The Security Sector in a Law-based State

A Short Guide for Practitioners and Others

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May be cited

Someone must have been spreading false information about Joseph K., for without having done anything wrong, he was arrested one fine morning.

Franz Kafka, *The Trial,* (1925)

A Note on the Text

This is a pre-publication edition of a book that I hope to publish in a more conventional form in 2016. It is very nearly complete, but the current text lacks a full bibliography and index, and needs slightly bringing up to date in certain cases. I am, however, issuing it now in response to a number of demands for a book-length treatment of the Rule of Law, suitable for practitioners, as well as for Master's level and other students. Comments are welcome, preferably at dmc1952@me.com
If you have downloaded the text, please feel free to pass it on to others. The text may be cited as follows:
David Chuter, *The Security Sector in a Law-Based State: A Short Guide for Practitioners and Others,* Pre-publication edition, 2015, available at (followed by the site from which you downloaded it).

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FOREWORD

This text has its origins in a suggestion made in 2010 by Professor Ann Fitz-Gerald of Cranfield University that I might like to teach a module on the Rule of Law as part of the Master's degree in Security Sector Management, taught at the UK Defence Academy and elsewhere in the world. Without her initiative, and her support and encouragement, and that of her colleagues, this text would not exist.

I was very happy to do accept the suggestion, since the subject is one that had always interested me, and that I had never had a chance to teach. As always happens, the first courses I taught led to demands for others, and over the next few years I wound up giving a series of lectures on different aspects of the subject in different parts of the world. Among many others, I would single out Dr Eleanor Gordon of the University of Leicester, who asked me to produce an online lecture on the subject for the Master's course in Security, Conflict and International Development, which obliged me to rethink some of my ideas in a concise form.

As is normal, when Professor Fitz-Gerald asked me to teach the course, I looked around for suitable introductory reading material for the students. To my disappointment, but not entirely to my surprise, there was very little of any value, and practically nothing on the security sector. There were several general academic treatments of the Rule of Law from the Anglo-Saxon perspective, on which I have drawn, and a series of (generally discouraging) case studies of attempts to instil these ideas in non Anglo-Saxon societies. There was also a whole area of "grey" literature: the products of donors, international organisations and NGOs, which were admirable in their sentiments, but largely useless for any practical purpose. Moreover, I had had the good fortune in the course of a long professional career to work with the security sectors of many states around the world, as well as living, for some years now, in a state where the Rule of Law tradition is much less well-known than that of the État de droit, which gives this book its title. I therefore appreciated that there were all sorts of issues not addressed in the traditional Rule of Law literature, and for that matter a great deal of literature on other subjects that was highly relevant. So I concluded, not for the first time in my life, that if there was to be an introductory text on the subject, I had better write it myself. Originally, this took the form of a rather shorter study guide, but inevitably I soon began to be asked when I was going to produce a full-length book on the subject. After several false starts and delays, this is (nearly) it.

The cliché that all lecturers learn from their students has never been truer than in this case. I had the good fortune, almost from the start, to teach students overwhelmingly from outside the Anglo-Saxon world, and in some cases from very different societies indeed. Much of this book would not have been written without the disconcertingly fundamental questions they have been in the habit of asking me, and the essays and dissertations they have produced. I am grateful to them all, and I hope that this text will continue to develop as the ideas in it are tried on new audiences.

INTRODUCTION: LAWS AND RULES

We begin with a distinction which is almost a contradiction, but which has become, over time, an uncomfortable amalgam, if not a hopeless muddle.

It is customary for books and essays written in English, and covering the subject matter of this book, to advertise themselves as being about the "Rule of Law". That term (here often abbreviated to ROL) will be used frequently in this book also, since it dominates thinking about a certain set of issues, even if those issues have little to do with laws, or rules, as such. But before we plunge into the subject matter itself, we need to understand how this amalgam to which I have referred came to exist, and why it has since become almost self-defeatingly complex and incoherent, and thus why most, if not all, so-called "Rule of Law" projects ultimately fail.

Much of what follows will be treated in more detail later in the book, but it will be helpful to the reader to keep the following rough sequence of events in mind as we go.

What was christened "The Rule of Law" in the nineteenth century has its origins in the classic English Liberal tradition, which for our purpose we will take to begin with Locke, at the end of the seventeenth century, and to effectively conclude with John Stuart Mill two centuries later. The tradition was not confined to England, of course, and it influenced the progenitors of the American Revolution as well as French thinkers from Montesquieu to de Tocqueville. This tradition, simply put, placed individual liberty, especially economic liberty, at the heart of its concerns, and sought to constrain the power of the state as much as possible. Indeed, beyond the protection of property (and their own persons), most Liberal thinkers saw little use for the state at all. This lack of state interference was what made the English (later British) and American states "free" in the celebratory rhetoric of their own political theorists, and those of their foreign admirers.

As its exponents made absolutely clear, this was an elitist ideology, not a popular one. The freedom it espoused was carefully qualified, and applied effectively only to property-owners, who had demonstrated, through their economic success, that they deserved it. The mass of the population, including my ancestors and perhaps yours, were too bestial to understand, let alone benefit from, such concepts. To control them, and prevent assaults on property, Liberal thinkers demanded (and to some extent got) what amounted to an embryonic police state. True economic freedom, of course, required the state to agree not to interfere in economic

relationships of any kind, as well as to ensure that the new labouring classes did not organise to disrupt these relationships either. It was wrong and misguided for the state to attempt to regulate such things as wages, working hours or child labour, because such things were effectively set by nature and human capacity, and it would be pointless, a well as morally wrong, to attempt to influence them. And finally, Liberalism's exponents saw ethnic minorities and colonial peoples as wholly excluded from these freedoms as well, and viewed with equanimity, or even approval, the extermination of the American Indians, and the continuation of slavery as an institution. In each case, as also with colonial subjects of certain countries, these peoples had lost the economic battle, and so deserved to disappear, perhaps with a helping hand if that were needed.

I have dwelt on this tradition at a little length for two reasons. Partly this is because standard treatments of Liberalism tend to retreat in distaste before it, but partly also because it was enormously influential in establishing the original Rule of Law tradition. A century or so ago, indeed, it would have been regarded as an unexceptionable summary of the ROL, yet today virtually none of its precepts appear in initiatives trading under that name, with the exception of those of International Financial Organisations, for reasons which will be immediately obvious. What changed?

Briefly, the elitist concept of Liberalism was challenged and influenced by a much more universalist one. In the early radical phase of the French Revolution, there arose the, literally, revolutionary, idea that rights with regard to the state applied to everyone, in all places at all times. This led, among other things, to the abolition of slavery in French colonies. Although savagely repressed (not least in France) this universalist tradition continued to grow in strength, assisted by fears about the consequences of the growth of modern political ideas like Socialism and Communism, and the attraction of these ideas to newly enfranchised populations. In addition, some Liberals were attracted to religious movements, such as the Quakers, interested in social justice. So in a complete reversal, many Liberals came to embrace the same socially and economically progressive ideas their predecessors had so bitterly opposed. Yet the tension between the two traditions has remained, because their origins are different. One is essentially middle class and elitist, the other populist and universalising, often shading into one of the varieties of Socialism. It is for this reason that the bloodiest examples of the repression of popular political movements, from the crushing of the radical phase of the French Revolution in 1794, through the repression of the popular revolts of 1848, the savage destruction of the 1871 Commune, to the violent repression of populist movements in Germany and elsewhere after 1918, were not the work of reactionary political forces, but of Liberal ones.

The growth of mass political parties of the Left and pressure for social reform, as well a subsequent desire not to repeat the disaster of the Second World War, led effectively to the rhetorical victory of universalist ideas after 1945, and the promulgation of various Human Rights texts which tend to be seen as the foundation of the ROL today. I say "rhetorical" because the reality, over the last thirty years, has been a clear reversion to something closer to the elitist liberal model of a century or more ago. But the situation is extremely confused, and so today both supporters and

opponents of a minimum wage, for example, can each describe themselves as "liberal".

This is only one tradition, albeit the most important one, and yet it contains within itself enough contradictions to make the idea of the "Rule of Law" problematic. But as well as left-wing traditions of collective rights (which are passed over very briefly here), there is another tradition, which has become partly absorbed into, and confused with, that of the incoherent Rule of Law tradition itself. This is the tradition of the Law-based State, which gives this book its title.

Again, very briefly, this tradition (*Rechtsstaat* in German, *État de droit* in French) is best seen as a reaction against the absolutism that had characterised continental European states from early modern times. In such a system, the Ruler held absolute power, in the sense that all the functions of the state were in the hands of one person. There was no countervailing source of power, nor any appeal against any act of the Ruler. The new tradition sought to replace this absolutism with a law-based regime, where every aspect of life was regulated by a "hierarchy of norms" deriving ultimately from a Constitution. In a completely different way, these ideas were intended to achieve much the same result as the Rule of Law, in limiting the arbitrary powers of the state. This tradition remains extremely powerful in most parts of Europe and also has analogues in countries influenced by Ottoman traditions, for example. Whilst the Law-based State tradition is not entirely monolithic, it is much more coherent, historically and conceptually, than the tradition of the Rule of Law, and forms the historical basis, for example, for the procedures of the European Union.

It would be hard to think of two more different traditions: a law for everything, versus as few laws as possible, for example. And to add to the confusion, the two traditions have also interpenetrated to some extent. What is described in English today as the idea of the "Rule of Law", and recommended to, and in some cases imposed on, other countries, is the uncomfortable amalgam described in the first paragraph. Depending on the case, the institution and even the individual, it consists of a mixture of ideas from the two traditions (with their variants) described above. So, for example, a donor ROL initiative with a police and justice system in a transitional state might simultaneously include an initiative to draw up a complex code of conduct for dealing with women and ethnic minorities, and a radical programme to abolish laws relating to working conditions and employment protection, without anyone realising the contradictions involved. Within the team implementing the programme, drawn perhaps from several countries and speaking several languages, there might be as many different understandings of the ROL as there were team members.

If the first stage in achieving clarity is the recognition that you are confused, then this book may perhaps be of some value in describing these confusions in more detail, and trying to clarify what the underlying issues actually are. Departing from a more complete description of the warring traditions and clumsy compromises described above, therefore, it goes on to discuss the important practical issues that they tend to obscure, and tries, at the end, to provide some very modest ideas for how to manage the security sector in a law-based state.

CHAPTER ONE:

THE LAW-BASED STATE AND THE RULE OF LAW

Freedom for the pike is death to the minnow – RH Tawney

The title of this book refers to a concept, which, although seldom called by this name in Anglo-Saxon writing, should be readily understandable to everyone, whether they have been formally introduced to it or not. As already suggested, a "law-based state" is exactly what it says: a state based on law (and laws) rather than on arbitrary decisions of the powerful, and a state in which everybody – even the powerful, even the government – is subject to the same laws.

It will be obvious from what has already been said that the traditional idea of the "Rule of Law" is not the same thing at all, although that term is now used in so many different and conflicting ways that some of its many meanings have become relatively close to the concept of the law-based state. And the concept of the law-based state itself is a relatively fluid one, as we shall see also.[1] Nonetheless, as I hope I have already shown, the concept of the "Rule of Law" is at best incomplete, and at worst misleading, and I have therefore not used it in the title of this book.

It is also worth pointing out that, notwithstanding the political and intellectual dominance of the Anglo-Saxon tradition, the majority of societies around the world share concepts that are closer to that of the law-based state than to that of the Anglo-Saxon Rule of Law as it is normally (if very variously described), This is a theoretical weakness, but it is also a practical weakness in Rule of Law initiatives, as we shall see. That said, it would be rather pointless to construct this entire book *without* reference to the Anglo-Saxon tradition of the Rule of Law at all, since that tradition forms the basis of most approaches of donors and international organisations. This already complicated situation is further exacerbated by the fact that much ROL literature, whilst called that, and written in English, is actually produced by authors from various different traditions, some of which (like the German) are fundamentally

[1] A very thorough, if now somewhat dated, comparison of the two concepts is Daniel Mockle "L'État de droit et la théorie de la rule of law" in *Les Cahiers du Droit,* Vol "(, No 4 (1994), available online at http://www.erudit.org/revue/cd/1994/v35/n4/index.html

those of the law-based state. In an attempt to keep confusion in this present book to a manageable minimum, I have accordingly adopted the following approach:

The concept of the law-based state (French *État de droit*, German *Rechtstaat,*) is complex, and varies somewhat between countries, although it is much clearer and easier to understand that the Rule of Law tradition in its almost infinite variety.[2] But its central point is that all parts of society, including individuals, institutions and governments, live in a law-based context to which they are all, even governments, subject. This does not simply mean, as it might in Anglo-Saxon countries, that the government can ultimately be overruled by the courts. Rather, it means that the government, and its subordinate institutions, may not act *at all* unless they can justify their actions by reference to laws, including ultimately the Constitution. In France, for example, even the smallest act of the smallest municipality has to be preceded by a citation of the applicable laws: if one is not cited, or invalidly used, then the act can be challenged in court.[3]

In spite of the international currency of the Rule of Law as a collection of ideas, its very Anglo-Saxon connotations, and the complete lack of agreement on definitions, mean that it is easier to use the formulation "law-based state", which is by comparison clear and easy to understand. For the purposes of this book, the concept of the law-based state to be used is the following.

A law-based state is one where the government and its agents have a settled, institutional relationship of subordination to hierarchical levels of law, and where the whole range of security and justice activities of the state respects this law, both in spirit as well as in the letter. In turn, the citizen has a variety of legal mechanisms to attempt to enforce their expectations of the state.

The book is then largely concerned with the practical and managerial problems of applying this definition in real life, especially in the security sector. Some states have developed this idea further than others, but whether the system is described as the "law-based state" or the "rule of law", fundamentally the same practical issues arise.

All that said, so much has been written, and continues to be written, in the Anglo-Saxon Rule of Law tradition, that it is sensible to begin with that, to point out its difficulties, to continue with a discussion of the law-based state, and then to proceed to broader issues, which are themselves more general in nature, are essentially found in both traditions, and which do not depend on precise definitions. I have used the term "Rule of Law," with which most readers will be familiar, to refer to the corpus of issues with which both the ROL and the law-based state have to grapple, rather than mechanically adding "law based state" on each occasion. I have only referred separately to the law-based state where the issues diverge. This is

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[2] For a good summary of its development, in both the French and German traditions, see Jacques Chevalier, *L'État de droit*, 5th edition, Montchrestien 2011.

[3] The official French government explanation of the *État de droit* is available online at http://www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/qu-est-ce-que-etat-droit.html

perhaps a clumsy solution, but it seems to be the least bad available. We return to more theoretical questions at the end.

DEFINITIONS FOR SALE

We begin, then, with what is referred to as the "Rule of Law". In its current manifestation it is a complex and slippery idea, both inherently, and also because of its political instrumentalisation by governments, donors, international organisations and local actors. Most contemporary discussions of the ROL nod briefly to this uncertainty, and to the plethora of overlapping and competing definitions, before effectively giving up, and proceeding to discuss it from the angle, or angles, which the authors, or their organisations, appear to prefer.

Why is it, however, that "there are almost as many conceptions of the rule of law as there are people defending it"?[4] First, conflicting and competing definitions are, of course, normal in the humanities and social sciences. There is not much debate about what a kilometre is or what the bile duct does, but there are large, and potentially endless debates about the nature of fascism, the causes of the French Revolution and the sociology of knowledge, not to mention the way one should live one's life. That is perfectly reasonable, since in social science and ethics there are seldom any final answers. The problem is, though, that much of the literature of the ROL, and almost all of the activities carried on under its banner today, are not descriptive or analytical, but rather prescriptive and practical. That is to say that governments, donors and international organisations define the ROL as they see it, and then finance projects to improve or introduce it, seeking to persuade governments to change their behaviour in line with the theories. Here, the often confused and contradictory nature of the definition of the ROL is a real practical problem, for a number of reasons.

First, governments may be asked by different donors to carry out a range of initiatives, all under the ROL rubric, with little coherence, sometimes in opposition to each other, according to different definitions used by the different actors. Second, even these actors may be confused about what the ROL means, and different offices in different countries may sponsor projects that have little relationship to each other. Meanwhile, staff in headquarters, unfamiliar with life in the field, may produce politically correct consensus documents on the ROL for public consumption, which do not actually describe what their own colleagues are doing.[5]

Moreover, there are fashions in government reform and development aid, as there are in everything else, and donors, as well as the community of NGOs and consultants that service them, will tend to clothe their projects in the currently fashionable vocabulary. Thus, an NGO which has been working for many years for a donor to overhaul the code of justice of various African military forces may have

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[4]Olufemi Taiwo. "The Rule of Law: The New Leviathan?" *Canadian Journal of Law and Jurisprudence,* Vol XII, No 1, (January 1999): p. 151.

[5] A good survey of the practical problems encountered by rule-of-law reformers, on which I have drawn in writing this chapter, is Thomas Carothers (ed) *Promoting the Rule of Law Abroad: In Search of Knowledge*, Washington, Carnegie Endowment for International Peace, 2006.

described its work successively or alternatively as justice reform, military capability building, governance reform, security sector reform, human rights training and now ROL, even though in practice it might have continued to do exactly the same thing.

All of this, of course, is typical of the agendas of donors and international organisations generally, and is not intended as a criticism. It is important to understand, though, that the ROL joins a set of other nebulously-defined issues including governance, security sector reform, development, human rights and democratisation, where huge amounts of money are spent on programmes, but where agreement on even basic definitions is a long way away, and may indeed be impossible.[6] Why this difficulty? There are two main reasons

MISUNDERSTANDING HISTORY

First, ROL deals with the most sensitive part of the apparatus of state and governments, areas which even weak states try to cling on to. Acting in the area of the ROL – or at least using its discourse – is a way of forcing one's way into this most sensitive of political areas, and having influence over the fundamentals of a state's operation and its relationship with its citizens. Naturally, there will be much enthusiasm to acquire this influence, and so outside organisations will tend to define the ROL as something that falls within their remit, and where they have a valid reason to involve themselves.

Thus, for International Financial Institutions, the ROL is a prerequisite for economic growth and a component part of neoliberal economic theory. This is often presented as a given, although in fact there is little actual evidence it is true. For development organisations, moreover, the ROL is a requirement for sustainable development and inward investment. In practice, organisations like the World Bank and the OECD tend to define the ROL almost entirely in terms of enforceable contract law. This is understandable, since they are experts in this area, as they are not in security or justice generally, and such a definition suits their political agendas. In addition, these organisations are the inheritors of the Liberal political tradition already referred to, that sees the ROL as essentially about nothing more than the ability to make free economic decisions (to express "preferences" in the economic sense of that term) together with laws to regulate them. Yet for all the effort expended in different countries, including Russia and China, history suggests that the essential argument being used here – that the ROL, as very narrowly defined, is essential for economic development - is simply untrue. It depends of course, how you define development, and it is possible to define both development and the ROL in ways that make the one seem tautologically to depend on the other. But if common sense definitions of the two terms are used, then such a relationship is essentially absent from the historical experience.

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[6] I have said rather more about this in David Chuter, "Fighting for the Toolbox: Why Building Security and Justice Post-Conflict is So Difficult" in Eleanor Gordon (ed) *Building Security and Justice in Post-Conflict Environments: A Reader*, University of Leicester 2014, available at https://www2.le.ac.uk/departments/criminology/documents/building-security-and-justice-in-post-conflict-environments-a-reader

To begin with, the idea that economic growth requires inward investment is not supported by history. Every major economic power in the world today funded its growth from its own resources, even after wars.[7] To that extent, the idea that the ROL is necessary to give hypothetical foreign investors "confidence" is just an unnecessary complication. But more generally, periods of rapid development or even rapid economic growth (and the two are not the same) do not seem to be associated with the strengthening of the ROL. In South Africa in the late 19th century, for example, investment poured into the country from everywhere, but not because the ROL had improved. Rather, there seems to have been little law of any kind at that stage. What there was, was an enormous amount of money to be made by the fastest and most unscrupulous operators. Much the same is true in contemporary Angola, Sudan and the Democratic Republic of Congo, where investment is flooding in because of the hope of making enormous profits. By contrast, neighbouring states such as Namibia or Botswana, where the ROL is better developed, see much less investment. In such potentially lucrative situations, the ROL is a hindrance, if anything.

Indeed, the most striking example of the irrelevance of the ROL to economic development (or at least growth) is 172 crime. For obvious reasons, enforceable contract law is not a major feature of the international drugs trade, reckoned to be one of the largest, in absolute terms, in the world today. Ironically, transnational organised crime has, for this very reason, to be based largely on trust. The trade requires large investments in infrastructure, transport and people, all of which have to be undertaken without the certainty that the money will be recovered.

It is arguable, in fact, that the ROL, in this narrow sense, is actually bad for economic development. Legal systems involve what economists call "transaction costs," which is to say the costs of simply making a system work. So a complex and elaborate legal system obliges companies to retain large and expensive legal departments and seek costly external advice. A great deal of time, money and effort is involved in legal battles and in attempting to insulate oneself in advance against legal challenges. In the United States, many have argued that the "lawyerisation" of society has forced companies to be conservative and defensive in their strategies, and to shun potentially dangerous innovation. Moreover, this kind of legal environment puts an emphasis on rent-seeking rather than useful economic activity. The current interesting example is that of the "patent troll:" a company, often existing only on paper, which buys collections of patents and uses them for opportunistic legal action against other companies.[8] By contrast, the world's most successful economies, especially in Asia, rely much less on legal frameworks, and much more on relationships of trust between business partners.[9] ROL initiatives seek to replace

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[7] On the delusions of international financial assistance, see Ha-Joon Chang, *Bad Samaritans,* Cambridge, 2007.

[8] A recent attempt to estimate the damage to the US economy caused by the abuse of the patent system is Bessen, Ford and Meurer, "The Private and Social Costs of Patent Trolls", *Boston University School of Law Working Paper 11-45*
(September 19, 2011).

[9] And not only trust. When in Bangkok many years ago, the author was told by someone in a position to know that the going rate for a business-related assassination was then $25,000. The price has presumably gone up since, but my interlocutor's point no doubt remains valid – that such methods are substantially cheaper, quicker and more certain than engaging lawyers.

these relationships of trust with legal frameworks which on the one hand can never be exhaustive (and so generate massive uncertainty), and on the other tend to replace social and moral imperatives with legal formulas which individuals feel no guilt in evading, provided the letter of the law is respected.

