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The Rule of Law in the Liberal Script

Central Commitments, Variations, and Contestations

Mattias Kumm

1 The Rule of Law: A Contested Ideal

A central component of the liberal script is a commitment to the rule of law. Even though the commitment to the rule of law itself is uncontested—there is no version of the liberal script that makes do without it¹—its meaning has always been contested and dominant understandings have shifted over time. To get a handle on the range of claims that have been and continue to be made in the name of the rule of law it is helpful to first distinguish between different levels of differences and contestation.

The first level, to be addressed in section 2, concerns the competing understandings of *the function* of the concept of the rule of law as part of the liberal script. There is no consensus on what disagreements about the meaning of the rule of law are actually about, thus giving rise to the claim that disagreements about the meaning of the rule of law are merely about the use of words (see Murphy 2014). This deflationary argument about disagreements about the rule of law is, I believe, misguided. But it does helpfully direct attention to the question of what exactly disagreements about the rule of law are about. Here it is possible to distinguish two core positions: The first (section 2.1) claims that the point of the rule of law is to give an account of how and why law's formalities have a distinctive value, a focus that is not captured

¹ The internal justificatory architecture of the liberal script can be conceived as consisting of five layers, where the relatively more basic layer serves as a starting point for the justificatory explication of the next layer, which requires the introduction of additional arguments and facts. 1: Every person has the status as free and equal in their civic relationship with others. (For the primary role of free and equal individuals in justificatory terms, see also Zürn and Gerschewski, this volume). 2: Persons conceived as such need to establish public authority among themselves in order for that status to be protected and realized (liberals are not anarchists). 3: That public authority needs to have a certain structure, for it to have authority over free and equal persons (there is a right to disobedience, resistance and even revolution under some circumstances if public authority lacks legitimacy). 4: The structure of public authority needs to be one that ensures individual and collective self-determination among free and equals. As such it has to reflect and adequately institutionalize a commitment to human rights, democracy and the rule of law. Layer 5 spells out in more concrete institutional and doctrinal propositions what this commitment amounts to. In a historical perspective, layers 1–2 can be considered invariant, perhaps even layers 1–3 (although here the position of I. Kant requires accounting for). In the present, all plausibly liberal scripts embrace layers 1–4, including a commitment to the rule of law. Variations concern primarily the fifth level, where different interpretations of these ideas compete. This is the level on which the contestations that are the focus of this paper take place.

by a focus on human rights and democracy, concerning themselves primarily with substantive and procedural concerns respectively. The rule of law understood in this way is a thin ideal with only a limited justificatory function. The second (section 2.2) insists that the rule of law is about establishing the conditions that must be met for public authority to be legitimate. In contemporary versions of the liberal script that inevitably includes reference to human rights and democracy to complement the formal features of the rule of law. I will argue that the second position is the most convincing interpretation of the ideal of the rule of law in the liberal script.

In the third section I will describe three competing views within the liberal tradition on how the formal features of the rule of law are to be integrated with a commitment to human rights and democracy to form a legitimate order. I will distinguish between: a classical or neoliberal (section 3.1), a republican democratic (section 3.2) and a global constitutionalist interpretation of the rule of law (section 3.3). Whereas there is considerable overlap among these positions, competing positions on the rule of law have different views on how the tension between the exercise of private and public autonomy, individual and collective self-determination, individual rights and democratic majorities are to be institutionalized in liberal constitutional democracies and the world of law beyond the state. Here I will argue that the global constitutionalist position has the best arguments in its support.

The primary point of the paper is to get an understanding of the range of positions that have been in play in debates about the rule of law in the liberal tradition, to inquire about core commitments as well as understanding more deeply internal contestations and varieties of the liberal script. But in this field, it is difficult to get a grip on what is going on without a good understanding and assessment of the sometimes implicit justifications provided for various positions. Not surprisingly, the paper uncovers and engages these arguments and inevitably presents its own interpretation and argument about how the rule of law should be understood.

2 What Is the Rule of Law About?

2.1 A Conceptual Division of Labor: A Thin and Limited Ideal of the Rule of Law?

Most contemporary legal philosophers in the Anglo-American world tend to insist that the point of the “rule of law” as a concept is to carve out a particular formal aspect of government, without necessarily tying it to the more ambitious project of establishing legitimate government.

A powerful argument for limited formal and thin conception of the rule of law is the intellectual clarity provided by a clean division of labor between concepts, each highlighting its own specific moral concern. The rule of law as an ideal, it has been argued, should be understood to highlight the moral virtues connected to formal characteristics of positive law, instead of loading the term up with associations connected to other virtues that ideally law should have. The rule of law should not simply

be conceived as the rule of good and just law², as Joseph Raz polemically puts it (Raz 1979b, chap. 11). We may care about the democratic character of the law, or its substantive justice, but there is something distinctive about positive law and the values of formality, that is intellectually and politically worth focusing on independently. It is those distinctive values relating to formalities—closely connected to what Lon Fuller called the internal morality of the law (Fuller 1969)—that allows us to talk about the rule of law as a distinct ideal, different from aspects relating to its democratic enactment or its respect for human rights. Historically Max Weber, for example, has insisted on connecting the achievement of a formal rational organization of society assuring the impartial administration of rules to the rule of law as a distinct and separate idea (Weber 1954), and in the common law tradition Dicey (1885) connected the rule of law to the availability of courts of general jurisdiction to resolve disputed not only between citizens, but also between citizens and public authority.

