work of many people rather than the intentional product of **a domineering majority** ruling us from the legislative centre of a State.

No one doubts that legislation can sometimes undermine *The Rule of Law*, by purporting for example to remove legal accountability from a range of official actions or **to preclude** the possibility of judicial review of executive action. But this is not a problem with legislation as such; this is a concern about the content of particular **enactments** Rule by judges (*Judgment as a matter of law JMOL*), too, can sometimes be seen as the very sort of rule by men that *The Rule of Law* is supposed **to supersede**.

Formal, procedural and substantive requirements

Theorists of *The Rule of Law* are fond of producing laundry lists of the principles it comprises. These principles are of **disparate** kinds, which may loosely be divided into principles that address the formal aspects of governance by law; principles that address its procedural aspects; and principles that **embrace** certain substantive values.

Formal aspects

The best known are the eight formal principles of ***Lon Fuller***'s "*Inner morality of law*"; and ***Joseph Raz*** generality; publicity; prospectivity **intelligibility**; **consistency**; **practicability** stability; and **congruence**. These principles are formal, because they concern the form of the norms that are applied to our conduct.

So for example, the requirement that laws be general in character, rather than aimed at particular individuals, is purely a matter of form. It is compatible with invidious discrimination so far as its substance is concerned, since even a norm like "*A person who is of African descent must sit in the back of any public bus that they ride on*" applies, universalizably, to everyone. A formal requirement of generality does not guarantee justice; but that partly reflects the fact that justice and The Rule of Law work as separate criteria for evaluating a political system.

Generality is an important feature of legality, reflected in the longstanding constitutional antipathy to ***Bill of Attainder.*** Of course law cannot work without particular orders, but the generality requirement is usually taken to mean that "*the making of particular laws should be guided by open and relatively stable general rules*". These rules themselves should operate impersonally and impartially.

The requirement of clarity is also important in this regard. Laws must be public not only in the sense of actual promulgation but also in the sense of accessibility and intelligibly. True, much modern law is necessarily technical and the lay-person will often require professional advice as to what the law requires of him. It is also an important part of *The Rule of Law* that there be a competent profession available to offer such advice and that the law must be such as to make it possible for professionals at least to get a reliable picture of what the law at any given time requires. In the 19th century, ***Jeremy Bentham*** criticized customary law in general and common law in particular, for failing to satisfy this requirement: the sources of law were hidden in **obscurity** and though there were **spurious appeals** to precedent, much of the law was just made up by the judges as they went along.

Procedural aspects

We should complement this list of formal characteristics with a list of procedural principles as well, which are equally indispensable to *The Rule of Law*. We might say that no one should have any penalty, stigma or serious loss imposed upon them by government except as **the upshot** of procedures that involve:

a. A hearing by an **impartial** and independent tribunal that is required to administer existing legal norms on the basis of the formal presentation of evidence and argument;

B. A right to representation by **counsel** at such a hearing

C. A right to be present, to confront and question **witnesses** and to make legal argument about **the bearing** of the evidence and the various legal norms relevant to the case; so called: *Judgment notwithstanding verdict JNOV)*

D. A right to hear reasons from the tribunal when it **reaches** its decision, which are **responsive** to the evidence and arguments presented before it.

Arguably, such procedural principles matter more in the ordinary person's conception of *The Rule of Law* than the formal criteria mentioned previously. When people worried that the American detention facility in Guantanamo Bay from 2003 to the present was a "*black hole*" so far as legality was concerned, it was precisely **the lack** of these procedural rights that they were concerned about. What the detainees demanded, in the name of *The Rule of Law*, was an opportunity to appear before a proper legal tribunal, to confront and answer the evidence against them, and to be represented so that their own side of the story could be explained. No doubt the integrity of these proceedings would depend in part on the formal characteristics of the legal norms that were supposed to govern their detention, whose application in their case they could call in question at the hearings that they demanded. It's difficult to make a case at a hearing if the laws governing detention are kept secret or are indeterminate or are **constantly** changing. Even so, we still miss out on a whole important dimension of *The Rule of Law* ideal if we don't also focus on the procedural demands themselves which, as it were, give the formal side of *The Rule of Law* this purchase.

Some procedural requirements are also institutional in character: there must be courts and there must be judges whose independence of the other branches of government is guaranteed. This side of *The Rule of Law* is connected with the constitutional principle of the separation of powers. That principle is sometimes justified simply on the ground that it is unhealthy for power to be institutionally concentrated in society. But it also has a Rule of Law justification in as much as it **assigns** distinct significance to distinct stages in the making and application of laws.

Substantive theories

Though many jurists follow ***Joseph Raz's*** theory in thinking that *The Rule of Law* is a purely formal/procedural ideal, others believe in adding a more substantive dimension. They don't think it's possible to sharply separate our political ideals in the way ***Joseph Raz*** seems to suppose. At the very least, the formal/procedural aspects generate a certain momentum in a substantive direction. Generality-proceeding according to a rule-is often said to contain the germ of justice. And, stability, publicity, clarity, and prospectivity indicate a pretty fundamental connection between *The Rule of Law* and the conditions of liberty. We have to be careful, however, to distinguish between **allegedly** substantive requirements of *The Rule of Law* and specification of the deeper values that underlie and motivate the ideal even in its formal and procedural requirements.