Moreover, such legal codes do not affect all sectors of society equally. Many are directly imitated from overseas, and thus favour foreign companies over domestic ones. Likewise, no system of rules, however elaborate, can cover all eventualities, and the more complex the legal system the more disputes there will be.[10] Organisations that have the money and resources to fight such claims will prevail over those that do not. Indeed, large companies, especially from abroad, may deliberately use their financial muscle to keep legal cases going for years, to exhaust the other side and win cases that on the merits of the argument they should lose.[11]

I have treated this interpretation of the ROL at a little length partly because many people coming to the subject for the first time are surprised to encounter it, and partly because it is a good example of an interpretation of the ROL which is highly influential politically, but which is, in effect, only a series of assertions with no evidential support at all. It is, nonetheless, important because it is squarely in the tradition of Liberal interpretations of the ROL over the last few centuries – a tradition to whose wider implications we will return later. (It has, obviously enough, little to do with the tradition of the law-based state).

This promotion of definitions of ROL that lack any evidential foundation is not confined to organisations involved with economic issues. They are simply the most visible and blatant practitioners of it. Similar assertions are also found among other organisations: they are often self-serving, and designed to increase the power and influence of various organisations. So for human rights groups, human rights and the ROL are essentially the same, and one cannot exist without the other. For other organisations, the ROL is a fundamental part of democratisation or the reform of the security sector, without which the transformations sought cannot be achieved. For others, it is inseparable from greater media freedom, presupposes an increased role for women, or a stronger civil society, and many other objectives, according to the interests of the organisation concerned. It is worth simply pointing out here that, as with the liberal economic example, evidence of causative relations between the ROL and any of these desirable outcomes is essentially non-existent, except, again, where one is tautologically defined to include the other. Particularly fallacious is the idea that the ROL, in some manifestation or other, is associated with the risk or avoidance of conflict. This is an issue I return to at more length below.

DOUBTFUL ASSUMPTIONS

[10] Something that will be familiar to everyone who has worked in a large organisation, but which was in fact proved to be true, mathematically, by the Austrian mathematician Karl Gödel.

[11] See, for example, the lengthy and futile attempts of the people of Bhopal to obtain compensation for the chemical leak of 1984, which claimed tens of thousands of lives, and had to contend with obstructionism both from the US company which owned the plant, and the Indian government. From a huge literature, see, for example, Sheila Jasanoff, "Bhopal's Trials of Knowledge and Ignorance" *Isis,* Vol. 98, No. 2 (June 2007), pp. 344-350.

The second reason for the confusion and complexity in the definitions of the ROL is more philosophical. As with democracy, human rights and other related subjects, most ROL ideas are based on assumptions that are often widely accepted, but inherently un-provable. For example, the idea of the importance of equality before the law is widely supported today, but it remains, a bottom, only a personal preference to say that equality is preferable to inequality. Many societies, even today, find the concept hard to accept, and there is no way in which it can logically be proved to be superior to other systems. (And indeed, the recent tendency has been to seek positively *unequal* treatment before the law for groups described as "women" "children", or simply "victims.") Most ROL thinking is therefore essentially arbitrary in its choice of objectives, and the very breadth and fuzziness of the concept means that different initiatives will begin from quite separate and often irreconcilable sets of assumptions.

In the circumstances, it is natural to ask whether the slogan "Rule of Law" (for it is not really even a concept) has any meaning or any use, or whether it should simply be abandoned as pointless, as perhaps should such ill-defined and unhappy concepts as security sector reform, "governance" and democratisation, whose utility has seemed less and less obvious as the years pass and the corpses of unsuccessful interventions pile up.[12]

But there is a difference, in the sense that whereas many of these other slogans are only slogans, the ideas which are trying to escape from the noise and confusion of the ROL "debate", and the more orderly debate that surrounds the law-based state, are themselves inherently important for society and for the citizen. This is because the ROL is, fundamentally, about the strategic relationship between the citizen and the state, and is therefore objectively important for the management of any state and any political system. However, precisely because the ROL is about the relationship between the individual and the state, the elements of the ROL that you consider important will vary depending on your own conception of this relationship, and indeed your place in society. The anchoring of the ROL in western, and primarily liberal, traditions of thinking about the state creates its own problems when the ROL is applied to non-western liberal societies, but in this context it is also important to note that there is not even a unified western liberal view of the state, and so no single view of the ROL either. It is this very variety of views and traditions that makes the study of the ROL interesting, and nowhere more than the security sector.

Thus, although the dominant western, especially Anglo-Saxon tradition sees the state as the main source of danger to its citizens, and assumes the ROL is about the limitation of state powers, and whilst extreme versions of this approach deny much of a role for the state at all, beyond that of a kind of economic umpire and enforcer of contract law, this is only reflected in certain concepts of the ROL. Mainstream social-democratic thinking sees a larger role for the state, in helping people to lead better lives, and their view of the ROL reflects this. Some European

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[12] On the misadventures of Security Sector Reform see among others, David Chuter, "Understanding Security Sector Reform", *Journal of Security Sector Management* Vol 4 No 2 (2006). For possibly the last word necessary on "governance" see Kate Jenkins and William Plowden, *Governance and Nationbuilding: The Failure of International Intervention*, Cheltenham, Edward Elgar, 2006.

continental traditions, with a strong tradition of administrative law, emphasise formal correctness of procedure and careful delineation of responsibilities, and this is very important in the law-based state debate. Many states have a tradition that means that all government actions have to be explicitly justified by a law or a decree. (Here, we are also back in law-based state territory). Recent securocratic thinking in major western states, on the other hand, has favoured reducing controls on the power of the state at the expense of individual freedoms in the name of public safety. All of these different ideas have left their mark, often indirectly, on the ROL debate and on specific initiatives undertaken with third countries.

In most cases, these different (and relatively arbitrary) points of departure are not recognised as such, and the thinking behind each of them is assumed to be consistent, or even universal, if, indeed, the question actually arises. It is therefore very difficult to make a sensible analysis of the various ROL propositions, or to have a serious debate. Understandably, some have wondered whether the effort is actually worth making.

WHAT THIS BOOK IS (MOSTLY) ABOUT

Whilst, for obvious reasons, there is little point in trying to produce some kind of consensus or compromise definition of the ROL, it is possible to isolate a small number of areas of common interest in the ROL debate, most of which also appears in debates about the law-based state. They are subject to debate and challenge even within western liberal societies. But they will do in this context as a brief indication of what the ROL debate is (mostly) about.

First, is the idea that all members of society, all institutions and all levels of government and their agents are ultimately bound by the law, including international treaties and conventions. This concept, even if looser in the ROL tradition than the law-based state tradition, has two important immediate practical implications, if it to be effective. First, even if the principle of equality is established, in the Constitution or elsewhere, it still has to be put into effect. This means that, at least in principle, wealth, power, political position or influence should not affect the way that individuals are treated by the law. This is much more difficult and, in most societies, effectively impossible beyond a certain point. Secondly, and as we shall see later, there are no enforcement mechanisms by which governments can actually be bound to subject themselves to the law, if they refuse to do so. In this case, what we really mean is that governments, and the political culture from which they come, agree to be bound by the law, even if that law poses problems for them. The weakness of the Anglo-Saxon tradition, as opposed to that of the law-based state, is that in the former, rights, laws and constitutions are concessions wrung, grudgingly and sometimes by force, from power elites, and always at risk of being ignored, or even reversed.

Second, it is normally argued that laws passed by governments should have various positive characteristics. Different lists have been proposed, but in general it is argued that laws should be predictable, publicly promulgated, not be retrospective, not be impossible to obey, be clearly drafted and so forth. This is doubtless important, though of course any society – even the most authoritarian – may have laws which are technically perfect. (The tradition of writing about the law-based state

has historically placed a great deal of emphasis on this aspect of formal correctness, often at the expense of others).

Third, government and its agents should act in accordance with the laws. This is often tacked on as something of an afterthought, but in fact it is the heart of the issue. Citizens do not have relations with institutions, but with individual policemen, tax inspectors or immigration officers. Whatever the constitutional position may be, and indeed whatever instructions are given by hierarchies, if the will to behave correctly at the operational level does not exist, or if there are stronger pressures in the other direction, the ROL cannot be said to exist.

These criteria arose slowly and painfully over long periods, and often existed in practice before they were made any part of theory. Originally, human societies were small, and under the direct control of the strongest, the best warrior or the wisest hunter. More settled societies generally adopted rules for their own internal management, usually based around compromise, and involving only those issues that were likely to arise in everyday life. There was little scope for criminal activity in such societies, and what there was, was usually punished through humiliation rituals and restitution. Relations between villages and tribes, whether of commerce or conflict, were also regulated. Many traditional social systems in Africa and Asia, even today, are deeply influenced by these traditions. In general, there was a sharp distinction between acceptable behaviour inside the group, and acceptable behaviour outside it. The ancient Israelites, for example, were forbidden to kill each other, but encouraged, and even instructed, to exterminate rival tribes that did not accept their God.[13]

In smaller communities, the leader might spend some of his time settling disputes and dispensing justice, as Solomon did in the Bible, using a personal and episodic conception of law and justice. Here, justice was essentially a matter of respect for tradition, and punishing those who failed to follow that tradition's rules. It has effectively nothing in common with modern ideas of justice.[14] But eventually, powerful warriors would carve out kingdoms, towns and even cities would be established, and problems could no longer be sorted out at local level. The earliest codes of laws, like that of Hammurabi (conventionally dated at around 1760 BC) were an attempt to deal with these problems by promulgating lists of standard punishments (often very harsh) for particular crimes. The administration of justice was an important part of the power and majesty of a ruler, and a uniform code meant that the ruler's justice could be dispensed everywhere in the same way, even if he was not present. We therefore get the beginnings of the idea that laws should be stable and predictable, as opposed to arbitrary.

Yet at the same time we must not overstate the similarities with modern concepts. Nothing like our concept of law existed in Ancient Greece, for example: the word *nomos,* generally translated as "law" actually meant something much closer to "custom." Greeks, and even Romans, would have thought it odd indeed to put too much emphasis on texts: they relied much more native good sense, informed by

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[13] See, for example, the Book of Deuteronomy, Chapter 20, verses 16-18.

[14] See, for example, the discussion of Homeric Greece in Alasdair Mcintyre, *Whose Justice? Which Rationality?*, Duckworth, 1988, pp. 13ff.

reason.[15] ROL exporters are frequently taken aback by the fact that such traditions are alive and well in many African and Middle Eastern states today.

Nonetheless, codes of law became more complex as societies became more complex. At this stage, Trotsky's dictum that "all states are based on force", applied in its purest form. The rudimentary states, with their limited capabilities for coercion, were primarily designed to protect the ruler and the ruling elite. Codes of laws, but also armies and the earliest forms of police and intelligence services, were intended primarily to preserve existing power structures. Whilst some societies made efforts to develop and enforce criminal laws for the common good, law was for the most part an instrument of oppression. This especially applied in Europe, where the ruling elites were primarily landowners. Starting in 1773 in England, laws were rapidly introduced to enable existing landowners to seize and hold land that had previously been considered common property. The 1789 Declaration of the Rights of Man recognised the right to own property as one of the fundamental rights that the state should guarantee. Security and justice systems naturally evolved to ensure that the right to own property (and of course property itself) were protected.

Indeed, they were pretty much the only individual rights that were protected. Individual non-property rights as we now think of them are essentially a product of the last couple of centuries in the West. Insofar as personal rights existed in Shakespeare's times, for example, they were collective rights, often very ancient, in the form of privileges and exemptions from financial or other obligations. The idea of individual, universal rights, on which the modern concept of the ROL is based, would have seemed incomprehensible at that time, as well as socially and politically subversive. Most societies were organised hierarchically, with different sets of rights and responsibilities at different levels. Some still are. Society was conceived as an "organic" whole, in which different "parts" (bodily metaphors were common) although different, worked together. It was wrong to treat a master like a servant, but it was equally wrong to treat a servant like a master.[16]

The result was that codes of law of the day were often harsh, and by our standards unequal, but they were accepted as long as they were not arbitrary, and as long as they were fairly enforced. This remains the case today: what people mostly want is stability and predictability in their lives, and even harsh and repressive laws will be respected provided they are consistently applied.

How this situation developed into modern legal and political practice is described in the next two chapters.[17] Here, it is enough to record that the development of the ROL, in different ways in different societies, has historically been analysed according to three different types of theories about its nature, which have added a further layer of complexity to the debate, as well as to practice. One way of

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[15] A good recent book which is partly relevant to this argument, and which clearly demonstrates the gulf between Classical thinking and our own, is Melissa Lane, *Greek and Roman Political Ideas*, London, Pelican Books, 2014.

[16] See among others Darrin M McMahon, *Enemies of the Enlightenment: The French Counter-Enlightenment and the Making of Modernity*, Oxford University Press, 2001.

[17] The development of theory, as opposed to practice, is well covered by Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004.

approaching these distinctions is to consider the most ambitious – or at least the longest – definition of the ROL yet produced: that of the Secretary General of the United Nations in 2003.

For reasons already given, there is little to be gained practically by trying to produce an analysis or synthesis of definitions originated by different organisations for different purposes, but I quote this example because it includes just about every characteristic of the ROL that has ever been suggested, in the form of a massive laundry list. The ROL, we are told is: "… a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards." And moreover the ROL implies: …"measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

One could write a long commentary on this text, which is not really a definition at all, but rather a consensus-drafted descriptive formula that includes something for everyone, even if the sum total is an impossible (and internally inconsistent) standard, which no state has ever attained, or is ever likely to, and which is anyway almost impossible to judge. It is enough to say, though, that all such definitions really do is to combine a whole series of ill-defined concepts, in the hope that something more convincing will result from the amalgam. That this is seldom the case should surprise no one.

There are several issues hidden away here (separation of powers for example) about which a huge independent literature exists, and which we will come to presently. But here I want to use this portmanteau definition to illustrate the two major tendencies in definitions of the ROL, and then glance briefly at a third.

DIFFERENT APPROACHES

The first is often described as the "formal" approach. It is concerned mainly with formal correctness of procedure, and the technical content of laws. This corresponds to the language in the UN definition about accountability, public promulgation, equality etc, although confusingly these characteristics are often grouped together under the heading of "legal certainty" which is here treated as a separate issue. Critics of this approach (and for that matter of similar approaches in the law-based state debate) point out that it takes no account of what laws are actually *about*. In other words, an extremely repressive and anti-democratic judicial system, which criminalised dissent and criticism, would still meet the criteria for the ROL if the draconian laws were properly advertised and fairly enforced. An example would be blasphemy. Most states until recently had criminal laws against blasphemy (some still do) and prosecutions have been launched into modern times. (The last successful prosecution in the UK, *Whitehouse vs. Lemon*, was a private prosecution brought in 1979.) Traditionally, blasphemy was regarded as a criminal offence against the moral foundations of the state and was severely punished. Yet no matter how scrupulously such trials are conducted, and no matter how correctly the law is

applied, most people today feel instinctively that the legal system has no business regulating what individuals think and say about religious beliefs. (In the past, of course, they would have thought differently).

Thus, those who are more interested in the content of the laws favour the so-called "substantive approach" which, as in the UN definition, requires that laws be "consistent with international human rights norms and standards." The problem of course is that there is no agreed list of such norms and standards, and drafting one is effectively impossible. There are certainly lists of such norms and standards promulgated by politically powerful organisations, which nations generally find it prudent to pay at least lip service to, and which in some cases they formally adopt. But this does not mean that such norms and standards are universally, or even widely, accepted in all societies, nor that, in practice, governments always pay very much attention to them if they appear inconvenient. Norms, in other words, are not necessarily normal. In addition, this approach introduces a dangerously subjective element into the debate, and facilitates political meddling by donors. It also has a curiously relativistic effect. To the extent that they theoretically exist now, such norms and standards were not widely observed fifty years ago, when presumably the ROL was enjoyed in few if any countries. And our descendants in fifty years time, when norms and standards have changed again, will no doubt conclude that the ROL did not exist in our epoch.

Two good practical examples of this relativistic tendency are the death penalty and tolerance of homosexuality. Fifty years ago, the first was generally supported, and the second was generally condemned. Now, the opposite is true. Fifty years ago the death penalty was almost universal, whereas now, if still in force in certain countries, it is clearly in retreat. Educated westerners today generally find the idea of state killing repulsive, as their grandparents found it normal and acceptable. Likewise, fifty years ago homosexuality was illegal in most western states, and strictly punished. Now, those same states, as donors, criticise African countries that have not followed their own change of thinking, and threaten to cut off aid unless they do so.[18]

This illustrates that point, perhaps, that norms and standards tend to be very context specific, and to vary a great deal. In theory, therefore, the ROL should be based on custom and practice in individual societies. The problem is that most societies are different, and few of them share all of the norms of donors, or at least those they are trying to promote.

The third way of looking at the ROL is the "functional" approach, which effectively says that the ROL is strongest when rules and procedures give as little discretion as possible to government officials. It is thus intended to prevent, or at least limit, arbitrary behaviour. What you think about this depends on where you start from. It is true that excessive freedom of interpretation can promote injustice and inequality of treatment. But as anyone who has worked in government knows, excessively restrictive rules also make sensible – and even humane - decisions much more difficult to take. In practice, we all tend to want the rules enforced firmly

[18] Ironically, many of these laws were taken over, unaltered, from the laws of the colonial powers who are now the donors. See for example "Cameron threat to dock some UK aid to anti-gay nations", BBC, 30 October 2011, available at http://www.bbc.co.uk/news/uk-15511081

against others, even if of course in our case we hope that the rules can be interpreted in a way that reflects our special circumstances. This is especially the case in the security sector, where law enforcement has become steadily more "functional" with the passage of time. Informal social controls through authority figures such as teachers have been effectively abandoned, and the old tendency for a policeman to have a sharp word with an adolescent criminal rather than arresting them is now a thing of the past. It is not clear that society, or even the crime rate, has thereby benefitted, whereas countries that have retained these habits (such as many in Asia) have lower crime rates and more social stability. Moreover, the "functionalist" approach actually encourages unethical behaviour, even if that behaviour is not technically illegal, since it substitutes a legalistic, hair-splitting approach for one based on norms and standards. If I can get away with doing something which is wrong, but technically legal, then I will.

Also hidden away in the UN definition are echoes of two other approaches to the Rule of Law in the widest sense of that term. The first is often described as "Rule by Law", and corresponds approximately to the "formalist" definition discussed above. For many societies (China is a contemporary example) this is what the ROL is about. Provided everything is done "by the book," then the content of the law is less of an issue. The role of the courts is limited to saying whether the government has applied the rules correctly. This has much to do with the Chinese Confucian heritage of correct behaviour and respect for formal processes, as well as the use of the law in such societies to enforce and reinforce social distinctions. Clearly, this concept of the Rule of Law contains nothing to limit the power of the state, only to make it actions less arbitrary. The second is often described somewhat whimsically as "Rule by Lawyers" and describes a situation where substantial ethical and moral, as well as legal, issues are decided by courts, which can be empowered to overrule governments on many issues. There are two obvious difficulties with this approach. First, it makes lawyers, whom no one has ever elected, into a self-appointed and unaccountable legislature able to overrule elected governments. Second, judges are people, and they have political, moral and religious views. They can be bribed and intimidated, they may have unhealthy relations with political or business figures, and they may simply be incompetent. Indeed, some have argued that in such cases giving too much power to the judiciary "may be detrimental to the Rule of Law itself."[19]

Given all this, most actual ROL definitions, as well as programmes and writings, try to steer a third, slightly awkward, middle course. They accept that formal correctness is a necessary condition, but claim that it is not a sufficient one. The problem of what actually constitutes a sufficient definition is a highly complex and divisive one, where we are very unlikely to see a consensus any time soon, although in some senses it is the most important of all.

DONORS ADRIFT

Considering the extent and the cost of what Thomas Carothers described as long ago as 1998 as "Rule of Law Revival," it is reasonable to ask two questions at

[19] Tamanaha, *Rule of Law,* p.110.

this point.[20] The first is whether initiatives undertaken by donors respect, or at least nod towards, some of these complexities. The second is whether there has been any observable progress in implementing the ROL, against any measurable standard. In both cases, the answer is effectively "no".

The reasons are intertwined, and they have to do mainly with the gap between the normative aspirations of ROL activism, and the mundane reality of programmes for which people are prepared to pay. The principles of the ROL are by their nature absolute: we say "equality before the law" not "quite a lot of equality before the law. It would similarly be odd to talk of "quite a lot of legal certainty." They are therefore aspirations, not guides to practical action, and they are ultimately impossible to measure. For example, one reason for America's astronomically high prison population, according to an *Economist* report, is that "many laws, especially federal ones, are so vaguely written that people cannot easily tell whether they have broken them."[21] Thus, one of the key principles of the ROL – legal certainty – is not being respected. But even if the will to remedy such a situation existed, how in practice would you actually go about it, and more importantly how would you know whether you were succeeding or not, and by what measure?

So a Development Ministry funding a ROL project overseas has to look around for intermediate objectives, which it can argue should have the effect of enhancing the ROL, at least in theory. The politics of government funding are such that parliaments and oversight bodies demand proof that money has been well spent, and bureaucratic politics requires concrete progress to be shown within the 2-3 years an individual customarily spends in their job. This effectively dictates a short-term focus on projects that are easy and quick to develop, and which have measurable outputs of some kind. The purchase of computers, or the provision of case-tracking software in courts are favourite examples, although it will be obvious that neither has much to do with the ROL as described here, nor, for that matter, with the law-based state more widely. These initiatives may not, therefore, be what is needed or wanted but, as those with experience of such projects will tell you, the level of funding is normally decided 3-6 months before the start of a financial year, before it has been decided what the money will be spent on. Local offices are then under pressure to spend the money on something, to avoid having their budgets cut the following year.

International politics plays a role as well. Consider a country in which the police are corrupt, because they are poorly paid, and brutal, because they are poorly trained. The cure – proper payment and proper training – is as obvious as it is politically impossible for donors to implement. The chances of the donor agency being enmeshed politically in a scandal involving corruption or violence are too great to allow involvement with the police themselves. So the agency will fund visits by national specialists and anti-corruption experts from its own country, (thus usefully recycling the money back home), as well as funding a local NGO to work on a code of conduct for the police, which will tell them to be honest even if they are not being

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[20] Thomas Carothers, "The Rule of Law Revival", *Foreign Affairs,* March-April 1998.

[21] "Rough justice in America: too many laws, too many prisoners." *The Economist*, 22 July 2010.

paid. Workshops and briefings will be held, civil society will be engaged, and a code of conduct will duly be published. Success, within the terms of the argument, has been achieved.