Besides intellectual virtue of clarity there is also a practical political strategic point in carving out a concept of the rule of law that is thin and limited. There have been and continue to be many contexts in which it is possible to establish a consensus focused on the potential virtue of laws formalities between opposing parties otherwise divided by deep political disagreements about questions relating to the institutionalization of democracy or human rights. For example, during much of the 19th century in Europe and in Germany particularly there was a great deal of ideological conflict over whether political authority was ultimately grounded in the will of the people or the will of a divinely legitimated monarch or what the respective roles of parliament and the executive should be, or what rights citizens have. Here a formal understanding of the rule of law allowed certain attractive features of regularly applied and fairly administered legal rule to be highlighted, allowing for progressive reforms in administrative law, while deeper constitutional questions on which no agreement was realistically achievable could be avoided. A formal understanding of the rule of law allowed lawyers and reformers to push for “technical” reforms, while never appearing to take sides in the big “political” or “ideological” questions of the day.

This is much the same reason why in international institutions like the World Bank or the United Nations today “rule of law” is a concept that allows the formulation of limited reform projects—for example anti-corruption measures, the formalization of property rights or the establishment of a adequately trained and organized legal profession or independent impartial courts—that are more likely to be embraced by states in the international community that may be neither human rights respecting or democratic.³ Rule of law reforms in such a context refers to projects that are deemed

² Yet this comes close to the criteria that make up the Rule of Law Index of the revealingly named “World Justice Project.”

³ In the World Bank’s World Wide Governance Indicators, “Rule of Law” is one of six indicators. It is focused on “measuring the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts. Together, these indicators measure the success of a society in developing an environment in which fair and predictable rules form the basis for economic and social interactions,

to be “technical” as opposed to more “political” or “ideological” projects relating to democracy or human rights.

Both these arguments for a thin and limited concept of the rule of law, are, however, ultimately unpersuasive. First, Joseph Raz may be right to insist that the rule of law should be understood as a distinct ideal. The rule of law should not be the same as the rule of good law, in order for the concept to keep its distinct function and not lose all contours. But it does not follow that the rule of law therefore should be conceived of as only focusing on the values of law’s formalities. The best argument for a more encompassing and yet analytically distinct meaning of the rule of law is implicitly provided by Joseph Raz himself. Raz correctly analyzes that law *necessarily makes a claim to legitimate authority* (Raz 1979a, pp. 28–33). This is a central distinctive feature about positive law, that distinguishes it from other kinds of norms. It seems plausible and attractive to tie the idea of the rule of law to a standard of achievement that would assure that law *actually has the authority it claims to have*. After all, there is no other concept that might plausibly serve *that* function. The rule of law, then, is indeed not identical with the rule of *good* law, but is identical with the rule of *legitimate* law (even if law fails to achieve perfect justice and does not implement good policy). To put it another way: the ideal of the rule of law as a standard of achievement is satisfied if and only if the law actually has the legitimate authority it claims to have.

Tying the rule of law to the conditions that must prevail in order for law to have the authority it claims for itself has an additional advantage over an account that merely seeks to spell out the values of law’s formalities. The problem with the latter is that it fails on its own terms. It implies that law’s formalities have some—even if limited—value, whatever the nature of the system laws are part of. Law’s formalities are only unambiguously valuable, however, in a context where the overall system is one which can plausibly claim legitimate authority. When law is part of illegitimate or evil systems, the value of law’s formalities, too, become more questionable. To clarify this point, imagine three scenarios.

In the first scenario positive law scoring high on all formal requirements is part of an overall legitimate even if partially flawed system. This is the type of context where legal formalities do indeed have all the virtues that are typically ascribed to them. Given disagreement about substantive issues of justice, economic prosperity and then like, there is something to be gained, all things considered, when these issues are settled in a way that meets formal rule of law requirements. Legal formalities further some version of liberty, autonomy or equality even when we disagree about what the full realization of liberty, equality or autonomy in fact requires. Even if we disagree, for example, about the just tax rate for different incomes, the fact that tax law establishes clear and settled rules on that issue is relevant both for liberty and equality. It furthers liberty to make tax practices predictable allowing individuals to plan their economic actions and take account their tax implications. And it reflects equality

and importantly, the extent to which property rights are protected” (ifo Institute 2009). None of the indicators directly focuses on democracy or human rights.

by ensuring that persons earning the same income are taxed equally. In legitimate systems legal formalities have a limited but real value.

Now imagine laws scoring high on formal requirements are part of what is arguably a system that is not only imperfect, but so imperfect, that revolution would in principle be justified to overcome it. These systems, although fundamentally still oriented toward the fulfillment of legitimate public purposes, are so structurally flawed that they lack legitimate authority, perhaps not as a matter of social fact, but as a matter of effectively establishing a moral obligation to comply. Think of the German Empire before the Weimar Republic, or the Austrian Hungarian Empire before World War I, or think of the Chinese one-party system today or other forms of contemporary autocratic legalisms (see Scheppele 2018). In such systems law's formalities play a morally deeply ambivalent role. On the one hand they may well provide assurances and safe harbors for subjects to some degree and might help to organize society in a generally rational and predictable way. But law in such a context functions first of all as an instrument of power. It is an effective technology to ensure reliably enforced centralized rule over large and diverse territories and peoples, with a class of professional bureaucracies and judges minimizing agency costs for the rulers. Furthermore, it is an instrument of power that tends to address the individual's agency: on the one hand that may be thought of as a good thing, since it takes individuals seriously as agents (law does not function like a cattle prod). But in such a context law effectively demands subjects to become complicit in their own domination. Here positive law and the virtues of regularity and predictability rationalize practices of power and provide a cloak of legitimacy, that allows forms of domination to persist and resistance to be discouraged. Law's formalities here are insufficient to morally legitimate these regimes, yet the forms chosen to exercise power have a legitimating effect. In such a context law's formalities, given their connection to ultimately illegitimate forms of exercises of power, are deeply ambivalent. Here formal law is an instrument that helps to render effective and perpetuate practices of domination, even if it also provides some level of protection. Law's distinctive formal features here are morally fundamentally ambivalent, with law's formal features enabling rule by law and demanding individuals' complicity in their own domination, even as it makes the yoke of domination appear lighter and more manageable.

