Journal of Positive School Psychology http://journalppw.com
2022, Vol. 6, No. 12, 339-352

Rule Of Law, Human Rights, And Democracy: An Analysis Of Key Principles, Issues, And Challenges

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Abstract

This paper explores the close links between the rule of law, human right protection, and democracy. Human rights refer to the rights available to all men and women as human beings. The rule of law denotes not only equality before the law but it is also a human ideal— that is, "the rule of law, not of men" (Radin, 2005). This article sheds light on the nature and scope of the rule of law and mechanism for its enforcement; it deals with the relevance of the Universal Declaration of Human Rights; and it also discusses how important it is for protecting human rights. This article argues that all these issues, the rule of law, as couched in the Universal Declaration of Human Rights, democracy, and the safeguarding of human rights, are not only inter-linked but necessary conditions for each other. That internal sovereignty poses a challenge to full compliance of states with an internationally recognized rule-of-law-based political orders. In contradistinction to

the rule of kings and/or arbitrary use of personal judgments that would take the force of law, as was the case in the past, this paper argues that the rule of law not only provides a conducive environment for the safeguarding of human rights but also for the flourishing of democracy— that is, the rule of law strengthens democracy and democracy strengthens the rule of law.

Key words. Rule of Law, Democracy, Human Rights, Universal Declaration of Human Rights, Formal versus Substantive Rule of Law

Introduction.

The rule of law is a contested phrase as it means different things for different people: from providing security to maintaining order to the functioning of courts (Haggard, MacIntyre, & Tiede, 2008). The rule of law had to pass through an arduous path to get to the modern standard and use of the concept. Antonin Scalia describes the method of justice employed by the king of France, King IX, Saint Louis, who had no proper training in customary law, but his decrees were considered just and obeyed by princes and nation, in the following words:

> In summer, after hearing mass, the king often went to the wood of Vincennes, where he would sit down with his back against an oak, and make us all sit round him. Those who had any suit to present could come to speak to him without hindrance from an usher or any other person. The king would address them directly, and ask: 'Is there anyone here who has a case to be settled?' Those who had one would stand up. Then he would say: 'Keep silent all of you, and you shall be heard in turn, one after the other' (Scalia A. , 1989).

This is a good example of doing justice through the use of personal judgement. The rule of law is, however, polar opposite to this kind of justice, as explained by Thomas Pain:

> [L] et a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other (Paine, n,d.).

Thomas Pain was however not the first person to talk about the sovereignty of law, Aristotle had said words to the same effect a few millennia ago. Ernest Barker had quoted him as saying:

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement ((Barker, 1946).

This discussion about "the law is king" leads one to the links between democratic political orders and the rule of law. Ronald M. Dworkin has rightly observed that what distinguishes democracy from totalitarianism is the rule of law. He adds that in democratic states, state functionaries safeguard the fundamental rights of all citizens and they have to play by the same rules as common people, so nobody is above the law (Dworkin R. M., 1970). In other words, institutional checks given in constitutions provides a protective shield against the arbitrary use of power.

Moreover, in England, parliament acted as a check on the power of kings. Suffice it to say that in 1689, the Bill of Rights stated that if the parliament was unwilling, then laws could not be made, suspended or repealed. This means that the monarchy now would have limited power in changing, creating or suspending laws because they would need the permission of the parliament to do so (Rehman, Gilani, & Khan , 2021). So is the case of the US constitution and political system wherein checks and balances have played a pivotal role in establishing the rule of law (Haggard, MacIntyre, & Tiede, 2008). Despite the contested its nature of the rule of law, it is a reality in today's politics. It is therefore imperative to have a look at the definition and scope of the rule of law.