In such circumstances, there is little incentive to measure progress in the ROL, even were that theoretically possible. Likewise, "lessons learned" might well be unwelcome lessons, and suggest that donor agencies are doing the wrong thing. But in practice donor agencies are doing what they can do – the restraining conditions listed above give them little flexibility. As a result, evaluations (which to be fair do happen) are largely of inputs rather than outputs, and are generally concerned with whether planned activities have been carried correctly and within budgets.

What is worrying about this kind of activity, as well as the waste of time, effort and money, is that a whole set of disconnected, short-term programmes of this nature come between them to collectively define what the ROL actually is. This is inherently wrong and dangerous, since the ROL, as we have seen, is much more a strategic political issue than it is a matter of buying the right software: indeed, it is not clear that the latter has any connection with the ROL at all.

FOR EXPORT ONLY?

In the preceding section, and as is normal, I have concentrated on the export of ROL ideas by donor nations to others. But if the logic of this chapter is accepted, then the ROL is important everywhere at all times, including in our own societies now. And western governments, have, over the last decade or so, massively undermined the ROL in their own countries in the name of fighting "terrorism" or "extremism." These governments have not denied the undermining of the ROL: they have defended it on the basis that their societies face such terrible threats that former liberties must be curtailed. So it is perhaps natural, in picking up a book such as Thomas Carothers' *Promoting the* Rule *of Law Abroad*, to wonder when the companion volume, devoted to the United States, will appear.

In practice, however, there is an almost total disconnect between domestic and overseas ROL issues. (To be fair, this is much less true of the law-based state debate). At the time of writing, the Senate of the United States has agreed once again to extend for a further period a law – the National Defence Authorisation Act of 2011 – which gives the US military the power to arrest and hold indefinitely with trial or legal recourse any person alleged by the government to "substantially support" or to be "associated with Al Qaida" anywhere in the world. Yet one imagines that US ROL experts are not hastening to Zimbabwe or to Myanmar urging them to adopt similar laws.

For the economic dimension of the ROL the situation is even odder. For twenty years now, aeroplanes have carried squads of trained American lawyers to China to teach the Chinese how to introduce modern systems of contract law, and improve the ROL generally, so as to make their economy more successful. The results of such interventions have been mixed, to say the least.[22] Yet over the same period,

[22] See for example Matthew Stephenson, "A Trojan Horse in China" in Carothers (ed) *Promoting the Rule of Law Abroad.*

container ships full of manufactured goods from China have moved in the other direction, ultimately destroying what remained of American industry. And no one seems to have remarked on this discrepancy.

The temptation in the circumstances is to cry hypocrisy: don't do as we do, do as we say. Politics being what it is, some element of hypocrisy would not be surprising. But there is more to it than that. First, experts do not always communicate very well. The small number of experts who worry about ROL issues in the United States have very little contact with the much larger group who work on the ROL abroad.[23] Likewise, development ministries, NGOs and international organisations seldom involve themselves in both sets of issues. Second, as anyone who has worked abroad knows, there are strong social and professional pressures to avoid criticising one's own country. Criticisms are often met with the response that "our circumstances are special" or "even if there are problems at home, the situation is better than here." Of course, all circumstances are special.

But a more useful answer, in fact, is that ROL, like a number of similar subjects, is conceived of in absolutist, normative, teleological terms. The principles are right, in other words, no matter who enunciates them, and no matter what states actually do in practice. Western ROL experts give advice that is ideologically correct, and propose courses of action that should be followed by everyone, irrespective of what their own governments may be doing. This perhaps explains why ROL initiatives undertaken outside tend to follow an idealised pattern, not to be taken directly from the practices of particular western nations. This method handily gets around the objection "you don't do that, why should we?" but there remains, nonetheless, an obstacle to acceptance of ideas which the state proposing them does not itself properly implement. All this can be hard sometimes for non-westerners to understand.

SECURITY IS SPECIAL

ROL, then, is not a technical issue of piecemeal reform of the justice sector, especially after conflict, but a substantive issue of great concern to all societies. It is the expression of the strategic relationship between a state and its citizens, and involves questions of what the citizen expects from the state, how the citizen wants to be treated, and what legitimate expectations the state has of the citizen.

Such questions are obviously relevant across the whole range of interactions between the state and the citizen, but they are especially pertinent where the security sector is involved, because the latter is the hard edge and the sharp point of a state's relations with its people. The absence of the rule of law is never comfortable in any field. In education, for example, the lack of equality before the law might mean that certain groups are disadvantaged in admission to elite universities or in teaching jobs. This is obviously serious, but also obviously less of a problem than if the same lack of equality of treatment extends to he security sector. If minority communities are unfairly targeted by the police, if discriminatory laws are introduced and

[23] See most recently Glen Greenwald, *With Liberty and Justice for Some, How the Law Is Used to Destroy Equality and Protect the Powerful*, New York, Metropolitan Books, 2011.

enforced, if the military becomes the tool of an ethnic, political or religious group, then clearly the situation is more serious than discrimination in education.

The rest of this book is primarily concerned with the question of how to manage the security sector according to the ROL as properly understood, or according to the principles of a law-based state if you prefer. Treatment of this particular issue has not historically been very persuasive, and has tended to fall into two very different and equally unhelpful approaches. One, already noted, is the reduction of the problem to a set of technocratic issues which can be addressed by western assistance and training. The hope (for it is only that) is that new technology, training, mentoring and "oversight" will somehow combine to change actual practice. Previously biased judges or corrupt policemen will, it is hoped, spontaneously change their ways. In practice, this seems hardly ever to happen. The second tendency, drawn ultimately from the study of civil-military relations, is to view the problem as one of "controlling" the security sector, preventing it oppressing the people, and surrounding and wearing it down with an apparatus of oversight and control and the cultivation of alternative centres of power. This does not work either, and anyway misunderstands the nature of the problem.

The actual practical problems of managing the security sector in a law-based state, with which this book is largely concerned, tend to be somewhat different. In particular, as we shall see, popular attitudes to security tend to be confused and contradictory, demanding rights for oneself, but not necessarily for others. Public opinion, the media and parliament are very often much more hawkish on security issues than the government. Far from government powers being restrained by parliament, the tendency is for parliament to demand that government take more and more powers to make the country "safe". NGOs, and human rights groups opposing such measures are often relegated to the fringes of political discussion. In addition, there are a whole series of questions about the tasks and responsibilities of the security forces, to whom they report and how, and how far their powers should extend, and be influenced or controlled by outside forces, including laws and conventions. These and many other questions are discussed in the pages that follow.

The single most important theme when addressing these questions must be that it is behaviour, not formal processes, documents and structures, which is important in establishing and safeguarding the ROL, especially in the security sector. Laws may be openly promulgated, but then simply ignored in practice. Catch-all definitions such as "extremism" or "terrorism" may permit a government to arrest and detain anyone it likes, whilst still claiming to respect the ROL. Human rights laws may reproduce international treaties word for word, but governments and courts may simply ignore them in practice. No matter how little discretion government officials may have formally, power, wealth and influence will always find a solution. In the end, therefore, the subject matter of this book is the culture and ethics of a political system and its security institutions. If the will to respect the ROL does not exist, processes, documents and structures are irrelevant. If it does exist, they are of secondary importance (at most) anyway.

CHAPTER TWO

LAW AND POWER

Laws are like sausages: it is better not to see them being made.

- Remark attributed to Otto von Bismarck, but probably pre-dating him.

We have so far discussed the Rule of Law and the law-based state without being very precise about what the Law is. The idea of "Law" (usually capitalised) tends too often to be presented as an unproblematic good, and a semi-divine concept worthy of great respect, but it is too seldom analysed in critical terms. In fact, an individual Law is not itself intrinsically good or bad, positive or negative, it is just a Law. Most people would prefer to live in a society where there are Laws, rather than No Laws, but of course such a society, whilst full of Laws, could be highly unjust because of the nature of the Laws themselves. (Indeed, anarchists would argue against laws on the basis that they are always unjust and oppressive). This chapter considers the subject of Law in general from a political, not a technical, perspective, and addresses the issue of where Law, in the form of texts and procedures, actually comes from.

The question of why Law should Rule, or whether a state should be based on it, is too often approached in very formal and abstract terms: the subject is The Law, if you like, rather than actual Laws. Consequently, in the law-based state tradition as it developed in the eighteenth and nineteenth centuries, there was a determined search for the origins of an uncontested Law, to which all things would be properly subordinate. The theory of hierarchical norms, on which the theory of the law-based state is in turn founded, holds that laws are only valid if they respect the norms in place from a higher level, and those respect a higher level, and so forth. At the highest level of all, of course, is the Constitution. But where does the Constitution come from, and why are its norms self-evidently correct?

Inasmuch as an answer was ever found to this question, it was based on metaphysics, rather than legal theory. In the tradition of Rousseau and Sièyes, it was argued that a Constitution is the product of a gathering of delegates who represent the National Will, not in the sense of representing different lobbies or points of view, somehow to be reconciled, but rather of representing, collectively, a mystical popular consensus about all major issues in the Constitution, even if no-one could explain where it had come from.[24] All subsequent laws are thus assumed to reflect the universal popular will, in a hierarchy of increasingly detailed provisions, down to the level of local parking regulations.

[24] See for example Jacques Chevallier, *L'État de droit*, 5th edition, Montchrestien, 2011, pp. 54-6.

In the Anglo-Saxon tradition, where metaphysics is less commonly taught to law students, there is no really convincing explanation of why, in principle, the Law should Rule, except that alternatives are often pragmatically worse. In effect, the main argument is from Tradition – we have always done it like that. In the US, this tends to be disguised as worship of the original Constitution and its drafters, whereas the British tradition tends to be a straightforward appeal to romantic traditionalism. The famous eighteenth century lawyer Sir William Blackstone summed it up best when saying that "precedents and rules must be followed unless flatly absurd or unjust", because "we owe a deference to former times."[25] Obviously, the actual process of the physical production of laws, or even of Constitutions, is fantastically unlike this, as we shall see.

A POWER RELATIONSHIP

At its most basic, any system of law involves a power relationship. Law is more than just a power relationship, of course, but it is always at least that, or there would be no point in making laws. Indeed, this was why the English jurist John Austin (1790-1859) developed what he called the "command theory" of law, which sees the law as a series of commands, from a sovereign figure, backed by the threat of sanctions and thus in practice obeyed. This rather utilitarian concept of law has always been anathema to those (like international lawyers) who have seen law as a normative series of aspirations, but there is no doubt, politically, that a law that cannot achieve its effect is useless, and not really a law. More recently, the great German sociologist Max Weber argued that

> Law exists when there is a probability that an order will be upheld by a specific staff of men who will use physical or psychical compulsion with the intention of obtaining conformity with the order, or of inflicting sanctions for the infringement of it.[26]

Weber did not say that everything has to be enforceable all the time, but he did say that enforcement has to be probable.

Whilst the criteria of enforceability is key to the effectiveness of laws in general, there are also cases where, as we shall see, laws do not actually have to be enforced to achieve the political effect that is sought. This is because in the end laws are only intermediary devices, not ends in themselves.

To the extent that law is about power relationships, laws themselves do not create this relationship, however, so much as demonstrate that it already exists. If this seems counter-intuitive, consider that no system will introduce a law which it wants to enforce, but which it expects to be widely ignored or disobeyed. Laws are a symbol of the existence of a power relationship in which a group that has the power to make laws can be confident that another group will obey them. Indeed, there is no more interesting question in the whole debate than why people obey the law. The

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[25] Cited by Alasdair McIntyre, *Whose Justice? Which Rationality?* Duckworth, 1988, p. 229.

[26] Max Weber, *Economy and Society: An Outline of Interpretative Sociology,* University of California Press, 1978, p.34.

philosopher Michel Foucault (1926-84) spent much of his life grappling with the question of how power is exercised, and why it is that individuals obey rules of all kinds, especially through personal interactions, where they have in theory the choice of disobedience. He concluded the obedience is actually a series of micro-relationships that require the preparedness to obey, not just the will to dominate.[27]

The question of why we do obey the law is a fascinating one, and always provokes lively debates among students. I frequently ask the question: if you are driving at night through an isolated area and encounter a red light with no other traffic on the road, do you stop? It elicits every conceivable answer, some of principle and others of pragmatism. Yes, because it's the law, yes because another car might be about to arrive, yes because then any accident can't be your fault, yes, because if you break this law why not others, maybe, depending on whether you think it is really safe, maybe but not always, no, because the law is not meant to apply to such circumstances. We will meet all of these types of arguments subsequently, attached to more weighty issues.

There are two broad types of qualification to the general idea of law as simply a power relationship. First, some laws actually benefit rather than penalise those who are affected by them, over a long enough period of time. Motoring laws, however tedious, do help to reduce accidents and save lives, and were in general introduced because a new form of activity posed dangers that had to be regulated. Commercial law was in effect historically a form of self-regulation, from which all honest businessmen could ultimately expect to benefit, although extreme concentrations of wealth and power have made this less true in modern times. Second, some laws are essentially political statements, indications of where power lies and symptoms of the current state of political debates. More is said on this below in the description of motives.

Finally, perhaps, even if we depart from the idea that law is a power relationship, then following Foucault, we do not have to assume that laws are always imposed on an unwilling population. Actual pragmatic research shows that people obey laws not simply (or even mostly) because of threats of punishment, but for a whole set of social and ethical reasons. Obeying the law is, in other words, a commitment that most people make voluntarily.[28]

ACTORS

The simple concept of the law as a power relationship involves essentially four actors:

The Originator conceives the idea of the law in the first place, to serve some wider purpose. Normally, this actor will be a government, but, as we shall see,

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[27] Notably in *Surveillir et punir* (1975) translated as *Discipline and Punish: The Birth of the Prison,*, London, Penguin Books, 1991. See also his 1976 Collège de France lectures, some of which have been collected in English under the title *Society Must Be Defended*, Tr. David Macey, Penguin, 2003.

[28] See for example Tom. R. Tyler, *Why People Obey the Law*, Princeton University Press, 2006.

governments may be brought by internal or external actors to introduce laws for all kinds of reasons independent of their own wishes

The Implementer turns the political objective into a legal text. There is a distinction in many political systems between the process itself and the ultimate political approval. In Westminster-style political systems, parliament may formally approve the laws but, precisely because parliament is dominated by the party or parties that form the executive, its role is often largely ceremonial. (More is said on this in the next chapter). Moreover, in many systems, Ministers, or official organisations, are able to make regulations without parliamentary involvement.

The Enforcer is responsible for ensuring that the law is actually obeyed. In criminal law, the situation is generally fairly straightforward, but many other laws and regulations (such as those involving the environment) are policed by institutions which may have the right to exact modest fines, for example, but no more. For the law-breakers, illegality is often the cheaper option.

The Subject. In principle, it would be odd to have a law that applied to no one, although this comes quite close to happening in laws that are introduced as a result of moral panics, or to appease the media. But, there is always someone being targeted by a law, and someone whose rights are enhanced or reduced as a result. Sometimes both happen simultaneously – ie a given law may enhance the rights of one group at the expense of the other.

One conclusion from this – sometimes over looked by legal scholars – is that laws are introduced for a reason of policy. Laws are seldom if ever introduced for their own sake, and it is always necessary to look behind the words employed, and to try to work out what the originator of the law (again, not always the government) was hoping to achieve.

MOTIVES

We can distinguish broadly five political motives for originating laws, some of which apply to international as well as domestic law.

The first is to change behaviour, or stop it changing. An example of the first would be Prohibition in the United States, designed to stop people drinking alcohol by making it difficult and illegal for them to do so. The law was eventually abandoned as a disastrous failure, and resulted in a massive increase in organised crime, as well as a permanent population of habitual criminals. That said, it does actually seem to have had some genuine public health impact, because people overall drank less, and so it partially achieved its stated objectives. By contrast, the progressive criminalisation of drugs such as cocaine and marijuana during the twentieth century seems to have had no measurable impact on their consumption at all. An example of the second category would be laws to stop people taking advantage of new technologies to download and copy various forms of entertainment media. In the latter case, whilst the activity is impossible to stop completely, governments hope that the stigma of illegality and the (faint) risk of prosecution will be disincentives. So far, there is little evidence either way.

A second reason is to intimidate and frighten. For some nations, certainly, legally imposed security rituals are a useful political control device. Various "security" related laws (those relating to airline travel for example) can come into this category. It is doubtful whether even those responsible for their introduction actually believe that laws to prevent the carriage of jars of jam on board aeroplanes will make the travelling public any safer. Some of the explanation lies in the need to appease public fears through what is called "security theatre" (see below). But there is little actual evidence that people are either particularly worried about airport security, or that they are comforted by security theatre.

Rather, organisations have always known the value of arbitrary and variable rules for breaking the spirit and inculcating obedience. Indeed, it is essential that the rules should change, and be fundamentally arbitrary, so that the subjects of the rules are obliged to obey them blindly. After all, if you can intimidate an educated person in a position of responsibility into removing their shoes and belt, and shuffling in stockinged feet through a metal detector, for all the world like a political prisoner, then there is probably little limit to what you can oblige that person ultimately to do. Likewise, the introduction of ever more rules and restrictions serves to make people more conscious of threats (real or imaginary) and so more manipulable.

The actual implementation of such essentially arbitrary rules, often by poorly paid, trained and motivated employees, reveals a great deal about how the ROL actually operates at ground level, where it is most important. Airport "security" checks are particularly interesting, because they allow security employees a measure of power, for short periods of time, over people who are frequently wealthier and better educated than they are, and who are dependent on their cooperation to board a plane for purposes which may be important. Moreover, such checks provide these employees with the maximum of temptation, combined with the maximum of impunity: there are effectively no sanctions for bad behaviour, unless they commit an actual criminal offence, and sometimes even not then, since thefts by airport security staff seem to be common.[29] Most people who travel frequently by air have their own horror stories of arbitrary and stupid behaviour by security employees, but recently some academic research at European airports has demonstrated that such employees frequently behave according to informal rules they devise for themselves, rather than any instructions they have been given.[30] This is, of course, entirely to be expected.

It is not necessary for laws to actually be used to be effective. Thus, Slavo Zizek draws attention to Article 133 of the former Yugoslav constitution: a wide-ranging provision which punished any text that "might arouse tension and discontent among the public." The fact that the provision was so little used actually made it more powerful: in effect, it was so broad that writers could be charged with it at any moment, and so only the benevolence of the state prevented writers from being imprisoned at will. Better not to offend the state, therefore.[31]

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[29] In the United States thefts are so common that special sites exist to help travellers avoid them, see for example http://abcnews.go.com/Blotter/TSA/

[30] Kirschenbaum et al, "Airport security: An ethnographic study" in *Journal of Air Transport Management*, November 2011.

[31] Slavo Zizek, *Violence: Six Sideways Reflections,* London, Profile Books, 2009, p.135.

A similar logic seems to lie behind the recent introduction of a law in Canada to punish, with a ten-year prison sentence, anyone who wears a mask while taking part in a "riot or an unlawful assembly". Since the definition of these terms is for the authorities to decide, and a generally peaceful demonstration often has some criminal or violent behaviour on the fringes, the law seems fairly clearly intended to stop people taking part in political gatherings from concealing their identities, or even deterring them from being politically active at all.[32]

But laws do not actually have to exist to affect behaviour either, as long as people think they do. During the Toronto G-20 summit in 2010, police began arresting anyone who came, even accidentally, within five metres of the imposing metal fence erected around the conference site, and holding them in special prisons. When this behaviour was queried, the authorities first claimed that the law they were relying on was secret, and then admitted under pressure that no such law existed, and they had invented it. In practice, however, the non-existent law enabled the detention of nearly 1000 people, some demonstrators, others just passing by.[33] Likewise, in many countries in the world in recent years, the police have begun arresting people, including tourists, taking photographs of public buildings, vaguely citing "anti-terrorism" provisions. In London, the Commissioner of the Metropolitan Police was eventually obliged to make a public statement that photographing public buildings was not an offence under the Terrorism Act of 2000.[34] However, anecdotal evidence suggests that such arrests are still taking place, in a number of countries.

It is true that victims in various countries have been able to bring claims for damages against police services, and have even received apologies. But there are no records of policemen actually being disciplined as a result, and few citizens will have the energy, time and money to fight the system to the bitter end. In practice, most people will do what representatives of the law say, even if those individuals are exceeding their powers. For the police, this kind of misbehaviour is essentially cost-free and it illustrates, once more, why the ROL is essentially a concept that applies at the everyday level of personal interaction. It is not a matter of guidance issued by distant authorities.

A third motive is to respond to public fears and prejudices, often exacerbated by an irresponsible media, and on the basis of public understanding of crime which is often wildly at variance with reality.[35] Demands to "do something" about a problem which is likely to have been exaggerated, and may not even exist, are often met with the reflexive introduction of pointless laws, which do at least give the impression of activity. Regular moral panics about the supposed effects of video games are a traditional and often-recurring example. Even the concept of "law and order" itself is an ambiguous one in any divided society, because petty criminals habitually come

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[32] See "Wearing a mask at a riot is now a crime", online at http://www.cbc.ca/news/politics/story/2013/06/19/pol-mask-bill-royal-assent.html

[33] See for example, "Police admit no five-metre rule existed on security fence law ", The *Globe and Mail*, 29 June 2010.

[34] See http://www.urban75.org/photos/met-police-photography-advice.html for a copy of the text.

[35] See, for example, a study by the (UK) Royal Statistical Society described eg in http://www.independent.co.uk/news/uk/home-news/british-public-wrong-about-nearly-everything-survey-shows-8697821.html

from an underclass, and such underclasses are often largely composed of recent immigrants and ethnic or religious minorities. In France, there is much petty crime in the suburbs of major cities, where immigrants tend to live. Various proposed or actual laws to "crack down" on such crimes are therefore understood to be code for repressive actions against minorities, to curry favour with extreme right-wing elements of the electorate. Thus, in 2010, the French government introduced a law to deprive immigrants who had been nationalised for less than ten years of French citizenship if they were involved in the murder of a policeman.[36] The circumstances it envisaged are most unlikely to arise in practice, but everyone recognised it at the time as a move in the electoral game before the 2012 elections, and an attempt to undermine support for the extreme-right *Front national.*

In some cases, problems identified in a law may actually exist, but governments are reacting to media hysteria, rather than to reality. For example, what is known to non-experts as "cybercrime" certainly exists, but its extent is effectively impossible to quantify, because of definitional problems and the fact that many of the most successful crimes are by definition unnoticed or unreported.[37] A recent report by a data security company arguing that "cybercrime" costs the UK economy £27 Billion per year, and enthusiastically promoted by the British government, was nonetheless dismissed as "meaningless" by experts.[38] Indeed, whilst a great deal of time and effort is spent in introducing laws and setting up institutions to control new forms of technological crime, the fact is that there are virtually no reliable figures to describe its extent. We do not know, therefore, whether time and effort might have been better spent on laws and procedures to tackle more traditional problems.[39]

In some cases, as instanced here, the main driver of legislation is fear, complicated by the fact that public opinion has almost no idea what the relative level of different dangers actually is.[40] In addition, the media, governments and the general public often have no ability to understand even simple statistical measurements, or perhaps prefer to ignore them. Reports of a heroin "epidemic" sweeping the United States recently, turn out on examination to be an estimated increase in use of the drug by adults from 0.2% of the population to 0.3% over ten years.[41] But in other cases where new laws are demanded, there is a strong moral element, often amounting to a type of moral blackmail. One example is human

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[36] "Les députés adoptent le projet de loi sur l'immigration", *Le Monde*, 14 October 2010.