Finally consider evil regimes. Imagine a legal system that conceives of itself as inherently opposed to anything connected to the liberal script. The idea of persons sharing a civil status as free and equals, it is claimed, wrongly glosses over politically fundamental distinctions, be they racial, class-based or religious. Drawing on whatever historical examples you might prefer, imagine some version of a legal system based on racial supremacy grounding an apartheid system and justifying domination of one group over another as a natural state of affairs, perhaps justifying ethnic cleansing or even genocidal elimination of "inferior races." Alternatively imagine a system in which those who have the right kind of class consciousness and insights into the laws of world history righteously dominate those deemed reactionaries and counterrevolutionaries, justifying their imprisonment or their being worked to death in labor camps. Or imagine a system of theocratic oppression that insists that law's

function is to establish the reign of the religiously righteous over those who in the eyes of god are infidels and subject to eternal damnation, who are subject to elimination if, after having been confronted with a chance to convert to the salvific truth, fail to do so. In such contexts it is not clear whether law's formalities have any value whatsoever. Imagine a Nazi commander running a concentration camp completely aligned with Fuller's "internal morality of law." Compare that to a concentration camp run by a corrupt commander, where individuals can bribe their way out, or friends and relatives may engage in special pleading for acquaintances. These cases are not plausibly described as one in which the formal virtues regarding the law are outweighed by the awful substantive injustice of such systems. Here the use of law's formalities as an instrument to achieve perverse ends arguably not only fails to make the practice less unjust, it makes the practice evil.

To conclude: Any thin conception of the rule of law is unable to provide an account of its value, because its value inevitably depends on the context of which it is part. In the third scenario law's formalities arguably make a practice worse than it would be without them, in the second scenario the role of law is at best ambivalent and only in legitimate systems is it plausible to assign law's formalities an unambiguously positive, even if limited, value.

Furthermore, there is no strategic necessity to use the "rule of law" as a focus for more limited, formal reforms, when agreement on, say, human rights or democracy, cannot be reached. Those reforms can be framed as what they are: Focused on fighting corruption, securing the independence and impartiality of the judiciary, ensuring access to justice, effectively guaranteeing property rights, or whatever else the focus might be. Such projects may certainly be worthwhile and they do address issues related to the rule of law. But the rule of law will not be realized without also achieving more demanding standards relating to the establishment of legitimate authority, namely establishing democracy and respecting human rights. Pretending otherwise opens such projects up to charges of ideological obfuscation and using formal legal ideals to cover up what is in effect the domination of some over others. Projects geared toward securing some of the formal virtues of rule-based governance should be permitted to be brought under an umbrella named "the rule of law" only if it is clear that such an umbrella also allows space for projects relating to democracy and human rights.

2.2 The Rule of Law as an Ideal Relating to the Conditions of Legitimate Public Authority among Free and Equals

So what follows? If the rule of law is to be tied to the conditions that must pertain in order for law to actually have the legitimate authority it claims to have, what exactly would that require? Liberal legality refers to a tradition of thinking about law that has its origin in the Enlightenment and the Age of Revolutions. Its history and variations can be understood as attempts to work out a basic puzzle. The puzzle is how

legitimate public authority can be possible among persons sharing the basic status as free and equal persons. In conceptual terms that puzzle is claimed to be resolved by reference to the idea of “the rule of law” as a substitute for and contrast to a more traditional state of affairs, where one set of persons rules over others (“the rule of men”). If we take seriously the opposition between “the rule of law” and “the rule of men” (even if they rule by law) Plato and Aristotle asked the wrong question. Then the question is not who should rule, whether one person, a group or everyone. Instead the aspiration is to end all rule by persons over other persons. There are no rulers in well-ordered liberal societies. But the proposition that no person should rule was not presumed to justify anarchy. Instead the negative ideal of nondomination, and its positive corollary, the ideal of individual and collective self-government of free and equals, was to be achieved by way and in the medium of the law. The only legitimate public authority over individuals imagined as sharing the civic status as free and equal was a legally constituted, constrained and guided authority. Within a liberal order even a prime minister, chancellor or president is not a ruler, but a mere holder of public office. They, like other public officials, are authorized to play a role in the making, interpretation and enforcement of the law, authorized and limited by norms defining jurisdictional, procedural, formal and substantive constraints. Referring to them as rulers, however, misses the deep discontinuity conceptually between the exercise of power as it was imagined before and after the enlightenment revolutions.⁴

But what, more specifically, does that mean? To say that law should rule and not men or that persons should govern themselves individually and collectively meant that law could not simply be understood as an instrument by which power is exercised (the rule *by* law), even though it might be a significant discipline on those exercising power if they could only do so by means of the law. If rule of law means more than merely rule by law then the idea of law must be connected to something that is independent of the will of particular persons that is implemented through law. One way that law can be conceived that separates it from the will of any particular person is to claim that law exists naturally, as a form of right reason (*recta ratio*), that it is derived from supra-positive standards of rightness in some way. Yet the rule of law in the post-revolutionary modern sense is also distinguished from “the rule of reason” of the old natural law tradition, focusing instead on posited, properly enacted law in the form of constitutions and legislation. That then is the puzzle at the heart of the concept: How can one make sense of the rule of law, if it does not degenerate into either the rule of men (even if they rule by law) on the one side or the rule of

⁴ For late 19th- and early 20th-century thinkers like Weber, the “iron cage of modernity” does not allow for escape from being ruled by rulers. But Weber’s conceptualizations are not sensitive to liberal-democratic normative considerations as they are predominantly understood today. In his sociological account of legitimacy, for example, he distinguishes between charismatic, traditional and legal sources of legitimacy. Quite remarkably the idea of democratic legitimacy remains unaccounted for. Weber, Dicey, and others are best historically understood as scholars seeking to articulate an ideal of the rule of law as a bridging concept between genuinely liberal democratic ideals in the tradition of the French and American revolutions and conservative authoritarian features of late 19th- and early 20th-century European practice. The regimes these thinkers were effectively describing and in part legitimating would, however, be rejected as illegitimate by both 18th-century revolutionaries as well as post-1990 mainstream proponents of liberal constitutional democracy.

reason (*recta ratio*) on the other? What does an order look like where the rule of one set of persons over another set of persons has been replaced by the rule of law and yet that law is not simply natural law, justice, “*recta ratio*,” but posited law, made by human beings? If we were to describe such a situation as one in which the domination of one group of persons by another were abolished and individual and collective self-government were realized, how could that possibly be achieved through the rule of positive law?