The Rule of Law— The Definitional Problem

As noted earlier, the rule of law means different things for different people. A.V. Dicey is considered to be the person who popularized the expression, the rule of law, if not creating it. For Dicey, the rule of law means four things: no arbitrary use of state or governmental powers, "equality of all citizens before the law; uniformity of courts; the unacceptability of *raison d'état* as an excuse for an unlawful act; and observance of the old maxim, *nullum crimen sine lege*" (no crime without law) (Dicey, 1885/1982). Over the years, many scholars have given their definitions of what they believe the rule of law is and what it means. The former president of the Supreme Court of the UK Lord Bingham has provided the following 8 sub-rules of the rule of law:

- The clarity, accessibility, and predictability of the law;
- The application of law to decide rights and liabilities;
- Equality before the law save "objective difference requires differentiation;
- State officials exercise their authority in good faith and operate within their legal boundaries;
- Complete legal protection for human rights;
- Provision of an adequate method at an acceptable cost for civil dispute resolution;
- State provided and fair adjudicative procedures;
- Compliance of the state with its international law related obligation (Bingham, 2007).

Joseph Raz highlights some of the fundamental principles of the rule of law which include: laws must be clear, stable, and general, and that "the independence of the judiciary must be guaranteed; natural justice must be observed; courts must have reviewing power over some principles; courts

should be accessible; and the discretion of crime-preventing agencies should not be allowed to pervert the law" (Raz, 1979/2013). Moreover, Andrew Heywood is of the view that the basic idea that law must rule, means that "it establishes a framework to which all conduct and behaviour conform, applying equally to all the members of society, be they private citizens or government officials" ((Heywood, 1997). Jeremy Waldron asserts that "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" (Waldron, 2016). The rule of law, therefore, refers to the supremacy of the law in all juridico-political orders across the globe, as it constitutes one of the basic principles of governance.

That said, the picture is not that rosy. Johann J Go quotes an ironic statement of Anatole France i.e., "the law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal loaves of bread" (Go, 2019), which must be borne in mind when one enumerates the pluses of the rule of law.

There is a debate in the literature regarding the conceptualisation of the rule of law as to whether it should be a formal or substantive, and whether its requirement should be "minimum standard" (thin conception) or "an aspirational standard" (thick conception) for something to be accepted and implemented as law. In its "thin" form, the rule of law refers to "minimum standard for something to law" while its "thick" conception means "an aspirational standard for being good law" (Rijpkema, 2013). According to World Bank, the "'thin' versions of the rule of law have largely given way to 'thicker' versions that move beyond a focus on procedure, to one on substance requiring adherence to normative standards of rights, fairness, and equity" (World Bank, 2017).

Despite the debate on the contested conceptual understanding of the rule of law, there is little disagreement on its essential nature and its basic requirements. Laws, as stated earlier, have to be general, open, clear, stable and non-contradictory; it also should be efficient as well as consistent, so that there is no confusion in its enforcement by state institution. Furthermore, the clarity, transparency, coherence, and general nature of the law is of great value, so that the fundamental human rights of all citizens of a state are equally respected and safeguarded. The law of jungle, not the rule of law, will prevail in a state where state functionaries abuse their authority.

One can therefore argue that there exists an inseparable link between human rights and the rule of law. A document that ensures the safeguarding and promotion of fundamental rights of people is the European Convention on Human Rights (ECHR, henceforth). The European community has inherited a freedom- and rule of law-based value system that necessitates the enforcement of fundamental rights of all citizens (European Convention on Human Rights, 1950). It is generally believed that courts review the actions of policy makers and legislators in the light of the ECHR. It is apt to note here that the ECHR later provided a foundation for the UK Human Rights, 1998 whereby

the domestic courts in the UK must interpret all legislation in accordance with the European Convention, regardless of the date of its enactment. The courts are bound to check whether laws are compatible with the rights protected by ECHR, 1950 (Bingham, 2007).