[37] See for example Robert M Lee & Thomas Rid, "OMG Cyber!", *The RUSI Journal*, Volume 159 No5, 2014.

[38] "Cybercrime cost estimate is 'sales exercise', say experts", available at http://www.zdnet.co.uk/news/security-threats/2011/02/18/cybercrime-cost-estimate-is-sales-exercise-say-experts-40091866/. On the use of "technopanic" to create fears about technology and justify legislation, see Adam Thierer, "Technopanics, Threat Inflation, and the Danger of an Information Technology Precautionary Principle", *Minnesota Journal of Law, Science and Technology,* Vol 14, No 1 (Winter 2013)

[39] A extremely useful collection of essays on the quantification of such problems is Peter Andreas and Kelly M. Greenhill, (eds) *Sex, Drugs and Body Counts*: *The Politics of Numbers in Global Crime and Conflict*, London, Cornell University Press 2010.

[40] See for example Barry Glassner, *The Culture of Fear: Why Americans are Afraid of the Wrong Things*, New York, Basic Books, 1999. Other countries show similar patterns.

[41] See Michael Tracey, "We're Really Starting to Panic About Heroin in America", online at http://www.vice.com/read/america-is-really-freaking-out-about-heroin-use-now accessed 13 July 2014.

trafficking. The image which the term evokes, and quite deliberately, is that of traditional slavery, with third-world victims being kidnapped and sold to westerners for various dark and uncivilised purposes. From what we know, the reality is generally quite different. Poor people are driven by poverty, conflict and the destruction of traditional livelihoods by international trade, to try to reach rich countries in search of work and money to send home to their families. Rich countries may welcome a source of cheap labour, but populist politics obliges them to set up complex and expensive barriers to immigration. As a result it is difficult and dangerous for would-be economic migrants to attempt to enter wealthy countries – hundreds are killed every year trying to cross from Mexico to the United States, for example.

There is no way that an economic migrant from, say, Mali can expect to arrive in Europe, crossing frontiers and border posts, as well as the Mediterranean Sea, unaided. This is where "traffickers" come in. Experts in bringing people across borders, they are paid objectively huge sums of money (thousands of dollars in some cases) to take groups safely where they want to go. Western governments are in an awkward position. On the one hand, their rhetoric of globalisation and the free movement of peoples, as well as the desire of their private sectors to have the cheapest possible workforce: on the other, public fear of immigrants, and of their likely effect on wages and working conditions.[42] In effect, campaigns against "trafficking" are usually just disguised controls on immigration, usually from Africa.

One solution to this conundrum is for governments to emphasise a dimension of trafficking that everyone would find unacceptable: that of women and children. A huge amount of international and national legislation exists on this issue, including the so-called Palermo Protocol of 2000, under the aegis of the United Nations. Yet there is little evidence that the problem actually exists on a significant scale. Partly it is a question of definitions. The Protocol relates to *forced* trafficking, a crime whose actual extent is very uncertain. But many governments, as well as NGOs campaigning to eradicate prostitution worldwide, use a much looser definition, where any external stimulus, such as escaping from poverty, or even seeking to better one's lot economically, counts as forced movement. Thus legislation in the UK defines "trafficking" to include the voluntary relocation of a practising prostitute to the UK in search of higher earnings.

As a result of this confusion about definitions, attempted prosecutions have been almost always unsuccessful, in spite of huge publicity campaigns surrounding them. One police operation in the UK in 2009 claimed that there were 18,000 trafficked women and children in the country, a figure that turned out on examination to be a confusion with an educated guess about the total number of practising prostitutes. The operation concluded without being able to show that any

[42] Alexandra Novosselof and Frank Neisse, *Les Murs entre les homes*, Paris, La Documentation française, 2007, contains much anecdotal and photographic material on the realities of economic migration.

women or children had been "rescued" at all.[43] Recent revelations suggest that some of the highest-profile allegations of "sex-trafficking" in recent years may simply have been invented, for publicity and profit.[44] The media have further confused the issue by sensationalising the issue and confusing the public about the difference between reality and the most lurid type of fiction.[45]

These episodes illustrate a major feature of politicised debates about laws – the use and abuse, or indeed invention, of statistics. For all forms of "trafficking" reliable figures are impossible to come by, and competition between interest groups necessarily makes the use of large figures more effective than the use of small figures.[46] Sometimes, however, these allegations can be tested. For example, before the 2006 World Cup in Germany, it was widely alleged that 40,000 women and children would be forcibly brought there to service the expected 3 million visitors, although the basis of both figures was never made clear. A subsequent in-depth study by the International Organisation on Migration concluded that the anticipated "increase in human trafficking, during and after the World Cup did not occur.... the 40,000 estimate was unfounded and unrealistic."[47] Undaunted, campaigners claimed that 100,000 victims would be trafficked into South Africa for the 2010 World Cup, or about one victim for every four visitors, which seems inherently improbable.[48] So far as is known, no trafficking actually took place. Similarly lurid claims are regularly made about American Football matches, with, according to one expert "no data" to support them.[49]

This is only an aspect of a wider problem however. For all except a small number of crimes, reliable figures simply do not exist. Where crimes are a matter of definition, or degree of severity, getting a grip on the size of the "problem" is effectively impossible. But it may suit the interests of groups in politics, the media or civil society to campaign on the basis that a given problem is under-estimated, or that there should be new laws or higher priority (and more money) for existing ones. As we have seen, numbers in such cases are often simply invented. But governments

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[43] See Nick Davies, "Prostitution and trafficking – the anatomy of a moral panic", *The Guardian*, 20 October 2009. Statistics have not become more reliable since: see a recent analysis by a trained statistician who was also previously a sex worker: Brooke Magnanti, "Zombie Statistics on Sex Work", online at http://www.thebaffler.com/blog/2014/06/zombie_statistics_on_sex_work#When:14:22:23Z
accessed 13 July.

[44] A particularly blatant case of wholesale invention was recently uncovered in Cambodia, see "Somaly Mam: the Holy Saint (and Sinner) of Sex Trafficking", *Newsweek*, 21 May 2014.

[45] See for example Noah Berlatsky, "Hollywood's Dangerous Obsession With Sex Trafficking", online at http://www.salon.com/2014/06/10/hollywoods_dangerous_obsession_with_sex_trafficking/ Accessed 13 July 2014.

[46] See David A. Feingold, "Trafficking in Numbers: The Social Construction of Human Trafficking Data" in Andreas and Greenhill (eds) *Sex, Drugs and Body Counts.* A classic but still relevant study is Max Singer, "The Vitality of Mythical Numbers, *Public Interest* (Spring, 1971), 3-9, available at http://www.edwardtufte.com/bboard/q-and-a-fetch-msg?msg_id=0002Oq&topic_id=1

[47] See the summary at http://www.iom.int/jahia/Jahia/pid/1737

[48] See Chandre Gould, and Marlise Richter, « The Need for Evidence to Assess Concerns About Human Trafficking During the 2010 World Cup », in *ISS Africa News*, 23 March 2010, available at http://www.issafrica.org/iss_today.php?ID=917

[49] See Kate Mogulescu, "The Super Bowl and Sex Trafficking", *New York Times*, 31 January 2014.

feel uncomfortable about committing public money to problems when they have no idea of their extent. So the search is on for any number, no matter how dubious, which can be publicly cited. A good recent example is the assertion made by politicians and campaigners in a number of countries that the average (female) victim of domestic violence had suffered 35 attacks before calling the police. If this figure were true, it would have various important practical consequences. But nobody seemed to know where this "mythical number" came from. Eventually, three criminologists tracked it down to a sample of 53 women in a small Canadian town in 1979, who were, in fact, asked a rather different question, using a methodology that was clearly very dubious.[50] But at least it was a number.

The examples cited above obey the political principle that easy answers are preferable to difficult ones, and also that witch-hunts against individuals are easier than systemic reform. But at least the crimes described above do exist, in some places at some times. By contrast, others are pure invention, and have involved actual, as opposed to symbolic witch-hunts. For several years in the late 1980s and early 1990s, the United States was convulsed by allegations of the existence of huge satanic ritual abuse conspiracies, in which thousands of children were allegedly kidnapped and ritually murdered each year. Massive amounts of police time were expended in the search for non-existent witches' covens, and politicians called continually for more powers and more laws to combat the menace. No prosecutions were ever successfully brought, and indeed the entire episode seems to have been nothing more than an episode of mass hysteria.[51] Yet these allegations were only the most extreme manifestation of what has been called False Memory Syndrome, where thousands of adults "remembered" horrifying histories of abuse by their parents and other adults, extracted (or in practice it seems, implanted) by untrained "therapists" who themselves strongly believed in the idea that even the most terrible memories could be repressed. Incalculable damage was done as a result, and many innocent adults were sent to prison.[52]

A fourth reason for laws is the protection or advancement of vested interests. When factories were first established in eighteenth century England, for example, there were few incentives for the existing agricultural workforce to leave the countryside for backbreaking, monotonous and poorly paid jobs in dangerous and unsanitary conditions. It was therefore necessary to introduce a whole procession of laws to make it effectively impossible for ordinary people to survive in the countryside any more, and so to oblige them to move to the towns.[53] As a result of these changes, in much of the developed world, trades unions began to develop in the nineteenth century, and posed a problem for vested interests that had not existed

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[50] See Heather Strang, Peter Neyroud, and Lawrence Sherman, "Tracking the evidence for a 'mythical number," online at http://blog.oup.com/2014/05/domestic-violence-policing/#sthash.MexLPZnS.dpuf accessed 13 July 2014..

[51] See among other accounts Debbie Nathan and Michael R. Snedeker, *Satan's Silence: Ritual Abuse and the Making of a Modern American Witch Hunt,* New York, Basic Books, 1995.

[52] See for example Richard Ofshe and Ethan Watters, *Making Monsters: False Memories, Psychotherapy and Sexual Hysteria*, Andre Deutsch, 1995.

[53] The economic thinking of the time that justified such laws is discussed in Michael Perelmann, *The Invention of Capitalism: Classical Political Economy and the Secret History of Primitive Accumulation*, Duke University Press, 2000.

before. The reaction was not only open repression, but also laws to make such activities illegal, and pursue organisers through the courts. Much more recently, and in a different area, publishers have persuaded governments to increase the period for which printed books remain in copyright, enabling them to continue to earn profits from past best-sellers without having to make any new investment. Such initiatives are not always so negative in their effects, however. Most legislation to make working conditions better and safer has been passed under pressure from organised labour, for example.

The security sector of most countries today is involved in two major activities to protect economic vested interests: against unauthorised downloading and copying of entertainment media, and against what is usually described as "counterfeiting". Each case is more complex than it may appear at first sight.

Since the development of the cassette tape in the 1970s, apocalyptic predictions have been made for the effect of illegal copying on the entertainment media and on its intellectual property. None has come to pass. The availability of compressed music and then video files on the Internet has since created a new problem of some kind, but it is not clear what that is. Various studies have shown that "downloaders" are in fact more likely to purchase media than others, and that, overall, the effect on the entertainment industry is neutral or even positive. But the key point here is that there is no reliable evidence about what the facts actually are, which is why a recent report to the UK government caused something of a stir by recommending that any legislation should be "evidence-based" for the first time.[54]

A similar problem exists with "counterfeiting". I place the word in inverted commas, because the normal understanding of the situation – fake goods passed off as real ones – does not seem to be a major problem, though, as usual, no-one actually knows what the size of the problem is. Rather, the actual issue is the production of simulated goods, which are close to, but not exact replicas of, designer labels. Here, evidence, as well as common sense, is quite clear. People almost always know what they are buying, and are not in any sense being cheated. They would buy the real article if they could, and indeed often do so later. They are quite clear that they are buying a copy or an approximation, which sounds reasonable from our experience of life. If you buy a "Lacoste" polo shirt from a street trader in Bangkok, you know what you are buying, and it is certainly not a Lacoste polo shirt. Such evidence as there is, suggests that the proliferation of substitute goods of this kind is actually helpful to brand name companies, since it is a form of free advertising.[55]

Since the actual net effects of both downloading and counterfeiting are so unclear, and since each might even benefit the industries concerned overall, it is natural to ask, in the context of the current chapter, what the wider purpose of laws

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[54] See for example Bingchun Meng, "Evidence or political will? DEA, Hargreaves and the future of UK copyright regulation", *LSE Media Policy Project*, available at http://blogs.lse.ac.uk/mediapolicyproject/2011/09/05/evidence-or-political-will-dea-hargreaves-and-the-future-of-uk-copyright-regulation/

[55] See Renee Gosline, *The Real Value Of Fakes: Dynamic Symbolic Boundaries In Socially Embedded Consumption*, Harvard University thesis, 2009. Available at http://gradworks.umi.com/33/71/3371273.html

against them might be. These laws are nothing if not extensive, and in recent years governments have spent, internationally and domestically, rather more effort on protecting intellectual property than they have, say, combating world hunger or climate change. At a domestic level, governments have produced a fearsome array of legislation, spent huge sums on publicity and propaganda, and set up entire new organisations (like the French HADOPI) with unprecedented powers. And most countries have substantial criminal penalties for even possessing "counterfeit" goods: surprising when consumers are alleged to be the main victims.[56]

At one level, of course, this can be a reflection of the lobbying power of certain industries, and of the unhealthily close relations that can exist between parliamentarians and special interest groups, which will be discussed in the next chapter. Equally, whilst downloading, for example, may ultimately benefit the music industry as a whole, it will often inconvenience individual companies at specific times. Harassed executives, pursued by rapacious shareholders, will naturally demand that something be done to protect their profits in the short term. Yet there is obviously more to it than this, not least because other industries, with their own lobbying power, are often unhappy with the activities of the entertainment giants, and seek to oppose them.

One speculative answer has to do with the nature of digital goods. Traditionally, prices have been related to supply and demand, and supply has always been constrained in some fashion. But today, the supply of digital goods is effectively infinite, and the cost of distribution approaches zero. The marginal cost of producing the software package with which this book is being written, for example, is trivial. At the same time, scarcity is no longer an issue. If I give you a copy of an MP3 file, I still have the original, and whilst you have gained, I have not lost. This is unprecedented in modern economic history, and is frightening and disorienting for traditional industries, and for that matter governments, who demand protection against the effects of change.

Another, equally speculative, answer lies in the very nature of file exchange. I give you a copy of an MP3: I do not attempt to extract value by selling it. Again this is very disorienting to industry and governments, who for thirty years have favoured a market-based economic system where everything and everyone is for sale. The idea that I might freely offer you a copy of something I own is a threat to this paradigm. The enclosure legislation of the eighteenth century, described in the last chapter, began the process of creating a complete "rentier" class, who earned a reliable income without having to work for anything, because they owned property, and, subsequently, stocks and shares. Such property could not be reproduced, but only bought and sold. Goods which have no physical existence, and which can thus be freely shared, are potentially very disruptive of this paradigm.

Finally, the case of "counterfeiting" probably has little to do with economic loss as such, and more with preserving the exclusivity of certain brands. By definition, not everyone can afford a Rolex watch: a cheaper Rolex would be less

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[56] On this subject more widely, see Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property Law*, Stanford Law Books, 2011.

desirable because it would fall victim to technical rather than status comparisons. Equally, if a fake designer T-Shirt can be made at the same quality and sold for a tenth of the price as the original, this might invite unwelcome questions about pricing and profits. In this context, it is probably not a coincidence that most elected politicians are relatively wealthy individuals who form part of national elites and are therefore quite likely to identify with elite interests of this kind.

In any event, these cases are important, because they are indicative of where some of the consequences of technology are taking the Rule of Law. As traditional industries based on intellectual property increasingly come under threat, governments will face increasing pressure to protect them. On the other hand, public opinion is not nearly so exercised about the issue as is elite opinion, and is usually happy to have something cheap, or even for free. One unintended consequence of the proliferation of intellectual property laws may therefore be a loss of public support for the idea of law itself, at least in certain cases. Sometimes, moreover, the desire to have something for free is perfectly legitimate. In most western countries, taxpayers can submit their tax returns on line, for free, as seems only proper. In the United States, one software company has prevented this happening, through fake "grassroots" campaigns, to ensure that its own expensive proprietary software continues to be required.[57]

A fifth and final reason is to send a political message of some kind, where the authority recognises that the law will have little or no practical effect, but wants to bring public attention to what it regards as a problem, and be seen to be offering at least an attempt at a solution. A variation is when a government introduces a law on a controversial social subject, such as abortion, prostitution or pornography, not because it is expected to be effective (such laws are almost always ineffective and often downright dangerous) but to buy political support for other, more controversial laws it wants to introduce. Messaging is a particularly popular expedient at international level, where nations will happily sign up to conventions that have no practical effect (like the Ottawa Convention on land mines) or address a largely non-existent problem (like forced human trafficking), but which look good.

At the national level, laws which advertise themselves as being against the sexual exploitation of children are a good example. There is certainly an industry that abuses children for profit and sells and distributes the videos and photographs which result. As usual, however, no one has the remotest idea how large this industry is. What we do know is that sites hosting the material tend to be in parts of Asia or the former Soviet Union, where the law is poorly applied. They are protected by security and pay walls, and are usually under the patronage of organised crime. There are, therefore, few ways for western law enforcement to tackle the problem. In spite of the fact that the protection given to such sites means that the average person is extremely unlikely to ever see any child pornography, unscrupulous politicians and journalists like to give the opposite impression.

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[57] See "Turbo Tax Behind Campaign Against Free Tax Filing", online at http://news.firedoglake.com/2014/04/15/turbotax-behind-campaign-against-free-tax-filing/ Accessed 13 July 2014.

Governments have, once more, taken to redefining the problem, and have criminalised, not the abuse of children or profiting from that abuse, but being in possession of, or even having once looked at, the resulting images. So when we read of the arrest of a "child pornography ring" it usually turns out to involve a group of sad and sick individuals who have shared images among themselves. (One unfortunate individual in New Zealand was sent to prison for *watching* cartoons showing allegedly obscene acts between pixies and other mythical creatures.[58] Such images are legal in Japan, where the website was located.) But public and media hysteria is thereby appeased, not least because of the assumption (unsupported by any evidence) that viewers of such material will also physically abuse children.[59]

The most disastrous example of misplaced energy, media hysteria and technical incompetence is the UK Police "Operation Ore", begun in 2002. It followed the confiscation of a server in the United States that had links to some 5000 sites, one of which was a portal to various "adult" sites, in turn including some featuring child pornography. Under pressure to "do something" about a currently fashionable subject, the UK police discovered an SQL database of credit cards of thousands of UK citizens who had, at one time or another, used one of the services of the 5000 sites. The police opted to believe that the presence of a credit card number in the database meant that child pornography had been purchased, even though it was known that stolen credit card numbers had been used and indeed some of those arrested had already complained of the fraudulent use of their cards. Nearly two thousand people were charged, and the majority were convicted, although physical evidence of possession of actual photographs was almost entirely absent. In almost all cases they pleaded guilty to minor, largely unrelated, offences to avoid appearing in court. About forty are known to have committed suicide.

Technical experts rapidly discovered that the case was riddled with errors, omissions and in some cases false testimony by the police.[60] It appears that many of the decisions to prosecute were made by junior detectives, without technical expertise, but under immense pressure to get results. Much of the police evidence was therefore discredited, and some of it was described by one judge as "utter nonsense." Nonetheless, all those who pleaded guilty were placed on child abuse registers, and almost all of those accused had their lives and families destroyed. As recently as April 2011 one victim was awarded £750,000 in damages for wrongful accusation by a policeman "trying to protect his own position" and in the absence of any actual evidence. [61]

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[58] See http://www.stuff.co.nz/national/crime/8577037/Man-sent-to-jail-for-watching-pixie-sex

[59] One pro-censorship group in the UK claimed in 2013 that 1.5 million British people had "stumbled across" online child pornography. A little arithmetical investigation showed that the claim was worthless. See http://www.ministryoftruth.me.uk/2013/06/02/have-1-5-million-adults-really-stumbled-across-online-child-porn/. Anecdotal evidence (including the author's own experience as a regular internet user for 20 years) suggests that it is extremely difficult, if not impossible, to "stumble across" such material. There is, in any case, no accepted definition of "child pornography."

[60] See for example Charles Arthur, "Is Operation Ore the UK's worst-ever policing scandal?" *The Guardian,* 26 April 2007.

[61] "Police face £750k bill for false Operation Ore charges", *The Daily Telegraph,* 2 April 2011.

This disastrous episode has a number of implications for the ROL in the security sector in the future. First, it shows how a toxic combination of hysteria, political pressure and ignorance can lead to hugely expensive investigations which may, in the end, lead nowhere, but cannot be seen to have failed. Second, advances in technology mean that people can now be accused of crimes based on nothing more than inference, with no actual evidence, which makes it effectively impossible to demonstrate their innocence. Third, national governments confronted with problems they cannot address increasingly turn to inventing crimes, or widening definitions, so that it looks as though they are taking action. Fourthly, any individual who falls into the system is likely to be assumed to be guilty, because they have projected onto them all the hatred and fear which their alleged crime evokes, especially if the real perpetrators are beyond the reach of the law. If you can't be with the one you hate, in other words, hate the one you're with. We will find the same patterns repeating when we come to discuss what are normally described as "terrorism" and "war crimes."

An unprecedented, and extremely dangerous, use of the law to make a political point is the current fashion for labelling certain events "genocide" and prosecuting anyone who disagrees with that assertion. The most recent example at the time of writing is in France, where a proposed law would have made it a crime, among other things, to dispute the judgement that the persecution of Turkish Armenians in 1915 was "genocide". The law was introduced by a right-wing parliamentarian in an attempt to attract the votes of the 500,000 French citizens of Armenian descent for the 2012 elections, and supported by the opposition Socialists for fear of alienating those same voters. It also appeared connected to attempts to block Turkey's entry into the European Union. Understandably, historians of all political persuasions have objected strongly to the government seeking to apply penal sanctions to historical judgements.