A close look at some of the basic revolutionary pronouncements is useful to get a more concrete idea of the basic components of the puzzle. The central revolutionary tenets are captured in the opening of the second paragraph of the American Declaration of Independence as well as core passages of the French Declaration of the Rights of Man. They are at the heart of debates about liberal legality and its discontents.

The relevant paragraph in the Declaration of Independence reads:

We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness-That to secure these Rights Governments are instituted among Men, deriving their just powers from the consent of the governed [. . .]

The core passages of the French Declaration of the Rights of Man read:

Art. 1: Men are born and remain free and equal in respect of their rights. Social distinctions, therefore, may only be founded on common utility.

Art. 4: Liberty consists in being able to do anything which does not injure another: therefore the exercise of the natural rights of each man has no limits other than those which assure the other members of society the enjoyment of the same rights. These may be determined only by the law.

Art. 6: The law is the expression of the general will. All citizens have a right to concur personally, or by their representatives, in its formation [. . .]

Here, there are three core ideas connected to the idea of legality that are both complex in themselves, stand in a complicated relationship to one another, with each remaining contested at different points in the following centuries. These ideas have been the subject of political, legal and intellectual struggle ever since. But it is the conjunction of these ideas and their relationship to one another that defines the idea liberal legality.

The first idea ties legality to ideas of substantive justice, that are fleshed out in terms of human rights and ties and defines the limits and purpose of government: The purpose of government is to secure the rights of individuals, or, as Kant would insist, the one right to equal freedom, understood as a general right to liberty whose limits need to be circumscribed with regard to other individuals. Spheres of liberty should be demarcated in a way that maximizes the general welfare.

The second concerns the formal aspect of legality: All infringements of liberty—all the line-drawing exercises between competing rights by public authorities in the general interest—have to take the form of enacted positive law. Liberal legality is focused on positive law, even as that law is connected to a distinctive normative ground and purpose.

The third concerns procedural aspects of liberal legality: the procedure by which the law is made. All laws must be enacted in a procedure that allows for the adequate participation of citizens, generally through elections of representative institutions or referenda. More generally the people—those whom the law claims to bind—are “the source” from which legitimate authority is derived. They are the point of reference for the justification of legitimate authority. Their will matters. This does not imply that “the will of the people” should be conceived of as simply existing as a pre-political natural phenomenon, the result of the aggregation of individual preferences in some welfare function which the law seeks to realize.⁵ But it does suggest that what can plausible be described as “the will of the people” will have to meet certain procedural (and perhaps also formal and substantive) criteria.

Here the core issue is how private autonomy of individuals as bearers of rights connects to the exercise of their public autonomy (see Müller, this volume). The central characteristic of a genuinely liberal integrative ideal is the fact that, whatever the right resolution of this tension might amount to in different contexts, the tension does not get resolved simply by way of a general prioritization of one over the other (see also Zürn and Gerschewski, this volume).⁶

The idea of liberal legality seeks to integrate the idea of posited formal law, enacted in the name of and ultimately attributable to the people, that respects human rights. At the heart of the struggle and debates over liberal legality are competing ideas about how these three aspects relate to one another and get integrated into an ideal of the rule of law to create a situation in which individual and collective self-government is brought about, and the domination of one group over another is abolished. The rule of law, then, is an integrative ideal that establishes the conditions under which legitimate authority can be established and exercised over subjects conceiving of themselves as free and equals.

⁵ This understanding of the idea of the general will was never plausible and has been further undermined by Arrow’s impossibility theorem, see Arrow (1950). His theorem states that when voters have three or more distinct options, no ranked voting system can convert the ranked preferences of individuals into a community-wide complete and transitive ranking, while also meeting a specified set of criteria. But nothing in this theorem suggests that it is not possible to distinguish between democratically adequate and inadequate procedures and that the result of certain democratically adequate procedures that also meet other (substantive and formal) requirements might be referred to as reflecting “the general will.” This is a democratically constructed notion of “the general will” about which Arrow, who was focused on welfare economics, has nothing to say.

⁶ In that sense what Jürgen Habermas described as the co-constitutive and coequal status of private rights and public rights (Habermas 1996) captures a core precept of the integrative liberal tradition of the rule of law.

3 Three Ways of Fleshing out a Liberal Integrative Conception of the Rule of Law

So suppose, as I argued we should, the ideal of the rule of law refers to the conditions that need to be met for public authority to be legitimate among persons sharing the status of free and equals. In that case, the question is what that means in more concrete institutional and doctrinal terms. There are some aspects of the rule of law that are generally uncontroversial and shared among liberal conceptions of the rule of law, including all three versions discussed below. They include the following constitutional essentials: the idea that all exercise of public authority should have a legal basis, ultimately grounded in a constitution, that fundamental decisions should be made by a duly democratically elected legislature, that legislative, executive, and judicial power has to be functionally, institutionally, and personally separated to some degree, that public authorities have to respect the human rights of those their acts address. Furthermore, any integrative conception of the rule of law in the liberal tradition is characterized by acknowledging the complementary nature and the tensions between private and public autonomy, individual and collective self-determination, individual rights and the will of democratic majorities. An account of the rule of law that fails to recognize this tension falls outside the liberal script as it is understood today. What is contested is how these tensions should be addressed, institutionally and doctrinally. What is also contested is the under what circumstances and in what form law beyond the state is legitimate and what role international public authority should play. In the following I will distinguish between three competing views about how that should be done, each giving rise to a particular understanding of the boundaries of legitimate public authority and the rule of law.