Another important document is the Universal Declaration of Human Rights (UDHR, 1998, henceforth) of the United Nations. According to UDHR, fundamental rights of people include: the equality of all citizens, complete legal protection for their right to life, liberty, happiness, and security, no discrimination based on race, colour or creed, prohibition of slavery, recognition by and equality before the law, etc., (Universal Declaration of Human Rights, 1948). This discussion makes it clear that equality before the law constitutes the essence of the rule of law. It needs to be mentioned here that the Universal Declaration of Human Rights (1948) was adopted by the United Nations General Assembly in response to the tragic events that happened during World War II (WWII, henceforth). Members of the UN pledged not to repeat the follies of wars such as those of the WWII. Eleanor Roosevelt, the wife of former American President Franklin Roosevelt and former United States delegate to the UN, referred to the Universal Declaration as the "Magna Carta of Mankind" (Hobbins, 1998). In other words, the UDHR of 1948 thus provides international safeguards for human rights across the globe.

In light of the above evidence, it is tenable to argue that rule of law is essential for human rights protection. Human beings are entitled to human rights, according to UDHR, 1948. The UDHR aims to promote peace in the world through the protection of Human Rights, as stated above. What is important to note here is that almost all states have incorporated the UDHR into their constitutions.

Additionally, there are regional mechanisms and frameworks for protecting human rights. For example, the European Convention on Human Rights (ECHR) provides a framework to ensure the protection of human rights in its 27-member bloc. The Convention was drafted shortly after the Second World War by the Council of Europe. It has a total of 14 main articles that were signed by all European member states, promising to abide by the common standards of human rights and freedoms. Then there is the African Charter of Human and People's Rights (ACHPR, henceforth) (adopted on June 27th 1918, enforced on October 21, 1986) states that it aims to protect and promote citizens' basic rights (it also adopted the principles of the UDHR of 1948). Specifically looking at part 1, chapter 1, article 9 of the ACHPR, all Africans living in the states that are signatories to the African Union (previously known as the Organization of African Unity), allows for all citizens to have their inalienable rights such as right to life, liberty, security, and freedom of expression. Jeremy Waldron rightly observes that "the Rule of Law is one star in a constellation of ideals that dominate our political morality: the others are democracy, human rights, and economic freedom" (Waldron, 2016). So, the violation of this golden principle i.e., the rule of law, is not without consequences as and when it occurs.

This issue is connected with internal sovereignty— that is, all states are internally supreme over all individuals and association of individuals. The rule of law faces one of the daunting challenges in its enforcement in form of internal sovereignty. There involves a technical issue in the complete compliance of states regarding violation of Human Rights, especially article 10 of the Human Rights Act 1998: how to keep a balance between the people's rights of assembly and expression and maintain law and order. For example, the case of *Steel & Others v UK* (1998) in which the UK police exceeded their powers by preventing people from peaceful demonstration; the police thus violated their basic rights, i.e., the demonstrators' right to assembly and freedom of expression. The demonstrators were not only peacefully protesting but were also protesting within the framework of the law. But the police were of the view that they had to maintain law and order and the "arrest and detention of protesters [was carried out] for breach of the peace" (Council of Europe, 1998).

In Africa, it is state functionaries, who in most cases, violate human rights behind the facade of fighting crimes such as drug and human trafficking (Human Rights Watch, 2022). According to ECHR, the absence of the freedom to express oneself shows that the absence of the operation and applications of the rule of law and that the powers of governing bodies over-step the limitations stipulated in its principles. In all, internal sovereignty provides a cover to states to implement international rules and regulations according to their own wish and will as well as in their cultural settings.

The rule of law thus makes government officials more accountable for the decisions they make as well as the manner in which they enforce those decisions. All people and powers within the state, whether public or private, must be subject as well as entitled to the benefits of laws, argues the former president of the UK Supreme Court Lord Bingham. Following this assertion, Lord Bingham provided 8 guidelines which revolve around three values: justice, equality, and fairness (Bingham, 2007). Overall, the rule of law revolves around equality, justice, fairness, and the freedom of expression.