As well as the Orwellian overtones of this legislation,[62] the subject of genocide is especially badly chosen. For one thing, as a distinguished French historian has noted, "the use of the term has become purely political and ideological."[63] But in any event, the law itself offends against one of the most basic elements of the ROL – the idea that laws should be retrospective. The concept of genocide, dubious and confused as it is, did not exist until 1948, more than thirty years after the events in Turkey. By definition, therefore, the events, whilst no doubt a crime of some sort, could not have been genocide. But in any event genocide is, at least in theory, a crime with a complex technical definition, which only a court can find someone guilty of. No court has ever considered the question and it is doubtful of it could be decided now anyway. Thus, the law is being used for political purposes, to enforce a judgement about history that logically cannot be true.

Ultimately, pressure for this kind of legislation only distracts attention from problems which are much more important. All the attention given to "trafficking" has

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[62] One of the slogans of the Party, in *1984* was "Who controls the past controls the future. Who controls the present controls the past."

[63] See the interview with Pierre Nora, published in *Liberation*, 22 December 2011. Available online at http://www.liberation.fr/monde/01012379101-il-s-agit-d-eloigner-la-perspective-d-une-candidature-de-la-turquie-a-l-europe

diverted attention away from much more mundane forms of exploitation of the poor and vulnerable, not least women and children. Pressure to "do something" about child pornography has taken interest away from real problems of child abuse. And so on. Only so many laws can be introduced, and only so many enforced, and in the interests of the Rule of Law, they should be the right ones.

To conclude, it is worth adding that there are also puzzling silences and lacunae in national legal codes where one would have expected laws, or stronger provisions. Many activities that gravely harm the environment are unregulated in many countries, because the political power of those responsible is too great. Likewise, strict control of firearms in the United States would save tens of thousands of lives a year, but proposing such a law would be political suicide for any government. Even when a law actually appears, it may be so qualified by lobbyists as to be meaningless. In 2011, a US government attempt to improve nutritional standards in schools to combat the frightening epidemic of obesity was effectively neutered by lobbying from industries, such as those making frozen pizzas and chips, as to be meaningless. Among other things, frozen pizzas with two teaspoonfuls of tomato paste counted as "fresh vegetables".[64] On the other hand, there are also draft laws (they seldom come into effect), which seem primarily designed to extract money from lobbyists by intimidation. One example is proposals in the United States in 2011 to introduce laws regulating credit card fees. Whether such proposals were ever seriously intended is unclear, but their effect was to panic banks into paying millions of dollars to politicians in an attempt to stop them. For politicians who live or die depending on their ability to raise money, creative ambiguity on an issue which affects powerful vested interests can be very lucrative.[65]

Whatever the motives, and bearing in mind the above qualifications, it should be recalled that the ability to pass laws, and have them obeyed, is one of the fundamental qualifications for an effective state. Indeed, a state that cannot enforce laws it wants to enforce is not really worthy of being considered a state at all. Experience suggests that people view the legitimacy of a state primarily in terms of its ability to enforce laws, and so in principle protect them, above all other criteria. Laws which are not passed, or not enforced because of special interests undermine the legitimacy of the state. Laws which are passed in haste, in panic or for blatantly political purposes corrupt the whole process. A state that cannot pass or enforce useful laws, and so cannot benefit its people, forfeits this legitimacy, often with disastrous consequences for political stability.

HOW LAWS BECOME LAWS

The "why" of laws, already referred to above, is obviously closely linked to the "how." Laws do not arrive on the statute book automatically and fully formed, and apparently small changes in drafting along the way can make an enormous difference to how the law actually operates.

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[64] See "Congress Blocks New Rules on School Lunches", *The Washington Post*, 15 November 2011.

[65] See "Reclaiming the Republic: An Interview with Lawrence Lessig" in *Boston Review Online*, 11 November 2011, available at: http://bostonreview.net/BR36.6/lawrence_lessig_republic_lost_campaign_finance_reform_rootstrikers.php

Traditionally, laws are enacted by parliaments, and this has generally been the case even in dictatorships and one-party states. Even the most despotic of systems appears to feel the need for popular endorsement of its actions, and sometimes this goes beyond mere theatrics. In the old Soviet Union, for example, it does seem that the (limited) parliamentary discussion of new laws did result in some actual changes.

In any event, of course, a law that appears before parliament will be the product of many internal battles within and between the organisations that sponsor it. They may be government departments, political parties, outside pressure groups or industrial, commercial or professional interests. The resulting compromise may be further tweaked in a coalition system, where political party representatives may have to negotiate more changes. In some Asian countries, where a high value is based on consensus, the entire text of a law may be negotiated in private among all parties before it is tabled.

Finally, all sorts of influences will be brought to bear on parliaments as they discuss draft laws. In the "Westminster" system, which usually produces large and stable majorities, the eventual form of the law will be very close to what the government has tabled. In systems where parliaments are more powerful (notably coalitions) there will be more significant changes. In systems like that of the US, where parliament itself originates legislation, almost any result is possible. As a result, much depends on where pressure comes from. In countries like Australia, where campaign finance laws are very strict, it is very difficult for outside commercial interests to influence the content of legislation once it is in parliament. In the US system, which is notoriously for sale to the highest bidder, detailed drafting of legislation by lobbyists to further the interests of outside groups is the norm.[66]

Laws may also be produced to repay financial favours, or in return for votes, or in anticipation of either. We have already looked at the new Armenian "genocide" law in France, and there are examples from other countries as well. In France, parliament has a limited ability to sponsor legislation, whereas in other systems (such as the US) it has the sole right. Thus, buying legislation is an important part of political lobbying in Washington. In recent years, this has extended to the creation of new laws, with prison sentences attached, so that more people are sent to prison, which in turn increases the profits of the private companies who increasingly run the prison system.[67] Since most judges are elected at most levels in the US, it is also

[66] A popular account of the actual production of laws in the US is Ken Silverstein, *Washington on 10M$ A Day: How Lobbyists Plunder the Nation*, Common Courage Press 2002

[67] Ironically, the sheer cost of this system, as well as numerous scandals associated with it, have started to influence budget-conscious American states to take back the running of prisons themselves. See for example "Three States Dump Major Private Prison Company In One Month", online at http://thinkprogress.org/justice/2013/06/21/2193261/three-states-dump-private-prison-company-in-one-month/?mobile=nc

possible to contribute to their campaign expenses in return for promises of a more severe (and thus more lucrative) sentencing policy.[68]

So "Law" in the end, is a very contingent thing, which we must not glorify or make a cult out of. It is a collection of words, which could, and in some cases should, have turned out differently, and which is often the product of power-struggles, compromises, threats and bribery, but also of mistakes, drafting errors, confusion and simple incompetence.

Moreover, in every society that has ever existed, laws disproportionately reflect the views and interests of the dominant group. This group may be social and economic, it may be religious or ideological, or a combination of several of these things. In any society, no matter how democratic, it could scarcely be otherwise. Laws are originated and approved by elites, and it is hard to imagine how it could be any different. Elite views of what is good for the economy, what are the main concerns about crime, what social problems are most pressing, what kind of foreign and security policy to conduct, and similar issues, are unlikely, except by chance, to reflect popular opinion and popular interests, and this will necessarily have an effect on the laws which are introduced.

Nonetheless, no matter how imperfect laws may be, and no matter how much people may resent certain laws, they generally obey them. It has already been noted that this obedience does not seem to come primarily from fear, but from a series of other factors. As will be suggested later, it is often because laws reflect underlying moral values, and it is those values, rather than laws, which people are actually obeying. But there is also a contractual element. That is to say, obedience to (reasonable) laws is given in return for other benefits, notably protection and predictability. If laws are coherent and impartially enforced, they will generally be obeyed. The establishment of the Rule of Law, or its reestablishment after a crisis, depends on this contract being observed.

UNINTENDED CONSEQUENCES

Several caveats have already been entered about too much reliance on The Law, but a couple more points need to be made in closing.

First, laws do not by themselves do anything. All that laws do, to repeat, is to establish a potential power relationship that then needs to be enforced. This may seem obvious, but we forget it every time we ask for new laws to "keep us safe" or to "stop something." All laws are, ultimately, is a set of permissions for a state to act, and a list of circumstances under which people can be punished for things that were not crimes before. Yet laws are frequently given almost magical properties, as though, as in the Sacred Books they have replaced, the words alone have power. This problem is particularly severe in law-based state systems, which absolutely require the capacity not only to implement, but also to monitor in fine detail, the many laws that are passed. How else, for example, to understand the recent suggestion by two

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[68] See for example Eric Schlosser "The Prison Industrial Complex", *Atlantic Magazine*, December 1998, and, more recently, Adam Gopnik "The Caging of America", *New Yorker*, December 2011.

distinguished (or at least experienced) politicians that the struggle against climate change would be assisted if the French Constitution were amended to make this struggle a priority?[69] It can only have been assumed that the very heavens would bend to the will of the French state, as they once, reputedly, bowed to the will of the Sun King, Louis XIV.

Second, there are now increasing worries that laws may be a burden disproportionate to their value. Here we are not talking of self-serving allegations that honesty or care for one's workforce are somehow "burdens" that companies should not be expected to bear. Rather, a question now being asked is whether if Laws are better than No Laws, are Many Laws better than Fewer Laws? Is there at least a hypothetical limit beyond which the multiplication of laws serves no useful purpose, and may even be dangerous?

As hinted already, this may well be so. The sheer number of laws and their sheer complexity may actually be a barrier to their acceptance, and to the acceptance of Law as a concept; The French Employment Code, for example, the *Code de Travail* runs to a thousand pages and is written in a style that few ordinary people can hope to understand. As a result, many ordinary employees, and small employers, simply do not know what their rights and responsibilities are. And in all systems, the different levels of law and treaty now found everywhere create conflicts and uncertainties which it may take experts years to unravel.

Ultimately, a society based entirely on laws, in unchecked profusion, can actually degenerate into a type of anarchy, where many laws simply cannot be enforced, and ordinary people, confronted with almost insurmountable obstacles of understanding, may well lose faith in the very idea of Law as a concept.

[69] The text is available athttp://www.liberation.fr/politiques/2015/07/12/inscrire-la-lutte-contre-le-dereglement-climatique-dans-la-constitution_1346812

CHAPTER THREE

DOMESTIC INFLUENCES ON THE RULE OF LAW

It's not illegal if the President does it - Richard M. Nixon, 1974

As already noted, formal structures, procedures and documents are largely irrelevant to the practical existence or otherwise of a law-based state,, unless governments, down to the level of individual agents, agree to abide by them. This does not mean that such elements are unimportant, but it does mean that they are not sufficient by themselves.

Some of these elements are domestic in origin, and form the subject of this chapter. They first include legal mechanisms, such as the Constitution of a country, human rights laws, and legislation that governs the security forces, both their internal workings and their relations with the citizen. There may then be a series of formal oversight procedures – independent commissioners, parliamentary committees and so forth. Finally, and very importantly, there are traditional cultural and social norms that govern behaviour. The last are sometimes at odds with the former two, especially when constitutions and laws have been imposed from outside, by colonial powers or by donors.

The requirements of a healthy democracy have been succinctly summarised by the security expert Bruce Schneier, writing in the aftermath of revelations of widespread (and probably illegal) spying on US citizens by the country's communications intelligence agency. What was needed, he argued was

> a court system that acts as a third-party advocate for the rule of law rather than a rubber-stamp organization, a legislature that understands what these organizations are doing and regularly debates requests for increased power, and vibrant public-sector watchdog groups that analyze and debate the government's actions.[1]

This is no doubt true, but these elements were all absent in the case in question, as, unfortunately, they seem to be absent in most cases of the abuse of the ROL. Why is this so, especially when there is no shortage of documents setting out ideas for procedures for formal controls, often in great detail?

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[1] "Restoring Trust in Government and the Internet", August 7 2013, online at https://www.schneier.com/blog/archives/2013/08/restoring_trust.html

The key, of course, is that these documents, however imposing, have to be respected, and implemented in the correct spirit. Constitutions in particular can be very vague, as is usually the case with consensus drafting, and are frequently invoked to cover circumstances for which they were never remotely designed. Thus, as will be described later, radical interpretations of the US Constitution in recent years have argued that some of its provisions put the actions of the President, and anyone acting in his name, above all national and international law if the security of the nations is thereby protected. Even disregarding such radical theories, constitutions and laws necessarily contain ambiguities such that a skilful lawyer can justify government policies that on the face of it are illegal on a plain reading of the Constitution's provisions. Finally, a constitution may provide every guarantee one might hope for (as did the 1977 Soviet Constitution for example), but in a context where the nature of the legal system itself was oppressive. So in the latter case, "slandering the Soviet state" was a criminal offence, and people were solemnly charged and convicted of it, according to perfectly objective legal procedures.

INTERNAL COMMITMENT

What this means in effect is that the first line of defence of the ROL lies not in external control mechanisms, but inside the organisations themselves. Indeed, this is actually the principal fashion in which the ROL is implemented in daily life. Unless individual government employees, including those who advise and implement policy, are themselves committed to the existence of a law-based state, then formal instructions and mechanisms will have no practical significance.

Thus, laws and other procedures have to be respected, the Geneva Convention has not only to be signed, but implemented and incorporated into military law, and enforced by the chain of command. Those in positions of responsibility in the security sector have to take the role of enforcers, which they do through good leadership and discipline.

Within governments are also to be found representatives of corporations – especially lawyers and doctors - with their own binding code of ethics, which they should obey irrespective of where they find themselves. Lawyers in particular are expected not simply to advise governments on what the law says, but also to ensure that the government is aware of the limits the law puts on their allowable behaviour. If political leaders choose to disregard this advice, as is their prerogative, then the legal responsibility falls on them. But it is no part of the job of the lawyer to help a government circumvent laws.

Unfortunately, this sometimes happens. It may be because ambitious lawyers tell governments what they want to hear, or it may be that lawyers sympathise politically with the government and want to help them. It is unfortunately often the case that, as Jack Balkin puts it "Lawyers can make really bad legal arguments that argue for very unjust things in perfectly legal sounding language. I hope nobody is surprised by this fact. It is very commonplace."[2]

[2] See Jack Balkin, "The Legality of Evil: The Torture Memos and the Living Constitution," at http://balkin.blogspot.com/2008/04/legality-of-evil-torture-memos-and.html

A celebrated case is that of John Yoo, a relatively junior official at the Justice Department under President George Bush II, who produced the so-called "Torture memos" advising the political and military leadership that techniques the world had always supposed to be torture were in fact not. He further argued that anyway, someone who tortured prisoners taken in the "War on Terror" would be "doing so in order to prevent further attacks on the United States by the al Qaeda terrorist network. In that case, we believe that he could argue that the executive branch's constitutional authority to protect the nation from attack justified his actions."[3] Unsurprisingly, his subsequent appointment to a Professorship of Law at the University of Berkeley proved controversial.

Yoo's opinion is worth reading in its entirety as an example of a lawyer trying to torture, as it were, his training and expertise, as well as his professional ethics, into providing advice that he must have known to be misleading. Indeed, his bad conscience is evident from the contorted wording, which enables him to avoid taking any actual responsibility for his actions or opinions. He never says "I think", but rather that "we" (unspecified) believe that a torturer "could argue" that his actions were "justified." Normally, one looks to lawyers for legal advice, and it is not clear what "justified" means in this context. Clearly, Yoo was reluctant to say that such actions could be argued to be "legal."

More sophisticated defences have since been deployed as well. Thus, a senior lawyer at the Central Intelligence Agency, for example, has recently argued that "rendition" (kidnapping of individuals abroad) is perfectly legal under US law, and that "U.S. law does not even preclude the United States from rendering individuals to a third country in instances where the third country may subject the rendered individual to torture. The only restrictions that do exist under U.S. law preclude U.S. officials from themselves torturing or inflicting cruel and unusual punishment on individuals during rendition operations."[4] It may well be that a court would consider this statement to be factually incorrect, given the wide and unambiguous scope of the Convention Against Torture, described in the next chapter. But in any event, this statement is a fairly obvious attempt by a lawyer to provide a legal defence to order of an activity carried out by his own organisation, and one which many regard as legally wrong, as well as morally distasteful.

Doctors in theory are more strictly controlled than lawyers, by a universal code of ethics, with sanctions, and by the Hippocratic Oath. But throughout modern history, doctors have placated their consciences with the argument that the security of the state comes before all else, especially if orders come from a political leadership they regard as legitimate. The practices of doctors in Nazi Germany, and to some extent in the Soviet Union, are well know, as are those under military regimes in Greece and Latin America, but modern democracies are not exempt either. A 2010 report by the American Medical Association recounted how doctors and psychiatrists

[3] The full text of the Yoo documents can be found at media.washingtonpost.com/wp-srv/nation/pdfs/OLCMemo20-39.pdf?sid=ST2008040102264

[4] Daniel L. Pines, "Rendition Operations: Does U.S. Law Impose Any Restrictions"? *Loyola University Chicago Law Journal,* October 2010.

from the CIA's Medical Services Directorate helped to conceive and implement various torture regimes.[5]

FORMAL CONTROLS

It is partly because internal, unofficial, controls do not always work, that various systems of formal, external, controls have been proposed. In most cases, they find their ultimate inspiration in the concept of the Separation of Powers, or at least in a vulgarised modern form of it. This doctrine, (though it has antecedents in the thought of Aristotle) was originated in its modern form by the now little-known Charles-Louis de Secondat, Baron de Montesquieu in his 1748 book, *De l'esprit des lois* ("The Spirit of Laws."). The book is important as being the first real attempt to discuss the laws of different countries in terms of their cultures and societies.

Montesquieu lived in an age of triumphant absolutism, in a country where all powers were concentrated in the King. He devoted a substantial section (Chapter 6 of Book XI) to "The English Constitution", although England is in fact, scarcely mentioned as such. The chapter is really an extended argument against the concentration of powers in the same body, whatever that might be, and an argument for what we would now call the "Separation of Powers", although this is not how Montesquieu describes it. The English, Montesquieu believed, had effectively succeeded in separating what he called the "three types of power": the power to make laws, the power to conduct war and diplomacy and the power to punish violators of the civil law. He argued that when these powers are exercised by the same body, tyranny results and the citizens live in fear. By distributing power between different bodies, the English system thus ensured the maximum liberty.[6]

Montesquieu is describing what we would now consider the Executive, the Legislature and the Judiciary, although none of those concepts, as he knew them, bore more than a passing resemblance to those we have today. Nonetheless, his argument was extremely influential, especially with the framers of the American Constitution, and, in a bowdlerised and much modified form, has formed the basis of much of the theory of the Rule of Law today. Two important points need to be made, however.

Montesquieu was not a democrat, and indeed regarded the idea of giving power to ordinary people (*la canaille* "the mob") as very dangerous. "Liberty" as he defined it, was specifically distinguished from popular democracy. He was concerned with the orderly internal management of an oligarchy such that no part of it became too powerful at the expense of the others, and so posed a potential threat to the citizen. The modern idea of the legislature and the judiciary "controlling" or

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[5] See Leonard S. Rubenstein and Stephen N. Xenakis, "Roles of CIA Physicians in Enhanced Interrogation and Torture of Detainees", *Journal of the American Medical Association*, Vol 304, No 5, (2010). There is now a website devoted to illustrating the involvement of doctors in torture in different countries around the world: www.doctorswhotorture.com. There is a long history of human experiments in the United States, especially in the paranoid context of the Cold War: see, for example, Allen Hornblum and Judith L. Newman, *Against Their Will: The Secret History of Medical Experimentation on Children in Cold War America,* Palgrave Macmillan, 2013.

[6] The full text of the 1758 edition is online at http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/de_esprit_des_lois_tdm.html

"overseeing" the executive, and being on a higher footing than it, would have seemed incomprehensible to him. Indeed, he was much more worried about parliaments having too much power.

Even at the time, moreover, it was doubtful whether the clear distinctions he posited really existed in the English political system, and now they scarcely exist at all in some cases. Thus, in Westminster-style political systems, the government (the executive today) is in power precisely because it has a majority in parliament, and therefore controls it. An executive that has lost control of parliament, indeed, would normally have to resign. Moreover, the nature of the executive itself has changed fundamentally. In Montesquieu's time, the executive was the King and his relatives, with other members of the aristocracy, who between them held nearly all of the Ministerial posts and the great offices of state. In almost all countries today, these functions are assumed by a career civil service on the one hand, and elected representatives on the other. And in any event, parliaments of Montesquieu's time were elite bodies representing only a tiny fraction of the population.[7]

COUNTERVAILING POWERS?

Nonetheless, in theory the courts and parliament represent countervailing powers that could be used for used for positive purposes to enhance the ROL. Many countries take this idea very seriously, at the formal level, anyway, and constitutional provisions and laws may legally establish a role for parliament and the supremacy of the courts for example.

But the real issue is less whether these provisions exist, than whether they are used, or indeed whether they are actually usable in any form. As we have seen, countervailing powers, no matter how powerful in theory, cannot actually be exercised in practice unless the government itself is willing to respect them. If there is to be a genuine separation of powers – as opposed to just a separation of functions – three criteria have to be met. First, the institution has to be technically capable of developing its own views on sensitive issues. Secondly, it has to have some practical method of influencing the outcome of debates or processes involving these issues. Third, it has to wish to have this influence and to employ it. With due allowance for national variations, parliaments and courts do not really meet these criteria in the security sector, and the media –sometimes evoked also as a check on executive abuses – does so even less.

ARE PARLIAMENTS EFFECTIVE?

Parliamentarians have careers to make, and it is hard to blame them for choosing to specialise in subjects where public and media attention is likely. This does not include the vast majority of security subjects. Social policy, education, transport or agriculture are much more newsworthy, and, to be frank, the intellectual

[7] Montesquieu actually knew rather more about England, and the reality of its system of government, than is apparent from his book. See Iain Stewart, "Montesquieu in England: his 'Notes on England', with Commentary and Translation", Oxford University Comparative Law Forum, online at http://ouclf.iuscomp.org/articles/montesquieu.shtml. Retrieved 18 June 2012

barriers to entry are much lower. Few parliamentarians, in a notoriously insecure profession, are prepared to devote the time and effort required to becoming even a passable expert on security issues, which many professionals spend their entire lives mastering. Those elements of security that do attract interest tend to be the newsworthy ones – law and order initiatives, scandals, cost overruns, equipment shortages and "human interest."