First, there are “classical liberal” and “neoliberal” theories, which insist on the priority of private autonomy⁷ (section 3.1). Second, there are Republican theories, insisting on the priority of public autonomy: The rule of law here is the rule of the general will that is formalized and made binding in positively legislated democratic law (section 3.2). Third, there are constitutionalist theories, which do not establish a general priority of one over the other. Instead, they seek to institutionalize the inherent tensions in contestatory, globally open, and engaged processes involving both democratic legislatures, rights-adjudicating courts, and international institutions (section 3.3).

⁷ There are no general features that distinguish classical liberalism from neoliberalism, except the historical context which determines what liberal positions are defined against. Classical liberalism was directed primarily against the traditional restrictions associated with the *ancien regime* in the 18th and 19th centuries. Neoliberalism was directed primarily against fascism and socialism in the 20th century as well as seeking to distinguish itself from the Rooseveltian liberalism (effectively social-democratic policies) that responded to the post-1929 economic crisis. In this I follow Gerstle (2022, pp. 6–10).

3.1 The Priority of Private Ordering: Classical Liberal and Neoliberal Versions of the Rule of Law

“Classical liberal” and “neoliberal” theories insist on the priority of private autonomy. Here the rule of law becomes a thin ideal generally focused on ensuring the adequate protection of private rights and the integrity of a private law based society. In this view rights are natural in the sense that their content and more specific contours are knowable without recurrence to the meaningful exercise of public autonomy. There are different accounts as to why that may be so. Here is not the place to go into the subtleties of competing natural law theories, the legacy of Roman law in private law thinking or the economic theories of different schools, be they *ordo-liberal*-, Austrian-, or Chicago-based (but see Schmidt, this volume). They all have in common the claim that the exact contours of such rights can be prescribed by generally applicable norms, which are to a large extent insensitive to contextual social or redistributive concerns. Whereas some versions of such an account are worked out on the basis of acknowledging natural rights to property or freedom of contracts, others are connected to utilitarian ideas, highlighting the significance of the “price signal” (Friedman 1962) for the efficient allocation of resources by way of an “invisible hand” (Smith 1986) creating “spontaneous order” (Hayek 1960) by way of the accumulated decentralized decisions of self-interested market actors. Classical liberal or neoliberal positions are compatible with the idea of constraints on markets, and they may require a proactive role of public authorities to establish appropriate legal guarantees and the institutional infrastructure for markets to function. But any legitimate constraints on markets must serve the purpose to overcome market failures, such as market externalities, information asymmetries or structures enabling anti-competitive behavior. Furthermore, details of market design and intervention are imagined as technocratic expert-driven exercises, leaving little if any role for the meaningful exercise of public autonomy.⁸

The practical consequences with regard to the structure and doctrines relating to legitimate public authority of such ideas are twofold. First, understanding of the rule of law informed by these ideas had led courts in the late 19th and early 20th century to limit the capacities of legislatures to regulate markets, striking down, for example, legislation establishing minimum wage laws or maximum working hour laws or interpreting narrowly any legislative acts that deviate from established common law baselines.⁹ This is no longer a position upheld today, where social concerns as well as a host of other purposes beyond addressing “market failures” in any narrow sense will be recognized as legitimate public purposes for restriction on markets.

⁸ For an overview see Harvey (2005). See also Axe et al., this volume, and Schmidt, this volume.

⁹ See *Lochner v. New York* (1905) in the United States. In the United Kingdom much the same was achieved by way of a strong interpretative rule according to which a statute should not be construed in ways that diverged from basic rules of the judicially developed common law of property and freedom of contract.

Today, neoliberal thinking about the technocratic nature of economic regulation and efficient market design serves primarily as an implicit authorization for democratically thinly legitimated international organizations, central banks, or courts, as well as other expert bodies to play a decisive role in the rule-making process. Such an understanding of the rule of law has guided the design of legal infrastructure of globalized markets, from the more concrete contours of the rules on free movement of capital, trade and services to the *lex mercatoria* governing the substantive rules of investor–state arbitrations. Though not explicitly anti-democratic, such an orientation tends to sideline the role of the democratic legislature across a wide range of policy domains and generally downplays the centrality of democratic values, when they appear to be in tension with achieving the right kind of market-oriented policies.¹⁰

3.2 The Priority of Democratic Legislation: Republican Versions of the Rule of Law

Republican positions on the rule of law insist on prioritizing public autonomy. The rule of law here is simply the rule of the general will that is formalized and made binding in positively legislated and duly enforced democratically enacted law. Legitimate authority has its foundation in the democratic lawmaking of the people. How exactly that process is imagined may vary, but it will highlight some mix of identitarian and deliberative elements, without necessarily denying some role to elements of bargaining. In the liberal version of the republican tradition the democratic process is institutionally anchored in parliamentary lawmaking with the make-up of parliament in turn determined by free and fair elections based on an equal right to vote. There may also be an emphasis on more direct forms of people's involvement, but the core thrust of the Republican versions of the rule of law is against the usurpation of lawmaking power by other institutions: Those other institutions can be either an overbearing executive branch, populated by administrative agencies with their own internal instrumental rationality and, as in the case of Central Banks, a high level of independence from the political process. They can also be international or supranational institutions seeking independent regulatory roles. In their focus on electorally accountable parliaments or referenda, republican conceptions have a strong national state-focused orientation. And they can be courts, inappropriately second-guessing judgments made by the democratic legislature (establishing “juristocracy” instead of “democracy”). A Republican understanding of the rule of law will not necessarily be categorically opposed to allowing for a role of these other institutions but will insist on carefully policing the limits and domain of decision-making outside of the