The UDHR is considered to be one the direct sources of the freedom of expression. This is because article 19 stipulates that every individual possesses a right to express himself or herself, and this right is inviolable. But in some regions, this right is violated blatantly. For example, in Africa, this vital component of the rule of law is ignored. There are two main reasons for this violation: firstly, the government unfairly treating its people in aspects such as social inequalities, poverty challenges, inadequate health and social systems and the use of repressive and autocratic powers in a democratic society which creates a suffocating environment and infringes upon the right of freedom of speech of its citizens (Human Rights Watch, 2022). This evidence suggests that authoritarianism and rule of law can hardly go together.

This type of situation can be observed in the case of the dictatorship of former President Robert Mugabe of Zimbabwe. Having ruled for around 30 years, Zimbabwe exemplifies an oppressed country, as he had used the military to

maintain his position in power and had thus kept control the government and people. Zimbabwe is a backward country in all indices of development. The country suffers from illiteracy rates of 80% and an unemployment rate of just over 60%, being the highest in sub-Saharan Africa to date. Robert Mugabe has put himself above the law by using violence against his people. It should also be mentioned that President Mugabe abused his power by limiting the freedom of expression through the law that prohibits insulting the Zimbabwean president. This law still exists today even after the fall of Mugabe's rule (Marima, 2018).

Secondly, there exists little equality before the law. The term "isonomy— the principle of equality before the law of all subjects or citizens of the state"— nicely captures this principle of legal equality (Law, 2015). This principle, first propounded by Greek philosophers, highlights the significance of equality of all people, regardless of their class of citizenship, in the eyes of the law. In other words, nobody is above the law. Furthermore, Article 7 of the 1948 Universal Declaration of Human Rights (UDHR) stipulates legal egalitarianism— that is, everyone is entitled to the same protection of the law free from all kinds of discrimination (Universal Declaration of Human Rights, 1948). This also points to the close link between justice and the rule of law.

Justice is the foundation of the rule of law, as it depends on "the administration of justice" (United Nations, 2019). The rule of law emphasizes that all individuals have access to justice. But there are countries where access to justice is extremely problematic. Accessing Justice in Africa is difficult because those who are responsible for enforcing laws, are not enforcing it the way as required by law (Leftwich, 1993). Due to the high level of illiteracy and poverty, many Africans do not understand the procedures of seeking justice, which ultimately allows state functionaries to use the ignorance of citizens to their advantage. For example, the families of the thirty-seven victims killed in the 2012 Markana Massacre in South Africa are still trying to seek justice from the courts because of the unjust police shootings at the mine workers for demonstrating against low wages (Reuters, 2015). There are therefore instances where state functionaries violate the key ideals of the rule of law: equality under the law and freedom of expression. Worse still, there is no stringent, internationally acceptable mechanism whereby authoritarian states can effectively be stopped from violating human rights.

The violation of these values brings the issue of human rights protection to the fore. The safeguarding of human rights has close links with elements of the rule of law, as discussed below.

The Rule of Law and its Three Key Elements: An Overview

This section focuses on the three main elements of the rule of law with the aim to illustrate how important is the role of the rule of law in defending and protecting human rights. The first element is that the government and/or state functionaries operates within the framework of the law. This means that "government officials could be brought

before law courts by private citizens to answer for the violation of the law. For this restraint to exist, the essential prerequisite is that the judicial independence from the rest of the governmental apparatus" (Tamanaha, 2012). This also means that the law should be accessible, clear and certain to all people. The second element is that of equality of everybody before the law. In other words, the same kind of punishment must be meted out to people who have committed the same kind of crime (Barak, 2005). The third element is that of justice and accountability: it means that everybody should have access to courts and should be allowed to get justice in a timely manner (Wilkinson, 1989). These three elements act together to form the foundation of the rule of law; it also ensures that laws are followed by everyone, enforced evenly by those responsible for enforcing it, and that those who are accused of crimes are held accountable following due process of law.