Most countries have parliamentary committees covering security issues, but they do not necessarily attract ambitious and articulate parliamentarians. Their proceedings are often complex, and sometimes constrained by security limitations. The members almost always take evidence from witnesses far more knowledgeable than they are, and who have the right, and even the duty, not to communicate certain types of information to them, at least in public.

In any event, such committees are themselves bound by the basic logic and arithmetic of any Westminster-style political system. In such a system, where Ministers are drawn from the ranks of parliament itself, the instinct of an elected parliamentarian is to support their party. Indeed, there are often significant penalties for not doing so. This frequently means that elected parliamentarians of the government party will support a particular policy even when they think it is wrong, since they would not relish inflicting a defeat on a government that might be severe enough to bring it down. This is particularly the case in the security area, which is where most ROL problems arise. Conversely, opposition politicians will generally support their party line and oppose even initiatives with which they privately agree, in the hope of inflicting a defeat on the government. Expertise, as such, counts for very little in this discussion, and members of the Defence Committee, for example, may divide on party lines over a report, irrespective of their personal views on the issues.

To get an idea of what this means in practice, consider the parliament of a medium-sized country, with 200 members. Assume that the governing party or coalition has 110 seats and the opposition parties have 90. On the government side, perhaps 40 members will be Ministers or Deputy Ministers, business managers, or national or local leaders of their party. Such individuals have no choice about how they vote. Likewise, there may also be 15-20 opposition members, including official spokesmen, party leaders and so forth, who are subject to similar discipline. Thus, perhaps a third of parliament's votes are not a matter of individual belief or knowledge, but of party discipline.

In addition, of course, parliamentarians want to make careers, and annoying the party leadership is about the worst way to do this. Any parliamentarian who wants to be nominated to a committee, or considered for a ministerial post, would do well to vote the way the leadership wants. As a result, it is very hard to consider that in practice there is an entity called "parliament," which has a collective role separate from the executive. For example, in the kind of parliament described above, the defence budget will be approved because the government has more votes to deploy in its support than the opposition has to challenge it. But whilst it may be technically correct to say that parliament has "approved" the defence budget in such a case, it is hard to argue that it has done so as any kind of collective entity. In addition, parliamentarians also have to be wary of public and media opinion. If that opinion is

frightened and confused, and demands action of some kind, it can be difficult for parliaments to oppose these demands even if individuals within it think that the action proposed is wrong or immoral.

Certainly, when considering the damage that has been inflicted on the ROL in the last decade in western countries for example, there do not seem to be any cases where a western parliament has successfully challenged any new law that restricted civil liberties. This is unsurprising, given that, as we have seen, there is rarely an entity called "parliament" with a separate identity and set of interests that unite its members. Notoriously, parliaments only really come together when their interests are threatened or when their salaries and conditions of work come up for review. (The – perfectly legal – use of information obtained in confidence by elected politicians to speculate on the stock market seems to be a rare area of cross-party consensus in the United States, for example).[8]

The picture is not always as bleak as this, however. In parliaments elected by proportional representation, coalitions are often the norm, and in countries like the Netherlands, parliament does have an influence, at least in the sense that major decisions have to be negotiated among a number of political parties. Parliaments where the government has a small majority also have more influence than parliaments where the majority is larger. Finally, some systems do have a stronger distinction between the executive and the legislature. In certain cases (France is one) non-parliamentarians can be invited to become Ministers, and in turn, parliamentarians can develop more of a collective identity. The French tradition of factions, where members of the same party (especially on the Right) hate each other more than they hate the opposition can also loosen party discipline. The ultimate case is of course that of the United States, which has two separate parliaments, each of which considers itself to be an alternative government, and where the President can appoint literally anyone to any position of responsibility. This system – the very epitome of dysfunctionality – has fortunately not been widely imitated.

Parliaments do have some elements of "control" over the executive, of course. In theory, for example, enough government supporters could defect to the opposition to defeat the government's defence budget, or a plan for a new prison-building programme. But this is a very blunt and often self-destructive weapon, and one with unpredictable political consequences. Understandably, it is not used very often.

So parliaments seldom show themselves capable of uniting to "control" the executive, not least because the distinction between the two is very blurred. But even if they wanted to do so, their options are limited to the nuclear variety just discussed. If government violates a law, or applies the law in a perverse fashion, there is not much that parliament can do about it. Likewise, parliament has no ability actually to force the executive actually to hand over information. Indeed, as happened in South Africa during the 1980s, a determined executive can intimidate parliament into simply not asking.

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[8] See a CBS News report at http://www.cbsnews.com/video/watch/?id=7388130n&tag=contentBody;storyMediaBox

Parliaments are also popularly supposed to "hold governments to account" by questioning them. This happens to an extent, and Ministers can and do have a difficult time in front of parliaments and committees occasionally. But such proceedings often follow the wider parliamentary logic, with government supporters asking helpful questions, and opposition supporters hostile ones. And the longer-term consequences of a bad day in parliament are rarely very serious.

Finally, parliaments cannot really monitor the actual application of the laws they pass, except anecdotally. The actual implementation of laws, and the definition of terms, is in the hands of the very organisations that parliaments are supposed to "control." Thus, whilst US law apparently forbids electronic surveillance of the communications of US citizens, it appears that that country's National Security Agency simply decided to assume their targets were all foreigners unless it could be demonstrated, with at least 51% certainty, that they were not. It seems that this is not what those making the laws intended.[9]

ARE COURTS EFFECTIVE?

The situation of courts is more complicated, and much depends on such questions as the nature of the political system itself, the degree of influence that lawyers have within it, and the degree to which the system of government is explicitly law-based. In Britain, the idea of the courts overruling government is still new and disturbing. In countries with an administrative law tradition, it is much more common. There are countries, like Germany, where for political and historical reasons the prestige of the Constitutional Court is very high, and the government would not think of disobeying a finding. In France, the *Conseil d'État* has preserved its independence from successive governments, and struck down a number of proposed laws, as much as anything else because, in the fragmented French system, magistrates are fiercely independent and jealous of their prerogatives. In the United States, on the other hand, the current Supreme Court, with a majority of extreme right-wing judges, seems to be unwilling to challenge the government on security issues, and indeed agrees that some government actions should not even be subject to legal challenge. Lower courts have almost always gone along with what the government has wanted in criminal trials, and have been prepared to agree to keep evidence, and even the reasoning behind their decisions, secret. In one recent "terrorism" case in the United States, the public was not allowed even to know what the case had been about.[10]

If the judiciary is actually to have the "oversight" or "control" capacity described by some theorists, it needs to have the same three strengths as were described earlier for parliament; technical capability, the ability to intervene and the wish to do so in practice. At least one of these is often lacking.

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[9] The documents are reproduced at http://www.theguardian.com/world/2013/jun/20/fisa-court-nsa-without-warrant

[10] The published judgement on 14 October 2011, on the appeal of the Guantanamo prisoner Latif before the District Court of Columbia consists of the words "Classified Opinion Not Available to Public."

At its simplest, judges are expected to know the law. But as a distinguished British judge has observed, this is by no means always the case, even in relatively mundane areas such as commercial law. The profusion of law making in recent years in that country has been such that, in the absence of a centralised register, courts ruling even on sensitive issues may be "unable to discover what the law is."[11] Paradoxically, "rule of law" initiatives in states in transition may actually make the situation worse, by suddenly imposing entire new concepts and bodies of law, frequently literally translated from another language and another tradition, with which judges and courts are expected to become instantly familiar.

Judges cannot be expected to be experts on everything, and many cases now turn on technical issues which experts spend a lifetime becoming familiar with, and which they may dispute about in court among themselves. Judges in many countries have famously made fools of themselves by misunderstanding technical issues such as information technology or intellectual property, and have given conflicting and in some cases incoherent judgements. Most security issues are at least as complex as this. An appeal court, for example, might have to consider the case of someone convicted because, by methods which the government says it cannot reveal, he was alleged to be contributing to discussions in a language which no one in the court understands, about the technical feasibility of staging an attack on representatives of an unidentified western country.

As we will see in a later chapter, lack of expertise has been a particular problem in international courts dealing with war crimes issues. The cases (heard without a jury) have often turned on relatively arcane issues of military command and control, or the nature and extent of conflict, which are essentially matters of informed subjective judgement. Some of the early cases in The Hague were heard before judges who were court administrators or academic experts in international law, and had never actually conducted a criminal case. In such cases, judges are obliged to make factual findings about highly complex non-legal issues, and are as likely as the rest of us to make errors. Most famously, judges in the *Akeyasu* case in the Rwanda Tribunal in Arusha, unfamiliar with the sociology of Africa, conceived the idea that Hutu and Tutsi were ethnic (rather than socio-economic) groups, and so that the defendant was guilty of genocide rather than crimes against humanity.

Even if judges are entirely competent technically, there remain many other problems. In particular, we have to recognise that the idea of a clear separation between the executive and the legislature is a fiction in all countries to some extent. Judges are people, and they may have political, personal or ideological ties to members of the government, or they may have corrupt relationships with outsiders. There are many societies when judges will instinctively identify much more with the government minister, the general or the chief of police, whom they may know socially, or play golf with, than with an alleged subversive or terrorist whose ideas they disapprove of. This bias does not have to be conscious, and indeed many judges would be offended if it were suggested that they were biased. But it is hard to escape such problems in any society. It is for this reason that reserving too large a role for the courts ("rule by lawyers" as it is sometimes called) is often problematic in itself.

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[11] Lord Justice Toulson, cited by Tom Bingham, *The Rule of Law*, London, Penguin Books, 2011, p. 42.

Miscarriage of justice cases are the most difficult example, because here judges are being asked to critically examine, and potentially find fault with, the work of those who are their colleagues and may be their friends. The temptation to defend the system may be irresistible. The classic example of such dysfunction, from the United Kingdom, is the case of the so-called Birmingham Six, a group of Irishmen wrongly convicted for causing explosions with heavy loss of life in England in the 1970s. Looking back now, it seems incredible that any rational human being could have believed the men were guilty: there was effectively no evidence against them except their own confessions, which were immediately retracted and which, it was not disputed, had been extracted under torture. (There was a small amount of forensic evidence, which was soon discredited). But the men were Irish (although they had lived in England for many years) they were Catholics and some of them knew Irishmen believed to be active in the Irish Republican Army. Public and media hysteria at the time put immense pressure on the police to find someone, anyone, to blame for the deaths of more than twenty people.

Yet few doubted their guilt. The British establishment – including the legal system, but also parliamentarians and the media – resisted all attempts to question the verdict, and the few journalists and lawyers who investigated the subject were accused of sympathies with terrorism. The Appeals Court upheld the convictions in 1988. As evidence of a miscarriage of justice mounted, the government was caught in a political trap. The longer it delayed freeing the men, the longer it postponed the criticism and controversy that releasing them would cause, but the worse that controversy would ultimately be. It took more than fifteen years before the government eventually gave up, and did not contest the second appeal, in 1991. Even then, large parts of the British establishment greeted the release of the men with fury and incomprehension.

A key text in the Birmingham Six affair is the 1980 judgement of Lord Denning, then a senior and well-known judge, when the six tried to bring a civil case for assault against the police. Refusing this request, Denning argued, not that the men were necessarily guilty, but that if they won, it would

> … mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence, and that the convictions were erroneous…. This is such an appalling vista that every sensible person in the land would say: 'It cannot be right that these actions should go any further.'[12]

Even thirty years later, the cynicism of these remarks still has the power to shock. Denning seems to have understood that the men were innocent, but his concern was the defence of the reputation of the justice system, not questions of guilt and innocence. Like many people in similar positions, he was afraid that, if the justice system admitted mistakes and frailty, people would lose faith in it and stop obeying the law. Anarchy would then result. The fact that Denning attributed these views not to himself bit to "every sensible person" is perhaps as much evidence as

[12] The case is known to lawyers as *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, and the remarks are at paragraph 323D.

one needs of the bad faith and discomfort he must have felt. Denning's subsequent remarks suggesting that it would have been better if the Six, and other victims of miscarriages of justice, had been hanged, and thus forgotten by public opinion, also caused controversy.[13]

The same period also saw two other very similar miscarriages of justice involving Irish defendants, as a result of which an independent body to review complaints of miscarriage of justice was established in the UK. Commenting on these affairs a generation later, another distinguished judge noted rather primly that Denning and others treated the risk of a miscarriage of justice "in ways which we would not nowadays find acceptable." He also cited another distinguished judge, Lord Devlin, who called these three cases "the greatest disasters that have shaken British justice in my time"[14]

Miscarriages of justice happen in all systems. The question is how those systems deal with them; Economists are familiar with the principle of "sunk costs" i.e. money which has already been spent and cannot be recovered. Theoretically, sunk costs are to be disregarded, but behavioural economists have found that, once we have spent money on something, we continue to carry out that activity, even if we know it will be a waste of time. Classically, few people actually walk out of cinemas even if they dislike the film they have paid to see. Something similar happens in politics, where failed policies are often continued precisely because so much time and effort has already been expended on them. The more homogenous a system is, the more its different components identify with each other, the harder it is for the system to admit errors.

This complex mix of shared backgrounds and assumptions, of political views, identification with colleagues and the wider system, and fear of the consequences of admitting error is the main reason why the courts are often unwilling to "oversee" or "control" the executive. A good recent example of how this works in practice is a decision by a US District Court in 2011 not to allow a former Guantanamo victim to sue the US government, on the basis that "government officials could be distracted from their vital duties to attend depositions or respond to other discovery requests … a trial on the merits would be an international spectacle with Padilla, a convicted terrorist, summoning America's present and former leaders to a federal courthouse to answer his charges … the litigation would risk disclosure of vital state secrets … (and) discovery procedures could be used by our enemies to obtain valuable intelligence."[15] Obviously, such examples could be greatly multiplied from all over the world, though the arguments are seldom so blatant.

Finally, the courts do not only have a supervisory function, they have a basic function of ensuring that justice is done in the first place. Sometimes, judges may be idle, stupid or incompetent: occasionally, they may be clearly malevolent. As we have

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[13] See for example http://www.independent.co.uk/news/lord-denning-the-centurys-greatest-judge-dies-at-100-1078587.html

[14] Remarks by Lord Steyn in the House of Lord, 22 January 2004. Available at http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040122/conn-1.htm

[15] See http://jurist.org/paperchase/2011/02/federal-judge-dismisses-padilla-torture-suit.php which contains a link to the full judgement.

seen, in the United States in recent years, the running of prisons has been increasingly handed over to private companies. These companies are paid a fee per prisoner entered into the system, and so it is in their financial interest that as many people should be given prison sentences as possible. The natural consequence – the bribing of judges to impose custodial sentences – did not take long to appear, and some judges have now themselves disappeared into prison as a result.[16]

AND THE MEDIA?

As well as the Legislature and the Judiciary, other actors have appeared since Montesquieu's time. Chief among them is the media, which has often been cited as a counter-weight to government in discussions of the ROL. It is obvious, of course, that the media is rarely completely independent as such. Some media are directly linked to political parties, some are owned by commercial forces who may support or oppose governments for financial reasons, some may be part of international media empires, others may support governments in expectation of favours later. In such situations, journalists, even if they want to, may find it difficult to publish stories that cause difficulties for a government. Whilst explicit links between newspapers and political parties are less common in the West than they used to be, in other countries they remain the norm. Part of the problem during the decade-long crisis in the Ivory Coast was that the main media sources in the country were owned by political parties, and acted as their mouthpieces.[17]

NGOs and think tanks, other relatively new developments, are also sometimes cited as countervailing powers. Yet of course they are not self-financing, and in some parts of the world (notably in Africa) they are seen, and sometimes resented, as instruments of western and donor influence. Even in the West, the need to attract financing can result in a brutally competitive market, where NGOs and think tanks have to mark themselves out and maintain a high public profile by presenting controversial and newsworthy reports and recommendations. It should be conceded that such organisations often do good work, but such are the pressures on them that it is unrealistic to expect that they can ever successfully act as countervailing powers to government. In addition, of course, no one elects them, and so such organisations often have very limited legitimacy.

Yet in many societies, journalists, experts, think-tank professionals and others find it difficult to challenge governments, even when they disagree with what they are doing. The reasons for this have more to do with psychology than with politics. There is a natural tendency to want to belong, and to form part of a consensus. There is also a natural tendency to want to identify with power. Perhaps it was this that prompted the Ombudsman of the *New York Times* to ask in 2011 whether it should be part of a journalist's job to point out errors of fact in the statements of

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[16] See for example "Judge to serve 28 years after making $2 million for sending black children to jail " available at http://rollingout.com/criminal-behavior/judge-must-serve-28-years-after-making-2-million-for-sending-children-to-jail/

[17] See for example Charles Toussaint, "Relations "particulières" entre journalistes et personnel politique: le cas de la Côte d'Ivoire », *Africultures*, 20 November 2007, online at http://www.africultures.com/php/index.php?nav=article&no=7100

government and other powerful actors. Perhaps understandably, reader reaction was explosive. "Is this a joke? THIS IS YOUR JOB" wrote one irate reader.[18]

Especially in an area like security where there are levels of secrecy and access, it is tempting to believe that some policy of government which you think is misguided or even dangerous is in fact justified by information which is not available to you. There are practical advantages as well. To support what government says is to be accounted "serious" and given privileged access to government thinking. You may be invited to discreet and off-the-record discussions and seminars, and in turn government personalities may support functions you organise. Access means that your articles or your reports will be better founded and more authoritative. Finally, such a posture is largely cost-free. There are in practice no sanctions for journalists or other outsiders who get a story badly wrong, or even tell deliberate lies. Retailing things you know to be untrue in order to maintain your access to important people is a perfectly reasonable professional choice for a journalist, for example, who is unlikely ever to be called to account for their behaviour. There are, of course, journalists, NGOs and think tanks who do not follow the government line. But few are really independent, and many are reliably to be found *opposing* every government initiative in a certain area, in the company of others who generally do the same. Real independence is lonely, and psychologically difficult.

Some idea of what a genuine independence means is provided by the example of the French weekly the *Canard enchainé*. Scourge of successive French governments for a century, it has ended ministerial careers and destabilised governments with careful investigative journalism, a small and precise focus (largely French politics and business) and an intelligence network which many professionals would kill to acquire. Many of its best stories are based on leaked official documents. But its journalists are regularly harassed and spied on by those they write about, and the paper carries no advertising, and charges a relatively high price (€1.20) for its eight closely printed pages. In practice, few journalists are ready to work like that.

An instructive counter-example is the media treatment of the alleged weapons of mass destruction in Iraq in 2003, where much of the Anglo-Saxon media simply regurgitated government allegations. The presentation by the then US Secretary of State Colin Powell to the UN Security Council was reported in tones of hushed reverence by the US media, although we now know that almost all the claims he made were false. Subsequently, it appears that the same news outlets went as far as reporting that WMD had actually been found In Iraq, although the American government itself never actually claimed that. In most cases, corrections were never published, and no journalistic careers seem to have suffered as a result.[19]

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[18] See Clay Sharkey, "The New York Times public editor's very public utterance", *The Guardian,* 15 January 2012. Capitals in original.

[19] For selected media quotations of the time see Gilbert Cranberg, "The Iraq War, Colin Powell and the Press" *Watchdog Blog*, 18 December 2011, online at http://blog.niemanwatchdog.org/2011/12/the-iraq-war-colin-powell-and-the-press/ and Seth Ackerman "The Great WMD Hunt", *Fairness and Accuracy in Reporting*, July-August online at http://www.fair.org/index.php?page=1150

Finally, there are public figures able to influence public opinion and command media attention, who could in theory oppose government policies they believe to be wrong. Historically, this sometimes actually happened, with the opposition of Sartre and others to the war in Algeria, and of a large number of public figures to the apartheid regime in South Africa. In both cases, there was probably a small positive effect on public opinion, although also in both cases the protesters were very much the minority.

These days, though, public intellectuals are more likely to be found supporting government policy than opposing it. There are no intellectuals in Britain.[20] In the United States, there is a class of generalist commentator frequently given the free run of TV and newspapers to supply allegedly objective commentary. For some years, *Salon* magazine has published a list of the thirty "worst pundits", serial offenders against truth and logic, and almost without exception they have supported government policy on all important security issues.[21] In France, the proud tradition of Sartre has long been abandoned. These days, intellectuals are more likely to found cuddling up to governments, and supporting wars rather than opposing them.[22]

That said, media and outside commentators do not invariably support governments on security issues. They may also decide to oppose governments where governments are weak and on the defensive. Sometimes this takes the form, as we have seen, of demanding stronger and stronger powers and firmer action from governments. Sometimes it means buying into interventionist fantasies of action abroad, from Bosnia and Rwanda in the 1990s to Sudan and Syria today. In the latter case, there is not only the vicarious pleasure of hitting someone while they are politically down, but also feeling morally superior to your victim while doing so.

COUNTERVAILING POWERS?

The above discussion has, I hope, demonstrated that traditional ROL discussions invoking institutions with "countervailing powers", which "oversee" and "hold to account" governments are largely unrealistic. In practice, there is little that such institutions can actually do, even if they are able to find out what is going on. And often they support, rather than criticise, the government. But even the unrealistic separation of powers model has to assume that certain things are true, if it is to be even theoretically effective, and, these days, it is not clear that they are.

The first is that public and elite opinion will be hostile to government exceeding its powers and undermining the ROL. As we have seen, this is seldom the case. Often, nobody cares. In 2010, for example, the *Washington Post* published a series of well-researched articles spelling out in great detail the creation, during the previous decade, or a huge, secretive, and immensely expensive internal security bureaucracy in the United States, mostly run by private contractors, a "Top Secret America hidden from public view and lacking in thorough oversight" in the words of

[20] As President Mitterrand found when making his first visit to Britain in 1981, and asking to meet a group of British intellectuals. Downing Street had to inform him that there were none.

[21] See the 2011 list at http://www.salon.com/2010/11/25/the_hack_thirty/

[22] See Pascal Boniface *Les intellectuels faussaires: Le triomphe médiatique des experts en mensonge*, Paris, Pocket, 2011.

the authors. Yet public and elite reaction was virtually non-existent, with only a few commentaries appearing in the media, most of them either deploring excessive government spending, or worrying that the series could undermine national security.[23]

The second is that, if public and elite opinion is mobilised (as can happen) then the government will be obliged to change its behaviour. Again, this is rarely the case, unless there are other factors operating as well. In general, it takes credible allegations of criminal wrongdoing or personal corruption by individuals to force action by government, and even then it will usually be limited to those allegedly involved, who are often sacrificed to the greater good. In other cases (as in the miscarriages of justice cases described above) uncontroversial organisational changes may be made to stave off further criticism. But of itself, criticism by parliament or the media is just a fact of life in government, and politicians and civil servants learn to ride it out.