¹⁰ An exemplary illustration of such prioritization is the role played by Chicago educated economists influenced by Milton Friedman and Friedrich Hayek in Chile of the 1970s, supporting the Pinochet dictatorship in its design of neoliberal economic policies, after it effectively disposed of the democratically elected socialist leaning Allende government.

parliamentary legislative process. It will insist on an interpretation of the separation of powers, for example, that imposes significant limits on executive rule-making, delegation to decision-making on the international level, or the role of constitutional courts. Furthermore, even when delegation of authority is deemed to be acceptable, the exercise of such delegated authority must always be understood to be subject to potential override by parliamentary decisions. The strong anchoring of all public authority in the law enacted by national parliaments and the strong connection between “the will of the people,” as it manifests itself as the result of the legislative process, is the hallmark of republican versions of the rule law. Whereas classical liberal and neoliberal positions emphasize the independence of right reason—some combination of natural law and technocratic insight—as central to the rule of law, republicans emphasize the *Demos* based voluntaristic grounding of the rule of law.

To illustrate what that means more concretely will in the following be illustrated with reference to contemporary debates on the role of constitutional courts. Constitutional Courts have emerged as the ultimate guardians of constitutional/human rights in liberal constitutional democracies after World War II. But even though all new constitutions enacted after 1990 have included the institutionalization of some kind of judicial review of legislation, the debate over its democratic legitimacy has remained alive (see Bellamy 2007; Waldron 2006). Republicans insist that such courts should be regarded as an anomaly, at best understood to function as a crutch for democratically immature societies, where trust among and in the people to democratically govern itself is missing. This is the reason, so the argument goes, why it may be acceptable for countries such as Germany, Italy, or South Africa, that had recently transitioned from some kind of authoritarian regime to democracy, to have strong constitutional courts. But there is no such need in, for example, Scandinavian countries, Britain, or New Zealand. Republicans do not deny that human and constitutional rights matter. But it was clear to the French Revolutionaries that endorsed the Universal Declaration of Rights of Men and Citizens that the meaning of these often abstract rights guarantees is best left to be determined by legislatures and citizens electorally holding those legislatures to account, and not democratically unaccountable courts. The function of rights declarations is to educate the public and remind the representatives of the nature of their task. Given reasonable disagreement over the meaning of these highly controversial abstract guarantees, their specification should not be assigned to judges, so the argument goes, but to democratic legislatures. Even when constitutional courts with the jurisdiction to review legislative acts have been established, courts should generally defer to legislative judgment, unless there is a clear and evident violation of the right. And if courts do play a more assertive role, they should do so only with regard to areas where there are good reasons to believe that the democratic process itself is infected by structural inadequacies, as, for example, may be the case when legislation burdens small and insular minorities or majorities seek to entrench their power by undermining the very structures that allow for democratic change (see Ely 1981). Finally, even when courts declare a legislative decision to be in violation of a right, legislatures should generally have the authority

to effectively overrule such a decision if, after due consideration, they remain unpersuaded by the reasoning of the court.¹¹ Private autonomy must be authoritatively circumscribed by the collective exercise of public autonomy, reflected in laws being responsive to the will of the people.

3.3 Constitutional Versions of the Rule of Law

A Constitutionalist version of the rule of law can be distinguished negatively from the previously discussed conception in that it does not presuppose a general priority of either public or private autonomy. Whereas the republican version of the rule of law is focused on law as the institutionalization of the people's political will and the classical/neoliberal understanding of the rule of law is focused on securing market rights as the *recta ratio* of natural law cum technocratic market design, the will vs. reason dichotomy gets resolved in the constitutionalist understanding of the rule of law by a "turn to justification" and its institutional corollaries.¹² What that means more specifically can best be appreciated by focusing on two core ideas connected to the constitutionalist version of the rule of law. The first concerns the role of human rights, as they relate to the legislative process on the one hand and constitutional courts on the other (3.3.1). The second concerns the role of international law and its relationship to national law (3.3.2).

3.3.1 Specifying Human Rights in the Democratic Process: On the Role of Legislators and Constitutional Courts

In the process of specifying and giving concrete meaning to the abstract human rights and constitutional rights provisions in constitutions legislatures and courts are conceived as partners. In this partnership each institution has a distinctive role to play in the democratic process.

The legislative process is *justice*-focused: It is a process in which electorally accountable institutions enact laws to settle disagreement about what justice among free and equals requires through deliberations and negotiations. The regulative ideal informing this process is seeking a consensus on what is right and just based on good reasons.¹³ At the same time, the parliamentary legislative process is designed to reflect the fact that there is reasonable disagreement about what justice and good policy requires and that it is unrealistic to think that an actual consensus will be reached.

¹¹ For a classical discussion of so-called "weak form judicial review" see Gardbaum (2001).

¹² Kumm (2010). See more generally Herlin-Karnell and Klatt (2019).

¹³ These idealizations may seem far removed from the actual practice of democratic politics, in which tactical and strategic maneuvering, political partiality, horse-trading, and eventual nose-counting are central features of the institutionalized legislative process. But not only is the institutionalized formal legislative process embedded in a context where actors have incentives to take their cues and integrate positions and arguments from deliberations that take place in the wider public sphere. It is also impossible to make sense of the actual practice of democratic politics, including the role that reason-giving plays in it as a matter of fact, without presupposing such a normative commitment. For an authoritative recent restatement of such a view, see Habermas (2022).

It institutionalizes the idea of a parliamentary opposition to foster contestation, also to force the process of reason-giving. And it ultimately allows majorities to settle disagreements authoritatively.¹⁴ The lack of actual consensus is not imagined to be a crisis or a sign of decay, but part of the ordinary operation of politics in a free and open society. The defeated minority can continue to insist that it was right and the majority was wrong, and it can continue to campaign for its causes, including the cause to have the government replaced in the next election. It is only required to accept that the majority has, in principle, the right to determine authoritatively what the law is and require that those in the minority comply with it. This contestatory justice-focused legislative process thus structures *the authorial role* that citizens play.