The next section discusses the two versions— formal and substantive— of the rule of law. Just to set the scene, it is apt to note that the formal version of the rule of law deals with formal attributes and procedures while the substantive one extends the rule of law to upholding fundamental rights and the observance of which makes a law good (and bad if not observed properly).

The Rule of Law and Formal Legality: An Analysis

Every state derives its authority from its laws, thus anything a government undertakes should be done in conformity with the law. Formal legality denotes that "laws are general, public, prospective, and certain" (Moller & Skaaning, 2012). Such laws then constrain both state officials and citizens to do thing which are lawful and avoid things which are unlawful. More simply, laws restrict governmental power in states where laws reign supreme, not men (Tamanaha, 2012). According to John Rawls, some of the basic principles of the rule of law include:

> First of all, the rule of law requires as well as forbids certain action, and every rational human being is expected to do and avoid, but there should not be any compulsion on doing things which cannot be done. It also implies that those enforce laws and give orders must act in good faith, and their good faith must be recognized by those who are required to obey the laws and orders. Hence, laws and commands are accepted as laws and commands only if it is generally believed that they can be obeyed and executed (Rawls, 1971/1999).

Here comes the importance of an independent judiciary. Independent legal system springs from the belief in the obedience to and execution of laws. Herbert Lionel A. Hart argues that there will be uncertainty about rules— what kinds of rule and what is their scope— and inefficiency if there exists no legal body that has the authority to settle disputes and resolve disagreements among citizens (Hart, 1961). Laws therefore must be prospective, general, "publicly stated, they must be applied to

everyone according to their terms, and they cannot demand the impossible. A legal system that lacks these qualities cannot constitute a system of rules that bind officials and citizens" (Tamanaha, 2012). So, in order to uphold the standard of the Rule of Law, what is needed is an independent judiciary and justice mechanism whereby free, fair, and transparent trials take place, and it has the authority to keep a check on parliament and executive if they exceed their constitutional powers.

Formal legality thus refers to the existence of clear, prospective, stable, and certain laws, which are enforced through state officials and adjudicated by judiciary if there occurs any violation of the law. Independent legal systems thus protect human rights, which extends the formal idea of the rule of law to its substantive version.

The Rule of Law and its Substantive Version: A Reappraisal

As noted earlier, the substantive version of the rule of law is about the protection of certain rights of individuals. Jeremy Waldron points out that "the rule of law comprises certain substantive ideals like a presumption of liberty and respect for private property rights" (Waldron, 2016). For Brian Tamanaha, "all substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications. The most common substantive version includes individual rights within the rule of law" (Tamanaha, 2012). The proponents of the substantive rule of law do recognize the formal understanding of the rule of law where there are formal attributes and procedures, but they take it a little further. They argue that the basis and/or derivation of certain rights is the rule of law, and then they differentiate between good laws— those laws which respect and safeguard those rights— and bad laws, i.e., laws that fail to protect those rights (Craig, 2021). The substantive version thus adds much more to the idea and understanding of the rule of law than its formal version. The substantive version of the rule of law, argues Ronald Dworkin, is not only the "rights" conception but is also more "ambitious than [its] rule-book conception." He elaborates:

> The rights conception is both distinct from the rule-book conception as an ideal for a legal order as an ideal for adjudication […] It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive laws, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable (Dworkin R. , 1985).

They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights,

which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain
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Professor Paul Craig is of the view that “the rule of law should embrace, in addition to its formal attributes, ideals of equality and rationality, proportionality and fairness, and certain substantive rights” (Craig, 2021). The rule of law is not only a formal idea, but also a principle that ensures rights and liberties of individuals. These ideas and ideals are put into practice by parliament and judiciary.