The third is that the underlying system is reasonably healthy, and that various protective organisations and documents are in force and doing their job. But often it is not like this. Constitutions, for example, often seen as the basic guarantee of liberty, almost always have clauses enabling part or all of the text to be suspended or revoked in an emergency of some kind. The "State of Exception" as Giorgio Agamben has called it in his important study, has, over the last generation, become something of a norm.[24] "Temporary" powers are taken by states and then never revoked. In some cases, these powers even pre-date the formation of the state. Emergency legislation passed by the British to cope with Jewish terrorism in the 1940s was taken over by the new state of Israel, and since used to detain Palestinians indefinitely without the need for any evidence against them.[25]

Sometimes the process is more recent. A good example is the whimsically titled "Prevention of Terrorism (Temporary Provisions) Act" of 1974, introduced by the UK government in the aftermath of the IRA bombings that year, although conceived and drafted some time before. Public indignation was such that the law was rushed through Parliament with little discussion. The Act itself was revised on several occasions, and was originally supposed to be approved by Parliament every year. After 1989 the annual requirement lapsed, and the law effectively became permanent, being replaced by the Terrorism Acts of 2000 and 2005, which effectively turned temporary provisions into permanent ones. There are many similar examples today in countries around the world.

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[23] For an account of the series and the reaction to it, see Glen Greenwald "Why has the Post series created so little reaction? ", *Salon* magazine, 23 July 2010, available online at http://www.salon.com/2010/07/23/intelligence_3/

[24] Giorgio Agamben, *State of Exception*, tr. Kevin Attell, Chicago, University of Chicago Press, 2005.

[25] See "Khader Adnan's Hunger Strike Puts Israel in a Bind," *Time* magazine, 22 February 2012, available online at http://globalspin.blogs.time.com/2012/02/21/a-hunger-striker-at-deaths-door-turns-up-the-heat-on-israel-and-on-the-palestinian-leadership/

The worry about such laws is that they create legal vacuums in which anything is permitted, usually without any oversight by the courts. As a result, what the general population still regards as "traditional freedoms" may not have existed in reality for years or even decades. They therefore make the installation of an actual dictatorship or authoritarian state very easy. Examples from history abound: the Nazi takeover of Germany was effectively accomplished through the "Decree of the Reich President for the Protection of People and State" promulgated by President Hindenberg the day after the Reichstag Fire in February 1933, to forestall a supposed Communist insurrection. The decree, which limited personal freedoms substantially, was in fact issued under Article 48 of the existing Weimar Constitution, an Article that had repeatedly been invoked by the President since the effective collapse of the Weimar Republic in 1930. Similarly, when the French Parliament voted itself out of existence a decade later, and awarded "full powers" to Marshal Pétain, it was simply continuing a tradition of emergency rule, which had been established for the best part of five years already.

The existence and the persistence of such laws (or absence of law in many cases) creates an awkward and politically-dangerous dynamic. Governments, having taken such powers, are reluctant to give them up, for fear of being accused of weakness or complacency. After all, an attack might come tomorrow. So the temporary becomes permanent, and, after a while, it seems logical to add new measures. In most cases, there is no real debate, and no oversight, so every institution puts forward new proposals for changes that would make its life easier. Typically, an enabling law will permit government departments to make their own laws and regulations without reference to parliaments. Thus, as the Israeli Jewish newspaper *Haaretz* noted ironically, emergency powers in force since 1948 allow the government to "ensure the state's continued supervision over such issues as ice cream production, show tickets and amniocentesis tests" under a state of emergency which is duly renewed every year.[26] Such powers tend to be widely accepted by populations. They are inevitably presented as being necessary for the protection of individual citizens against outside threats, and are – overtly at least – always aimed at identifiable and unpopular minorities. Thus, opinion polls in the United States over recent years have consistently shown that nearly half the population supports the use of torture to extract information in important criminal cases, though in fact such practices are contrary to US (and international) law.[27] Of course respondents do not imagine that they themselves will ever be subjected to torture. Rather, the question is framed in terms of "terrorist suspects," a largely meaningless category of person whom it is acceptable to torture because They are Not Like Us.

This leads to the last major pre-supposition that is often falsified in practice, which is that there is agreement about what threats or risks exist, and what crimes

[26] See Jonathan Lis, "Israel extends 63-year state of emergency - over ice cream and show tickets", *Haaretz*, 15 February 2012. Online at http://www.haaretz.com/print-edition/news/israel-extends-63-year-state-of-emergency-over-ice-cream-and-show-tickets-1.363640

[27] See for example Pew Research Centre, "Public Remains Divided Over Use of Torture" 23 April 2009, available online at http://www.people-press.org/2009/04/23/public-remains-divided-over-use-of-torture/

these could lead to if not combated. For all the very justified criticism of the British authorities in the IRA bombing scandals of the 1970s, there was no doubt that an actual crime had been committed, and that people were dead or wounded as a consequence. But the significantly entitled *Prevention* of Terrorism Act arguably began the modern trend to the criminalisation not only of behaviour, but also of thought. Thus, the Act made it a crime to express support for the political objectives of the Irish nationalists, even in private. Much modern legislation in various countries goes further, creating entirely imaginary categories of criminal against whom it is not alleged that they have committed a crime, might be about to commit a crime, or even are contemplating doing so. Rather, as with the "suspected terrorists" in the previous paragraph, they are people to whom the state has taken a dislike. If I describe you as a "suspected terrorist" it does not mean that you have committed a crime, or have any plans to do so: it simply means I am suspicious of you, perhaps for no good reason. Victims of such processes then become trapped in a Kafkaesque world where they are not accused of any actual crime, but may nonetheless be held in captivity forever because someone is suspicious of them. The analogy with the child pornography panic above is quite exact: in some countries, for example, visiting an internet site which has links to another site which may feature the expression of opinions the government dislikes can be a crime, even if you had no idea you were committing it.

The ultimate extension of this approach is the creation of crimes by the authorities themselves, and the subsequent entrapment of alleged criminals. So-called "false-flag" operations are a very old technique, usually employed to discredit political groupings the government dislikes. Show-trials, brought to a pitch of perfection by Stalin, generally served to discredit, as well as destroy, political opponents by charging them with actual or planned acts of terrorism or sabotage. Many of today's "terrorism" cases draw on both traditions. If read closely, most accounts of the uncovering of "terrorist networks" today amount to little more than the monitoring of members of various minority groups until eventually one of their number makes an incautious remark which could be interpreted as encouraging or condoning some illegal activity.

In legal systems where entrapment is a recognised practice, the situation can be starker still. An analysis of "terrorism" convictions in the US in the ten years to 2011 demonstrated that, according to the government's own evidence, each of the plots was effectively designed by government departments, who then recruited weak and vulnerable individuals to pretend to carry them out, only to arrest them at the last minute. In other words, without government initiatives, the plots would never even have been hatched in the first place.[28] More recent studies suggest that the trend is continuing.[29] But why would government authorities do such things?

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[28] See Stephen Salisbury, "The FBI: Foiling its Own Plots Since 2001", *Slate* magazine, 7 July 2010, available online at http://www.salon.com/2010/07/06/fbi_foiled_terrorism_plots/

[29] See for example Project SALAM, "Inventing Terrorists: The Lawfare of Preemptive Prosecution", May 2014, online at http://www.projectsalam.org/Inventing-Terrorists-study.pdf. Accessed 13 July 2014.

Discrediting political opponents at least has some logic to it, but why pick on harmless and obscure people?

The simple and cynical explanation would be the preservation of budgets and organisations. The huge security bureaucracy of the United States, after all, must be seen to be dong something, and no doubt this is true of many other countries as well. That may be so, but it is hard to believe that the explanation is as simple as that. Part of the explanation may also be a desire to show a deterrent capability, or to intimidate genuine attackers into thinking twice. But the most important motivation is probably fear. As with the examples of child pornography or human trafficking, popular opinion does not actually know what the facts are, or understand the issues, and demands that the government "do something". Unscrupulous politicians and a complicit media stoke the fires of hysteria, scoring points off each other by accusing opponents of being too lenient or too complacent about the "threat". Governments can find themselves caught in a trap of their own devising: having insisted on the importance of an issue to begin with, they are now captives of the panic they have unleashed, and have to show that they are responding, not to the reality, but to the media and political exaggeration of it.

To take an example that is becoming wearisome with repetition, there is no evidence at the time of writing that the Al Qaeda group, or any of its affiliates, has seriously attempted to mount an operation against the United States at any point in the last decade. They appear to have concluded that their objective – undermining, and if possible eliminating US influence in the Middle East – can more easily be accomplished in other ways. From the generally moderate and realistic public pronouncements of US officials, it is seems likely that they recognise this. But a public opinion and a media fed on a lurid diet of Hollywood fantasies, terrified of nameless threats, and ignorant of or uninterested in sober analysis, demands action. There is a lot of evidence that, in such stressful situations, where the public is demanding results, investigators actually come to believe in the guilt of those they are entrapping. They argue, if only to themselves, that even if these people did not commit the actual crime they are accused of, they have probably committed another, or will do so in the future if left at liberty. In cases where the motive is ideological, of course, the latter argument is impossible to disprove. We have already seen how the entire UK legal establishment, as well as the media and the political class, was firmly convinced of the guilt of the Birmingham Six.

This is what has been called, tendentiously one might think, "noble cause corruption." A more formal definition is "corruption committed in the name of good ends, corruption that happens when police officers care too much about their work. It is corruption committed in order to get the bad guys off the streets…the corruption of police power, when officers do bad things because they believe that the outcomes will be good."[30] This problem seems to be a common one in every society, and, as we will see, the philosophy behind it has appeared in some strange places recently: in investigations and trials of alleged war criminals, for example. Needless to say, no system which respects the rule of law can allow individual policemen to make judgements about who are "bad guys", nor indeed what are "good ends".

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[30] John P. Crank and Michael A. Caldero, *Police Ethics, The Corruption of Noble Cause*, Cincinnati, Anderson Publishing Company, 2000, p.2

It would be easier, perhaps, if people only confessed to crimes of which they are actually guilty. But not only can psychological pressure by interrogators force innocent people to "remember" and confess to crimes they never committed, it appears that participants in psychological experiments can be manipulated, by simple memory techniques into incriminating themselves also.[31]

Fear of unnamed and mysterious threats has also prompted governments throughout history to adopt a sweeping and all-inclusive approach to preventing possible crimes from occurring. Where existing perpetrators have come from particular minority groups, the temptation is to criminalise the entire group. Thus, anarchists, communists, nationalists of all types, Jews, Irish people and most recently Muslims have been assumed to be collectively responsible, if not actually guilty, of crimes. If they are surveyed, harassed, locked up deported en masse, then surely among all the innocents there will be some who are guilty of something, or might one day be so. Given the elastic definition of "guilt" now in use around the world, this is often a self-fulfilling prophecy.

Yet, depressingly, this is not a new problem, nor is it linked only to "terrorism". In effect, police forces in many countries seem to have a history of twisting and misusing evidence when they are convinced that someone is guilty. The use of DNA testing has exonerated many who people who were convicted of rape or murder, although in the case of the latter, some had already been executed. In the United States, some 300 people have now been cleared of murder in this way. [32] More prosaically, the law enforcement authorities of that country recently admitted that they have misused hair analysis in thousands of cases, with potentially hundreds of people wrongfully convicted, and a number even executed.[33] And disturbingly, recent studies indicate that the miracle technologies themselves may be both intrinsically unreliable, and prone to misuse and corruption.[34]

SO WHAT IS LEFT?

This brief discussion of ethics leads us back to where we started. The fact is that when the ROL is abused, it is seldom if ever because the right documents do not exist, or the right training courses have not been provided. It is, of course, necessary for the security sector to function according to clearly defined rules. And there are

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[31] Julia Shaw and Stephen Porter, "Constructing Rich False Memories of Committing Crime", in *Psychological Science*, January 2015, available at http://pss.sagepub.com/content/26/3/291

[32] See for example Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, Harvard University Press, 2012, and the 2013 report of the Preventing Wrongful Convictions Project, available at https://www.american.edu/spa/djls/prevent/upload/Predicting-Erroneous-Convictions.pdf

[33] "See DOJ/FBI Admit They May Have Abused Hair Analysis To Convict Hundreds To Thousands Of Innocent People", available at https://www.techdirt.com/articles/20130723/00563923895/dojfbi-admit-they-may-have-abused-hair-analysis-to-convict-hundreds-to-thousands-innocent-people.shtml

[34] See for example Douglass Starr "Framed by Forensics," *Aeon Magazine*, 17 December 2014, available at http://aeon.co/magazine/society/how-can-we-rid-the-legal-system-of-bad-science/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+AeonMagazineEssays+(Aeon+Magazine+Essays)

many cases (acceptance of gifts is a classic example) where practices differ, and it benefits everyone to have clear regulations. So in addition to external laws and constitutional provisions, there are generally also laws to regulate the organisation and structure of the security sector, and rules for its internal functioning and discipline. In the case of the military, these can be quite elaborate and detailed, and, as we shall see, must also accord with international treaties on the law of armed conflict.

It is obviously important that these documents exist, especially in transitional situations where there may be genuine uncertainty and controversy about the functions of particular organisations. A police service that is being reconstituted after a civil war or political transition will need more documentation than one that has existed untroubled for decades. But it is no less important that these documents should actually be respected and implemented, and this is a question of organisation, leadership and discipline. Thus, the difference between a security sector that respects the rule of law and one that does not is not primarily one of organisation and rules, but one of a cultural willingness to respect the norms of the law-based state, and work within its constraints. Experience suggests that, if the personnel of the security sector are not prepared to act correctly, no amount of external pressure will make them do so. And, as we have seen, there are often powerful pressures in the opposite direction, not least from the media and the political system. There are, of course, things that outside forces can do to help, notably paying the security sector properly, and providing its personnel with decent conditions and enough resources. But whilst these can facilitate respect for the Rule of Law, they cannot make it happen.

Ultimately, for example, there is no way in which policemen could think it acceptable to entrap innocent people and extract confessions by torture simply out of ignorance, or because they happened to miss one particular lecture on human rights during their training. Attempting to address bad behaviour by lecturing individuals is largely pointless, since this behaviour is itself a product of the political system and organisational culture, and it is those that need to change. Experience suggests that, whilst these things can change and do eventually change with time, they tend to do so rather slowly.

Nonetheless, whilst you cannot lecture people into being good, you can set them a good example by people they respect and trust, and the kind of culture change which actually leads to improvements in the Rule of Law almost always happens

CHAPTER FOUR:

INTERNATIONAL INFLUENCES ON THE RULE OF LAW

Political action can only change the world in various ways. The point, however, is for philosophers to explain it differently. - Anon

Many of the ideas reviewed in the previous section are international, in the sense that they are to be found in many countries, and they represent, to some extent at least, a partial consensus about the ideal relationship between a state and its citizens. But other elements of the Rule of Law are international in a more fundamental sense: they are derived from documents that are signed by large numbers of different states.

TREATIES, CONVENTIONS AND NORMS

Some of these Documents are formal treaties, which are legally binding on states, just like any other treaty, and which states should then incorporate into their domestic law. There are a large number of such treaties which have an impact on the ROL: some of the more recent and important include the (currently topical) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). Some treaties and conventions have a more restricted application: the obvious example is the European Convention on Human Rights (1950, and five subsequent protocols), which is binding on EU members and takes priority over their domestic legislation. The ECHR is an interesting example of where a formal enforcement mechanism exists – in this case the European Court of Human Rights, whose judgements it would be politically unacceptable for any signatory to refuse to accept.[1]

But a treaty is only a treaty, and it does not follow that a state which has signed a treaty, sometimes to please donors, or for the sake of a quiet life, is

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[1] The principal treaties referred to in the text are available online, as follows:
Convention Against Torture
http://www2.ohchr.org/english/law/cat.htm
Convention on the Rights of the Child
http://www2.ohchr.org/english/law/crc.htm
European Convention on Human Rights
http://conventions.coe.int/treaty/en/Treaties/Html/005.htm
Universal Declaration of Human Rights
http://www.un.org/en/documents/udhr/index.shtml
The United Nations Treaty Collection http://treaties.un.org/Home.aspx?lang=en contains a useful database of signatures and ratifications of the various treaties.

necessarily interested in implementing it. In some cases, the resources or the technical capability to implement the treaty properly may not exist, even if there is the will to do so. Nor is there usually any recourse against the state if it fails to implement the treaty, any more than with domestic legislation: a nation cannot literally be forced to implement a treaty commitment. Moreover, major states are careful what they sign, and most treaties are worded in such a way that they allow a degree of flexibility. So in the case of the ECHR, for example, a number of rights that appear sweeping are in fact heavily qualified later.

Thus, Article 11, guaranteeing the right of freedom of association and peaceful assembly is qualified by the exception that it "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." A determined government would not have to look far, therefore, to find a way around the Article.

Likewise, treaties are binding only when signed and ratified, and usually contain provisions for temporary or permanent withdrawal. Thus, Article 15 of the ECHR allows states to derogate from their obligations under the treaty "in time of war or other public emergency threatening the life of the nation." It is for states to make this judgement, and the UK duly derogated from some of the ECHR provisions after the attacks of September 11 2001, although those attacks took place in a foreign country.

As well as treaties and conventions, groups of nations will often issue declarations after a conference or large-scale high-level meeting. (The most obvious case is the Universal Declaration of Human Rights, adopted in 1948 by the UN General Assembly, when it still consisted largely of western states). These are often no more than statements of good intentions, usually drafted in such a way that it is impossible to judge whether or not they have actually been implemented or not. They are, of course, never more than politically binding, though it must be conceded that they can still have an indirect role in shaping policy and actions, especially where the content of the declaration is essentially uncontroversial. Few states publicly criticise the Declaration, for example.

Finally, there are what are usually described as "norms and standards;" sometimes the word "customary" is employed. There is, of course, no definitive list of such norms and standards, and there is very little agreement about what would go into any such list anyway. One of the problems with norms is that they are not normal – by definition, they represent aspirations rather than reality, and their framers will tend to argue that they should be as ambitious as possible, even if the result is that they are completely unrealistic as practical objectives. However, once more they can have an influence.

One of the most notable cases where a norm actually has made a difference is the progressive disappearance of the death penalty. Almost universal in the 1960s, it is now restricted to around a third of the world's countries, many of which are small

island territories. And even many of these do not actually carry out executions in practice. There is no doubt that international disapproval, and developing norms of repugnance against state killing, have played a major part in this progress.[2]

IMPLEMENTATION?

In practice as well as in theory, it is for states themselves to implement these treaties and respect these declarations. Few international documents contain provisions for monitoring compliance, and there are very limited mechanisms for doing so in any case, although enthusiastic NGOs sometimes try to substitute themselves. Major powers, especially western ones, become sensitive and irritable if there is any suggestion that their own practices should be monitored, although, bilaterally and through donors, they often seek to micro-manage the affairs of others. The ROL, ill defined as it is, has become a major mechanism for this interference, especially during post-conflict reconstruction activity. Its very vagueness means that donors can secure access to sensitive parts of government by arguing that the ROL in a given country is not being respected, by reference to some document the government, or a previous one, has signed. Such a claim is impossible to disprove, and few small and weak nations will feel brave enough to try. But instrumentalisation by donors is only one facet of the political use of treaties and convention, although an important one.

The importance of rights, freedoms etc, which make up part of the subject-matter of the ROL, has been stressed for a long time - at least since Article 55 of the UN Charter in 1944. But UN and other bodies have recently taken to stressing the importance of the ROL as a component of peace and security itself, which is quite new, and largely unexplained, and unsupported by evidence. Thus, the Secretary General of the UN reported in June 2006 that the Council "... attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace" and that it "considers enhancement of the rule of law activities as crucial in the peace building strategies in post-conflict societies."

Now such texts are drafted with great care, with agreement by the major players, and words like "indispensable" and "crucial" are not used lightly. In the first case, the implication is that a situation which is apparently peaceful, but where, in the view of outside observers, the ROL and human rights are not respected, is not in fact a peaceful one. The lack of any clear definition of terms means that such a judgement will be based on relative political power and subjective judgement, rather than objective criteria, and that, in effect, virtually any situation can be described in this way. In the second case, the implication is that ROL activities are an obligatory component of any strategy in a post-conflict society, whatever the conflict may have been about, and whether or not the local population considers that absence of the ROL (however defined) has been a problem. As always with the Security Council,

[2] Amnesty International has a substantial page of statistics and other information about the progressive abolition of the death penalty worldwide at http://www.amnesty.org/en/death-penalty

smaller states, even those who are temporary members, will have had little or no input to these texts.

More recently, in Resolution 64/116 of 2010,the General Assembly took up the baton, stressing "the importance of adherence to the rule of law at the national level, and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations ...." Now some of this thinking can be benign: as indicated above, some states lack technical capability to implement treaty obligations, and may genuinely seek help from abroad. But it seems unlikely that that is all that is meant here. Putting the two texts together, we see a logic whereby the Security Council, charged with preservation of international peace and security, identifies the lack of the (ill-defined) ROL in a country or a region as a threat to this peace and security. A small state whose ROL status has been criticised by outsiders in this way would therefore be well advised to "request support" from donors and large and powerful states to avoid being branded a threat to peace and security. It is possible, indeed, that a narrow definition of the ROL (focusing on commercial freedoms only) could be used to imply that government actions to limit this "freedom" (such as economic regulation or nationalisation) were actually a threat to peace and security.

HOW IT WORKS – OR DOESN'T

All this is to say that, behind the veneer of open agreements freely arrived at, and universally binding obligations, the position is actually just as complicated and confusing as one would expect from the way in which international relations usually works in practice. In a world where international commitments to ROL treaties and conventions are essentially unenforceable, the usual rules apply, and large states can, very often, get away with what small states cannot. Meanwhile, small states often cannot even defend their legal rights.

Much of this inequality is inherent in the system, and is not necessarily the result of a conspiracy or of deliberate manipulation. Negotiation of treaties and agreements is a very unequal business. The largest states may have experts in all areas, may have spent several years preparing for the negotiations, and may have draft language available even before the negotiations start. They will probably dominate the informal negotiations and preparatory commissions that take place before the negotiations start. Medium-sized countries with a good capability will still be able to take part in at least some of these discussions, and follow the negotiations themselves, with their inevitable multiplication of working groups and parallel sessions. But the vast majority of states, including those against whom the provisions of a treaty or convention may be largely aimed, will be hard-pressed to even keep up with the major developments in the negotiation. (Most of the serious negotiation will take place in English of course). The capital may receive a great deal of lobbying pressure from donors, but for independent advice it may have to rely on a weekly telegram from a harassed First Secretary in a small Embassy who has ten other things to do. As a result, smaller states frequently wind up signing treaties without knowing precisely what is in them, let alone what the practical implications will be. This state of affairs is probably inevitable as long as there are large and small states, and rich and poor ones.