Some jurists believe that there is a special affinity between *The Rule of Law and* **the vindication** and support of private property ***Ronald Cass*** says that "*a critical aspect of the commitment to The Rule of Law is the definition and protection of property rights*".

Others, like ***Richard Epstein*** , accept that "*analytically, The Rule of Law is a separate conception from private property*". But they think nevertheless that a contingent connection between *The Rule of Law* and private property can be established by showing that the forms of regulation defenders of private property are concerned about tend to be forms of regulation that The Rule of Law, even on a more austere conception, prohibits.

On the other hand, as we have seen ***Joseph Raz*** is famous for insisting that "*The Rule of Law is just one of the virtues which a legal system may possess and by which it is to be judged*", and that we should not try to read into it other considerations about democracy, human rights, and social justice. Those considerations, he said, are better understood as independent dimensions of **assessment**, ***Tom Bingham*** in his book on *The Rule of Law*, said this in response to ***Joseph Raz.***

All this sounds an analytic danger signal. Once we open up the possibility of *The Rule of Law's* having a substantive dimension, we inaugurate a sort of competition in which everyone **clamours** to have their favourite political ideal incorporated as a substantive dimension of *The Rule of Law.* Those who favour property rights and market economy will scramble to privilege

their favourite values in this regard. But so will those who favour human rights, or those who favour democratic participation, or those who favour civil liberties or social justice. The result is likely to be a general decline in political articulacy, as people **struggle** to use the same term to express disparate ideals.

The rule of law and the concept of law

Finally, an analytic question: what is the relation between *The Rule of Law* and the concept of law? A case can be made-controversial, no doubt-for bringing the two of them together. The concept of law could be understood to embrace the fundamental elements of legality, though this identification looks less **plausible** the more substantive the conception of The Rule of Law is held to be. On this account, a system of governance doesn't count as law unless it **exhibits** the characteristic forms and processes that we associate with legality. Otherwise we lose our sense of the institutional distinctiveness of law as a way of ruling a society. We saw earlier that ***Lon Fuller*** envisaged a connection along these lines. So, in his later work did ***Ronald Dworkin***. He asked us to consider a situation in which judges and lawyers were **grappling** with hard issues of interpretation or with difficult dilemmas posed by multiple sources of law. He said that in such cases, we might say that what was required as a matter of law might be different from what was required as a matter of justice.

That is a familiar separation (even if ***Dworkin*** thought it was narrower and more blurred than most legal positivists believed). But he said, it would make no sense to say that what was required as a matter of legality or respect for *The Rule of Law* was different from what the legal solution was to this case. He also mentioned the most known principle of good faith (*Bona fide purchaser BFP*) To figure out the legal solution we have to address the various legal and political materials precisely in light of our commitment to legality. A conception of legality is a general account of how to decide which particular claims are true. We could make little sense of either legality or law is we denied this intimate connection.

However, this is not the received position. According ***Joseph Raz*** to and others, you cannot understand what *The Rule of Law* is unless you already and independently understand what law is and the characteristic evils that law is likely to give rise to which *The Rule of Law* tries to prevent. On this account, legality represents a particular set of concerns about law that have emerged in our civilization. The fact that these concerns are undoubtedly moral in character - even though they are not comprehensive moral concerns- means that in view it is better to keep them separate from the concept of law itself, for fear of introducing a moral element into that concept.

Questions:

- Translate the underlined terms into Arabic.
- Give an abstract (in Arabic) to the topic.

Important notes

Thomas Hobbes: (April 5th 1588- December 4th 1679), England, English philosopher.
Lon Fuller: (June 15th, 1902 – April 8th, 1978) USA, American professor at Harvard Law School.
Jeremy Bentham: (February 15th, 1748- June 6th 1832), English philosopher, jurist, social reformer.
Joseph Raz: (March 21st, 1939) a professor of philosophy of law at the University of Oxford.
Ronald Cass: (April 21st, 1923 – 2 June 2006), British screenwriter.
Tom Bingham: (October 13th, 1933 –September 11th, 2010) British judge and jurist, Senior Law Lord.
Richard Epstein: (April 17th, 1943), USA, American legal scholar, Professor of Law New York University.
Ronald Dworkin: (December 11th, 1931 – February 14th, 2013) American philosopher, jurist, and scholar of United States constitutional law, Professor of Law and Philosophy at New York University.
Bills of Attainder: is an act of a legislature declaring a person or group of persons guilty of some crime and punishing them, often without a trial. Bills of attainder passed in Parliament by Henry VIII on 29 January 1542 resulted in the executions of a number of notable historical figures.