The role of parliament is related to an age-old debate about the rule of law and democracy. One can make a conceptual differentiation between democracy and rule of law but the two concepts are closely linked as both work for “protecting the equality and autonomy of individuals” (Lautenbach, 2013). For this to happen, checks and balances are incorporated into constitutions so as to stop one institution from impinging upon the powers of other state institutions (Wilkinson, 1989). The role of parliament in safeguarding individuals’ rights is of utmost importance, as without it, its legislative authority is affected badly. Infringement of basic and civil rights will become rampant as a result of diminishing legislative authority, which will negatively impact the substantive version of the rule of law.

The role of judiciary in protecting human rights and civil liberties, i.e., substantive conception of the rule of law, is also crucial. In fact, independent judiciary and the rule of law are *sine qua non* for each other. An independent, well-functioning formal justice system is a must for the Rule of Law to operate freely in any state (Hart, 1961), as laws must be unambiguous, prospective,

publicly knows in order for a judicial system to implement them (Tamanaha, 2012). One can therefore hardly disagree with Marcelo Bergman when he avers that the rule of law "should be understood as a social equilibrium where the vast majority of citizens accept to be ruled most of the time by binding and general norms that have a high probability of compliance" (Bergman, 2012). Jeremy Waldron has rightly pointed out that for a society is deemed to have strong democratic institutions where "citizens take rights seriously even if they may disagree about what rights they have" (Waldron J. , 2006). The disagreement over issues, such rights of individual, is resolved by judiciary, and this makes the role of judicial system in implementing the role of law extremely important.

Hence, the role of parliament and judiciary regarding the rule of law is beyond any doubt. Both parliament and judiciary are inseparably linked— both with the formal and substantive conceptions of the rule of law. In terms of practice, the formal version provides the institutional skeleton and procedures for the rule of law while the substantive version ensures that fundamental rights and political as well civil liberties of all citizens are adequately protected by state officials and institutions. The rule of law is therefore the bedrock of democracy.

Conclusion.

The rule of law, human rights protection, and democracy are inseparably linked. Margaret Jane Radin has beautifully summed all this up by stating that "the ideal of the rule of law, not of men calls upon us to strive to ensure that our law itself will rule us, not the wishes of powerful individuals" (Radin M. J., 2005). The rule of law is a contested phrase because it "encompasses many different aims – from the establishment of stable markets, to the enforcement of criminal laws and the protection of substantive human rights" (Dodd, 2004). There is however no disagreement over the purpose of the rule of law. The rule of law, according to Richard H. Fallon, Jr, serves the following three purposes:

> First, the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence. That they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness (Fallon, 1997).

But the above-mentioned ideals— couched in the rule of law— did not always exist. It was only after the Second World War that members of the United Nations reached an agreement and signed the Universal Declaration of Human Rights (1948) (UDHR), which guaranteed human rights under international law. The UDHR then paved the way for the incorporation of human rights in states' constitutions, but much later though. For example, the rights under the UDHR of 1948 were eventually incorporated into the UK constitution as the Human Rights Act of 1998. The ratification of the Universal Declaration of Human Rights necessitates putting in place to safeguard

human rights and political and civil liberties.

Human rights protection and the safeguarding of civil and political freedoms are part of the substantive conception of the rule of law. Another related version of the rule of law is formal legality— that is, laws which are clear, open, stable, certain, and prospective, so that there is no confusion in their enforcement. The role of judiciary in interpreting laws and arbitrating in case of disputes between citizens and/or the state and citizens is pivotal for the rule of law. So is the role of parliament in making, amending, and repeals laws. Richard H. Fallon, Jr trenchantly summarizes the debate about nature and scope of, and the mechanism for enforcing and implementing the rule of law, in the following words:

> the Rule of Law is a human ideal, and theories of the Rule of Law are inevitably framed to serve political or moral interests […] the ideal of the Rule of Law is perhaps most meaningful as a standard deployed in contemporary, domestic, legal, and political debates (Fallon, 1997).

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