The judicial process is legitimacy-focused and engages the *editorial role* of citizens.¹⁵ It is a process in which norm addressees can contest outcomes of the political process before impartial and independent judicial institutions claiming that their rights have been violated, requiring public authorities to show that the settlement reached is demonstrably susceptible to a reasonable justification.¹⁶ If a law is not susceptible to a reasonable justification, then it can't claim to have settled a reasonable disagreement authoritatively. In such cases the majoritarian decision establishing the law is merely an imposition of the victorious majority on the minority. Its lack of reasonable justification makes it a form of majoritarian domination.¹⁷ If an impartial and independent court determines that such a reasonable justification is not possible, then that decision violates the rights of the burdened persons, lacks legitimate authority, and should not be applied as law. In the editorial role, citizens seek to ensure through the constitutional judiciary that the authority exercised in their name by the legislature is in fact exercised legitimately: Burdens imposed by the laws must be demonstrably justifiable to those burdened as a reasonable attempt to do justice also to them. If such a justification succeeds, the addressee can't reasonably reject law's claim to legitimate authority.

Note how in this understanding courts do not ask whether the legislature has indeed succeeded in finding the most just, fair, efficient or otherwise desirable solution to the problem it sought to address. Courts do not replace the judgment of the legislature on what justice and good policy requires. Courts merely assess whether the legislature stayed within its competencies to settle the question of what justice requires within the bounds of reasonable disagreement. For that to be the case the

¹⁴ For a rich description and normative assessment of the democratic legislative process, see Waldron (1999).

¹⁵ For the general conceptual framing see Pettit 1999. For more concrete institutional and doctrinal implications, see Kumm (2017).

¹⁶ Typically, courts will use some kind of a proportionality test to assess whether that is the case. See Barak (2012); Moeller (2011); Stone Sweet and Matthews (2008).

¹⁷ The real legitimacy issue is here is not the court striking down such a law against the will of legislative majorities. The real issue here is on what grounds legislation by the majority could claim legitimate authority over the dissenting minority, if no reasonable justification can be adduced for it. There is no "countermajoritarian difficulty" (a term that has unhelpfully dominated the discussion of judicial review since J.H. Ely introduced it in *Democracy and Distrust* (1981)) that judicial review needs to overcome. There is a potential "majoritarian difficulty" inherent to the legislative process that judicial review, appropriately conducted, helps overcome.

legislative has to be susceptible to a reasonable justification even to those who are most burdened by it. This means that the assessment of relevant reasons will always involve a degree of deference. The appropriate degree of deference is conceptually demarcated by the distinction between what is rightly justified and what is reasonably justifiable, or what is just and what is legitimate.¹⁸

Courts, under this conception, play an independent supervisory role as *jurisgenerative junior partners* to political branches of government. Under such a conception the *right to vote* and the *right to contest* are equally nonnegotiable participatory features of the democratic constitutionalist enterprise. Citizens are not just authors of the laws collectively; they are also editors of the laws individually. Constitutional orders that deny its citizens such contestatory possibilities by way of judicial review are deficient.

There are constitutional systems with a proven track record of establishing stable liberal democracies where several factors work together to minimize the detrimental effects of such a deficiency: These are political communities characterized by a traditionally high level of social cohesion and trust whose constitutional history has evolved without revolutionary shocks and abrupt transitions in the past century. It is not uncommon to find constitutional arrangements in such communities that have not established meaningful judicial review. Typically, these countries may also allow for other constitutional leftovers as ghosts of bygone eras to remain in place: an official established church, for instance, or a monarchical, largely ceremonial, head of state. This is true, for example, of Scandinavian countries and also of the United Kingdom.¹⁹ More generally it is striking that all liberal constitutional democracies that have abstained from establishing reasonably well-developed systems of judicial review appear to have a Monarch as a head of state (besides the above mentioned also the Netherlands, New Zealand, and Australia). Conversely nearly²⁰ all liberal democracies that have established judicial review are republics.

3.3.2 Constitutionalism and the Rule of Law: Global, Cosmopolitan, and Universalist: International Law and Its Relationship to National Law

Whereas state focused republican orientations connect the rule of law to national democratic control of all authority and is skeptical of genuine authority beyond the state, the classical liberal and neoliberal orientations connect the rule of law with the transnational primarily by way of a focus on the establishment of market structures. In contrast, constitutionalism and its understanding of the rule of law is best understood as having a global, cosmopolitan, and universalist orientation conceptually built into its DNA.

¹⁸ For the insistence that judicial review is about assuring the legitimacy of legislative acts and not justice, see now also Hickey (2022).

¹⁹ Unlike Scandinavian countries with populations between 5 and 10 million, the United Kingdom is a comparatively larger state of roughly 67 million, which is historically deeply divided by class, race, and regional identities. Here there is less cohesion and trust among the wider population than in Scandinavian countries. But *elite* cohesion is high, brought about in part by a shared educational background shaped by a small number of elite public schools and universities.

²⁰ One exception is Spain.

If the point of constitutionalism is to define the legal framework within which collective self-government of free and equals can legitimately take place, standards of constitutional legitimacy have to reflect the global legitimacy conditions for the exercise of self-government on the national level.²¹ Whether a national constitution and the political practices authorized by it are legitimate does not depend only on the appropriate democratic quality and rights-respecting nature of domestic legal practices. National constitutional legitimacy is not self-standing. Instead, national constitutional legitimacy depends, in part, on how the national constitution is integrated into and relates to the wider legal and political world. The drawing of state boundaries and the pursuit of national policies may generate justice-sensitive externalities that national law, no matter how democratic, cannot claim legitimate authority over. It is the point and purpose of international law to authoritatively address problems of justice-sensitive externalities or threats of externalities of state policies by way defining the boundaries of legitimate state policies. International law seeks to create the conditions and defines the domain over which states can legitimately claim sovereignty. States have a standing duty to help create and sustain an international legal system that is equipped to fulfill that function. Only a cosmopolitan state—a state that incorporates and reflects the global legitimacy conditions for claims to national self-government and sovereignty in its constitutional structure and foreign policy—is a legitimate state. And international law is not a derivative afterthought, but an essential focus for those concerned about legitimate authority. Three things follow from this.

First, constitutionalist ideas are central not only for the domestic state context, but also for making sense of international law and providing it with its own principled grounds and internal teleology. Constitutionalism is *global* in this way. What more specifically this requires for an understanding of the rule of law in international relations is highly contested and too large a topic to address here. Here it must suffice to point to some of the core questions about what an international rule of law requires: Is it necessary for there to be compulsory jurisdiction for courts, allowing states who claim that their rights have been violated a legal remedy? Or is it sufficient that the spread of courts and tribunals after the end of the Cold War has led to a situation in which in many instances of claimed rights violations judicial remedies of some sort will be available, while generally the enforcement of international relies on unilaterally decided countermeasures? Is it necessary for there to be some kind of a global democratic process empowering humanity as a whole to act as a political subject and if so how might it be conceivably structured? Or is it sufficient for highly fragmented processes across different subject matter domains to provide administrative processes to address regulatory issues, as the idea of global governance suggests? Is it necessary for there to be some kind of effective collective security regime, assuring

²¹ The connection between “accountability for external effects arguments” and constitutionalism beyond the state has been first made in the legal literature on EU law by Maduro (2000), and has been more fully developed for the purposes of reflecting on the structure and justification of global constitutionalism in Kumm (2013). In the political sciences the “external accountability argument” goes back to Grant and Keohane (2005).

what amounts to an effective global monopoly on determining what constitutes legitimate use of force? Or is it the case that the rule of law is compatible with a liberal global hegemon, insisting on its prerogative power to effectively anchor and guarantee a stable “rules based” order globally? If you believe that the rule of law requires each of the more demanding options, then the rule of law functions primarily as a critical ideal against which to assess the deficiencies of the existing international order. If you believe the less demanding options are sufficient for the establishment of an international rule of law, then you’ll be more comfortable describing the actual international legal order as a genuinely liberal one.

Second, constitutionalists insist that domestic law and international law should be understood as an integrated body of law. Such a picture of the legal world has features that might plausibly be called monist. But if it is monist, it is not a monism grounded in the idea of a source-based hierarchy of norms. The norms of international law do not trump the norms of domestic law in all cases. Instead the relationship between the two bodies of law are mediated by shared constitutional principles—the principles that constitute both domestic and international law—and gives rise to a rich and institutionally complex practice that has been described as “constitutional pluralism.”²² But even if these principles do not require the general subjugation of national law to international law, they require that national constitutions be “open”: an “open” constitution is a constitution that allows states to engage the international community and international law constructively, both by allowing for membership and participation in international institutions, and by allowing national courts to play a meaningful role in enforcing international law.²³ Call the requirement that the constitutional foreign relations law of a state be “open” to international law in the appropriate way the *cosmopolitan* element of the rule of law.

Finally, constitutionalism is *universalist*. Domestic constitutions are required as a matter of international human rights law, both in their structural features and primary norms—to respect, protect, and fulfill universal human rights. This is best interpreted as effectively requiring domestic constitutions to establish the core structural features, institutions, and procedures of liberal constitutional democracy.²⁴ There are many varieties of liberal constitutional democracy, of course, and each state has to design its institutions and codify basic norms in a way most suitable and resonant for the relevant political community. But only constitutions that plausibly qualify as liberal constitutional democracies meet international standards. This does not mean that states not meeting these standards should not be recognized as sovereign states, or that they may be subjected to coercive intervention. But it does mean that a state that is not a liberal constitutional democracy can be described as legally deficient, incompatible with what the rule of law requires.

²² See for a wide-ranging discussion of positions Avbelj and Komárek (2012).

²³ Whereas the relationship between European Union law and the constitutional law of member states is a classical preoccupation of EU lawyers, the constitutional law of foreign affairs more widely has also more recently been rediscovered as a general field of interest, see for example, Bradley (2019), Nollkaemper et al. (2018). For a constitutionalist approach to this field see Kumm (2005, p. 256).

²⁴ For an early argument in this direction see Franck (1992). For an early critique see Marks (2000).

4 Conclusion

There is a general *abstract* consensus that a commitment to the rule of law is an integrative part of the liberal script. Yet the rule of law is also a concept at the heart of concrete contemporary disagreement, leading to contestations about what legitimate authority looks like and how we should govern ourselves. When law firms lobby for the institutionalization of investor–state dispute resolution in specialized tribunals, they invoke the rule of law as an argument to strengthen their claims and the claims of investors. At the same time, progressive international movements mobilize against these and other neoliberal practices, rejecting not the rule of law, but insisting that its correct interpretation requires something more responsive to democratically prioritized public policy concerns.²⁵ Furthermore, in some states coalitions are built between liberal republicans and populist authoritarian orientations to seek to free governing majorities from the shackles of judicial constitutional oversight, decried either as “overconstitutionalization” or “juristocracy,” all in the name of restoring the proper rule of law.²⁶ At the same time, the European Union introduces mechanism allowing it to sanction member states undermining constitutional courts in the name of the rule of law.²⁷ Competing understandings of the rule of law thus give rise to concrete highly politicized contestations about institutional roles and the direction of public policy. The paper is successful if it provides a helpful analytical framework for a deeper understanding of these contestations, the varieties of liberal traditions they are connected to, and the normative issues they raise.

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²⁵ For a discussion of these concerns see Kumm (2015).

²⁶ On this see Schäfer and Zürn (2021).

²⁷ For the description of the EU’s rule of law conditionality regulation see European Commission (2023).

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