In turn, the lack of any real transparency and accountability in the negotiation process itself encourages scepticism and cynicism in smaller countries. Confronted with a declaration that the state cannot implement, and may in any case be politically unpopular at home, why protest? Why not just sign the thing, take the money from the donors, and forget about it except for the occasional supportive remark in a speech?

There is also the danger of undermining the spread of new norms by insisting on them too fiercely and dismissing opposition to them without trying to understand it. We have already seen how Western elites have completely reversed their positions on issues such as the death penalty and homosexuality in the last two generations. We now argue, in effect, that the attitudes and practices of our own countries when we were colonial powers were wrong, and that our attitudes and practices now are correct, or at least superior. Most educated people – including the present author – believe this to be true. But we have to accept that we cannot prove it, and that in the end all ethical positions are matters of opinion, no matter how strongly we may hold those same opinions. This sober judgement has been widely accepted since it was demonstrated in the work of the English philosopher, John Stuart Mill (1806-1873).[3] But most people are instinctively uncomfortable with the idea that ethics are relative, and seek some kind of assurance, from an ideology or an organised ethical system, that their beliefs are not just sincerely held, but actually superior to others. In some societies, religious belief can function as a common point of reference but, in post-religious societies, we have to accept that, whilst we may certainly choose to act *as if* certain ethical positions were superior to others, this judgement remains a pragmatic and subjective one.[4]

Such philosophical issues rarely arise when treaties and declaration on the ROL are being negotiated: there is no time for them and no interest in them. Rather, received ideas and fashionable commonplaces of the day tend to be included, not least because their absence would be noticed otherwise, and criticised by various interest groups. Such ideas and commonplaces are probably accepted, at least passively, by the majority of the delegates, and in turn few would go so far as to actually argue against them. But such ideas may not be universal, or even very common, in the societies these delegates represent, and in some societies they may have very little support. Even in Britain, for example, where the death penalty was abolished in 1964, opinion polls suggest that at least half of the population would like to see it restored, and right-wing newspapers and pressure groups frequently campaign for that, although they stand no chance of success.[5] This conflict is of political interest in any event, but its importance in the ROL debate is much greater, given donor pressures for change, and the practical consequences of such change on the lives of ordinary people.

A good example is the legal position of women in many parts of the world, including, more recently, their role as actors in the security and justice systems. It is

[3] Notably, but not exclusively, in his *System of Logic*, (1843).

[4] A useful, if demanding, exploration of the problem of multiple, mutually uncomprehending traditions of ethics, is Alasdair MacIntyre, *After Virtue*, Third Edition, London, Duckworth, 2007.

[5] See the summary of current debates at http://www.bbc.co.uk/news/uk-14402195

true that, in many parts of the world, women are today as relatively disadvantaged as they were in the West when the human rights treaties of the 1940s and 1950s were being drafted. In other areas, they are no better off than were women in the West a hundred years ago. Which is to say that societies evolve, and in most cases legal norms follow social evolution rather than determine it. So the entry of women into the workforce as the nature of western economies changed, and as a result of two major wars, brought about social pressures that eventually led to changes in the law. Many ROL-type initiatives today are attempts to short-circuit these developments by seeking to impose on societies a century's worth of change overnight, but often without touching the underlying structures of society which these beliefs form part of. We are then surprised at how foreigners react to ideas about the position of women, or children, or sexual minorities the way our great grandparents would have done. We are, of course, free to believe that ethical standards progress, and that our views are superior to those of our great grandparents. But once again we cannot prove it, nor can we assume that our shiny new values will so dazzle other societies that they will feel obliged to adopt them more rapidly than we did.

In effect, and without becoming too technical, we are dealing here with a vulgarised form of the traditional dichotomy between Idealist and Materialist interpretations of events. Most famously expressed by Marx and Engels in their attack on Hegelian thought in the *German Ideology*, the materialist criticism is that idealists see the world in terms of the triumph of new ways of thinking, rather than actual visible and tangible changes. By this logic (widespread in the ROL debate, and even more so in the law-based state literature) the mere passing of a law or the making of a declaration is an end in itself, and need have no practical consequences whatever. Thus, I recall being told by a student from a country where lack of judicial independence was a major weakness, that the problem was now essentially resolved. How did you manage that, I asked. Well, he said proudly, judicial independence is now guaranteed by the Constitution.

ENFORCEABILITY

The lack of real enforceability of these texts poses particular problems for the human rights treaties and conventions that are part of the ROL furniture, even where the underlying logic itself is widely accepted. In some other contexts, treaties and conventions are at least partly enforceable. For example, arms control treaties such as the Chemical Weapons Convention and the Conventional Armed Forces in Europe Treaty have verification regimes which provide access to signatory states' territories under controlled conditions. But these are essentially exercises, and, whilst verification of such treaties is not perfect, large-scale cheating is difficult, and can be demonstrated technically. In addition, major powers regard both of these treaties as in their security interests, and therefore care about enforcement.

By contrast, human rights and other ROL-type treaties are effectively unverifiable, because they depend on subjective judgements about the behaviour of individuals towards other individuals in a very large number of distinct cases. In effect, such verification and enforcement as there is can only be at the most formal level. Thus, a state that has signed and ratified a treaty, incorporated its provisions into domestic law, issued instructions on implementation and trained the relevant

personnel, has done everything that is actually verifiable towards implementing its obligations. By contrast, it is very hard, and probably impossible, to know how the state is implementing these obligations at the level of the individual citizen. Indeed, even if a state conscientiously signs and tries to implement these treaties, it may be powerless to actually do so against domestic opposition. In many countries, for example, the police are organised locally or regionally, rather than nationally, and may even be subject to local, rather than national laws. A national government which signs these treaties may be dependent (as in the case of the United States) on local police authorities, often controlled by an opposition political party, to implement local legislation. Even then, the obligations actually have to be enforced.

The UN Convention on the Rights of the Child (1989) is a useful example. Inevitably, many of its provisions are both vaguely described ("freedom of thought, conscience and religion" in Article 14) and then heavily qualified (subject to "public safety, order, health or morals, or the fundamental rights and freedoms of others.") Enforcement, or even verification, is therefore impossible. Although the CRC has almost universal coverage, it is impossible in practice, except from anecdotal evidence, to know if it is being implemented or not, and for the most part impossible to affect the situation. For example, only two countries (Somalia and the United States) have failed to ratify the Convention, although Somalia has said it will do so. But it is hard to imagine that ratification by Somalia would make much difference in that country, given that the government in Mogadishu is effectively powerless to do anything. In turn, this is only an extreme case of the inability of many states, especially in Africa, to implement international obligations in practice. By contrast, the United States would be much more capable of implementing the Convention's obligations, but there seems little prospect that international pressure could overcome the opposition of various religious and nationalist groups in that country to ratification. Finally, even if a large country (China, say) was to be found to be grossly in breach of the Convention, by some objective measure, it would be pointless to try †o apply international pressure, since it would just be ignored.

In fairness, it should be added that many states do their best to abide by the provisions of this conventions and treaties, sometimes at a cost to the effectiveness of their security sectors. This can become especially problematic when political groups seek to use these treaties in imaginative, and arguably dishonest, ways that were not foreseen by the drafters.

A good example is the question of whether the provisions of the ECHR extend outside the borders of the signatory states, and therefore whether citizens of non-signatory states can bring cases against other countries. It was so argued in the so-called *Bankovic* case, decided by the Court in 2001. In 1999, during the Kosovo conflict, NATO forces had attacked a television station in Belgrade, causing deaths and injuries. Survivors and relatives sought to take the 17 NATO states who were signatories of the ECHR to the Court, alleging that NATO had effective control of the airspace over Belgrade, and was thus required to guarantee ECHR rights to those below, including the right to life. This somewhat tenuous argument was rejected by

the Court on admissibility grounds, since it was not convinced that the Convention applied in such cases.[6] Similar cases may fare better in the future.

A closely related question (again, not foreseen at the time of the Convention being drafted) is whether the ECHR applies to soldiers of signatory states on active service outside Europe. At first sight, this would seem odd, but a recent (at the time of writing) case suggests that it could do so under certain circumstances. In 2013 (and overturning one of its previous judgements) the UK Supreme Court decided that Article II (which guarantees the right to life) applied in Iraq to British soldiers under British command. The Court therefore gave the plaintiffs leave to bring a case against the UK Ministry of Defence on the grounds that servicemen died (i.e. their right to life had not been protected) because of errors and inadequacies in the procurement and deployment of equipment. [7] Quite where this will all lead is very uncertain.

IDEAS FOR EXPORT?

None of the above means that treaties and conventions are useless, or that further improvements in human rights and the ROL should not be sought and welcomed. But they are only the beginning of a very long process, and their contents and orientation represent a particular balance of political forces in the drafting process, rather than universal truths or moral imperatives. Their value tends to be indirect and long term, and in many cases they reflect changes in international opinion (as with the case of the death penalty) rather than causing them. And, as always, unless a culture of respect for such provisions exists, then all the treaties, conventions and domestic legislation in the world will have little impact.

This being so, it is necessary to be modest and realistic in what is proposed and agreed. Often this is not the case, and the result is a mess. Typically, states will agree a far-reaching protocol or declaration, based on ideas largely contributed by major powers, as well as international NGOs. Donors will promote the ideas (which may be genuinely good ones, and which they may genuinely believe) to states that took little part in the negotiation, and may have little capability to implement, or in some cases even understand, its provisions. They will pressurise governments to do more, praise those that do, fund NGOs that put further pressure and fund workshops and visits. One hesitates to criticise, since such initiatives are often praiseworthy. But they may also include ideas that are unrealistic, which are incapable of being implemented or which do not resonate with the views of the local populations. In the latter case, unfortunately, opposition is often dismissed automatically and out of hand. Our ideas are right, we believe, and if others do not hold them they ought to. Otherwise, their opinions are clearly wrong and can be discounted.

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[6] A copy of the ECHR press release is available at http://www.aldeilis.net/english/index.php?option=com_content&view=article&id=1897:echr-dismisses-bankovic-on-jurisdictional-grounds&catid=36:extraterritorial-obligations&Itemid=312

[7] An analysis of the decision is at http://www.ejiltalk.org/uk-supreme-court-decides-smith-no-2-v-the-ministry-of-defence/

The position is complicated by the fact that it is almost impossible to make absolute judgements about the kind of rights-based issues that underlie most ROL activities. Often the two (or more) sides are not even talking about the same thing. For example, those who would use the force of the law against homosexuals in Africa argue in support of their position that homosexuality is not part of African culture. Sympathetic commentators argue that homosexuality has always been present, and in some cases recognised. Observers of the debate argue that extreme Protestant Christians from the US are behind many of the repressive initiatives. In all probability, there is some truth in all of these contentions. But any political system can go only so far, so quickly. It is clear that resistance to reform in this area runs very deep in parts of Africa, and, no matter how tolerant of minority orientations we believe societies should be, we have to accept that fact.

In particular, we have to accept the fact that there is a huge gap between texts and reality, and that the first does not produce the other automatically, or necessarily even at all. In most western societies, rights and freedoms have been recorded in legislation once a social and political consensus in their favour has come into existence. Thus, it was possible to decriminalise homosexuality in Britain in the 1960s because a reformist government could take advantage of a social climate that was becoming rapidly more liberal. Such a development would have been impossible twenty years before, and probably twenty years later, as well.

Unfortunately, those who seek to export the ROL (and even more the law-based state) tend to have a naïve (and as we have seen, Idealist) belief in the normative power of words. They seem to believe, in effect, that the mere drafting and promulgation of a text can bring about the social and political changes which it describes. This seldom if ever happens in practice, and is perhaps the largest single reason for the failure of ROL initiatives.

CHAPTER FIVE

DOES THE INTERNATIONAL SYSTEM HAVE RULES?

If international law says we can't bomb Serbia, there must be something wrong with international law. – US official overheard by the author in 1999.

As well as international treaties and conventions that affect how nations behave in their own countries, there are also a series of agreements and customs that set out the rules by which states normally deal with each other. It is conventional to describe them as "international law". Agreements of this kind are between states and affect only states: individuals cannot violate them. Questions about the legality of the 2003 Iraq war, for example, relate only to judgements about the behaviour of states, not individuals in charge of them.

IS INTERNATIONAL LAW REALLY LAW? DOES IT MATTER?

The question of whether international law can properly be called law or not continues to divide even experts, and is not the kind of question that can ever really be settled. Moreover, it is not clear that those who believe it is law (essentially international lawyers) and those who do not (basically everyone else) are even talking about the same thing. Much depends on whether you believe it is a fundamental characteristic of law that it should be enforceable. If so, then it is hard to argue that international law is law, since there is no way of enforcing it. On the other hand, it can be argued that international law is influential, that states do not violate it easily, and that it is codified, and discussed and developed. All this is true, but whether it thereby qualifies as "law" is ultimately very much a matter of individual belief.

A compromise conclusion might begin from the fact that the international system, in spite of what is sometimes alleged, is not in fact anarchic. Most states follow the precepts of international agreements most of the time, because it is in their interests to do so. A host of agreements related to such things as telecommunications, aviation, space, maritime trade and international standards, are internationally respected and implemented. The international system would not work otherwise, and indeed elites would suffer more than ordinary people if that were so, and therefore support these agreements strongly. International agreements relating to the environment and to humanitarian affairs are more contentious, but are widely respected and states will feel awkward about violating them. Likewise, treaties, even on sensitive security-related issues, are generally adhered to. This is law as collective self-interest and, paradoxically, major states are often enthusiastic about such agreements being respected, because they have the most to lose if they are not. A good example is the 1961 Vienna Convention on Diplomatic Relations, the current version of the traditional operating system of international diplomacy, which

includes previsions to protect diplomatic personnel and premises. Clearly, the larger a country's diplomatic service, the more it will benefit from this immunity.[8]

But in the last analysis, little of what is described as "international law" is enforceable, and as a general rule, the more significant the issue, the less the chance of enforcement, especially against a major state. It is true that, even on sensitive issues, states usually adhere to these agreements, but it is not (at least in the case of the major players) that they feel constrained; it is that the agreements themselves (which are of necessity negotiated between states) suit their interests and needs. "International law" is better understood, in fact, as a series of non-binding norms reflecting what major states, for the time being, are prepared to accept. It is also an agreed discourse for discussing international issues, and states typically try to justify their own actions, and criticise those of other states, by reference to its vocabulary and concepts. Thus, states will generally try to appeal to international law to support their actions, and few if any will overtly flout it, or claim that it has no importance.

A good example is the British decision to join the United States in the 2003 attack on Iraq. Whilst the British government system is open to various criticisms, it does have the virtue of being legalistic, and so it would have been impossible for the British to have taken part in the face of legal advice against the operation. On the other hand, not to take part could have had, in the eyes of the government of the day, terrible political consequences for the bilateral relationship with the United States. It was therefore imperative that legal approval should be given. The issue was whether existing UN Security Council Resolutions gave approval for such an attack. The Attorney General of the government (a former professional colleague of the then Prime Minister) originally believed, as did nearly all commentators, that the relevant text (UNSCR 1441) gave no such authority. He changed his mind after a visit to Washington, which was fortunate, since there was no prospect of a further Security Council resolution making things clearer. The attack therefore went ahead, though it is fair to say that other members of the Security Council were surprised to find that they had apparently voted for a war without realising they had done so. Nonetheless, the then Attorney General has continued to defend his reasoning stoutly.[9]

INTERNATIONAL LAW EVOLVES ….

In this context, it is not surprising that international law does not try to prescribe, but to rather to follow the evolution of international practice. A good example is that of Humanitarian Intervention, packaged these days under the label of the "Responsibility to Protect" (R2P). The drafters of the United Nations Charter were very clear about the need to reserve the right to wage war to the Security Council, and to ensure that other forms of military attack were illegal. In particular, they recognised that all sorts of pretexts had historically been used for aggression, of which intervention allegedly to protect others had been one of the most used. They

[8] The text of the Convention, with commentaries, is at http://www.viennaconventionondiplomaticrelations50thanniv.org/

[9] See for example "Goldsmith admits to changing view over Iraq advice", available on-line at http://news.bbc.co.uk/2/hi/8481759.stm

had before them the recent example of the humanitarian interventions by Germany in Czechoslovakia and Poland. As a result, the idea, much put around in the last decade, that there is some "balance" to be struck between the inviolability of frontiers and the behaviour of governments to their people, is entirely false and unsupported by any historical evidence. Nonetheless, the search for ingenious new arguments to permit intervention without a Security Council resolution encouraged the invention almost overnight of an entire new doctrine by which states that could not "protect their people" in some undefined manner forfeited their traditional protection under international law. It is fair to say that R2P has always been a confused and internally contradictory notion, and that little if any thought had been given to how it would work in practice. Once it became clear that in principle anyone could use the doctrine to intervene anywhere at any time against anyone else, the brakes began to be applied. Indeed, as early as 2005 one of its originators, a former Australian Foreign Minister, was acknowledging that he really did not know what the term meant. These days, the idea is used in a much less confrontational sense, and is often unrelated to conflict or violence.[10]

There have been other clever attempts to get round the principle of the inviolability of national frontiers, a principle that can be bothersome in practice. ("If international law stops us from attacking Serbia" said a US official in the author's presence during the 1999 Kosovo crisis "then there must be something wrong with international law.") A favourite device is the use of Article 51 of the UN Charter, which notes, though it does not establish, the traditional right to self-defence. All that the Article says, as an afterthought and tidying-up exercise is that "(n)othing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security" (emphasis added). It is hard to see how anything could be clearer. A state that is attacked does not have to wait idly until the UN comes to its rescue, but can continue to exercise the right of self-defence it already has, while it is waiting for the cavalry to arrive. But in recent years this concept has expanded exponentially towards a doctrine of pre-emptive attack against a threat that may arguably exist, or may exist at some stage in the future, or even to attacks on civilian targets and individuals in third countries believed to be hostile to one's own country. In time, this is likely to produce a situation where gratuitous attacks on foreign countries are regarded as perfectly legal, and thus the doctrine enshrined in the UN Charter will have been turned upside down. No wonder many smaller states are deeply concerned.

Because international law is led by practice, with theory labouring some distance after it, the response of international lawyers has been not to question these developments, let alone oppose them, but to seek to adapt international law to take

[10] For a good analysis, see David Chandler, "The Paradox of the 'Responsibility to Protect' " in *Cooperation and Conflict*, Vol. 45, No. 1, 2010, available at http://www.davidchandler.org/journals_articles/journals_articles.html

account of them.[11] In the absence of any enforcement mechanism outside the control of the very states that have been trying to promote new justifications for intervention, this is probably inevitable. International law, as I have suggested, is thus best seen as an attempt to codify what major states for the time being want, or are prepared accept. All law is like this to some extent, of course, but international law is perhaps unique in being effectively powerless to do anything but watch and then follow, as practices change, sometimes rapidly, in front of its eyes. But then "international law evolves" as a former government legal adviser once said to the author, with a resigned shrug.

RULE OF LAW AT THE INTERNATIONAL LEVEL?

Formally, international law (let us call it that for simplicity) is divided into three parts. First is public international law, the law of states and organisations to which we have been referring. Private international law, on the other hand, covers individuals and commercial corporations at the international level, as well as questions of jurisdiction over them. Finally, supranational international law is the relatively new subject of states' relations with supranational organisations, such as the European Union. What follows will concentrate largely on the first, with brief nods to the third.

As already suggested, the question of whether international law is law is incapable of resolution, since it depends largely on which definitions we accept. The best answer, to repeat, is that international law displays some of the formal verbal and organisational traits of other forms of law (not surprising, since it is modelled upon them), but that the substance is substantially different, and an outside observer (a Martian political scientist, let us say) would be unlikely to spontaneously choose the word "law" to describe the system. Yet that is not really the most important question.

A much more interesting question is whether something like the ROL can be said to exist at the international level. In other words, the question of whether observing the actual operation of the international system would naturally incline us to think of it as a law-based one. This is a question that experts have been slow to address, and normally approach only from the aspect of enforceability. This is analogous to ignoring all aspects except the enforceability of laws in a discussion in the context of a specific country, which would be curious. In fact, the way to approach the question is to look at the typical constituent parts of the ROL, as set out in the first section, and ask whether they apply in international relations.

Consider first the question of whether something analogous to the separation of powers exists at the international level. Unless such a separation can be shown to exist, then many of the features of the ROL cannot logically exist either. Is there an international executive, legislative and judiciary, or anything that resembles them?

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[11] An example is Tom Ruys, 'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice," *Cambridge Studies in International and Comparative Law*, No 74, 2010.

Obviously, nothing like an international executive can be said to exist, since that would imply a world government of some kind. There are organisations, ranging from the Security Council to the European Commission, via the World Bank and the International Atomic Energy Agency, which have powers of sorts over governments. But they form a squabbling oligarchy, rather than a united bloc, and few of them are genuinely independent in the sense that a domestic state and its agents are supposed to be. (The European Commission is perhaps the best example of a genuinely independent supranational organisation, but significantly it has few security-related powers). Moreover, most of them only have powers over states that have signed the treaties that established them. Historically, the modern state developed when an autonomous structure with its own independent actors took over the organisation and finance of the nation, frequently pushing aside aristocrats and regional rulers, who equate loosely to the nations of today. As Max Weber noted, in such a situation no "single official personally owns the money he pays out, or the buildings, stores, tools and war machines he controls."[12] The international system is far from that condition, since most of the money and the resources continue to be owned by states. It cannot honestly be said, therefore, that there is an executive of any kind at all.

The International Court of Justice is thought by some to be the equivalent of a national judiciary, and indeed is the closest analogue there is to such an organisation, although that is not saying much. Certainly, it performs useful functions, but also very limited ones. In particular, it is limited essentially to a kind of arbitration role, in which states have to agree to accept its jurisdiction before it can pronounce on a case. It also lacks any means of enforcing its judgements. It resembles rather more, in fact, the customary law procedures used in Europe a thousand years ago, and still found in certain parts of the world today, in that it depends on respect and moral pressure to have its judgements respected. Other international bodies, notably the World Trade Organisation, have quasi-judicial powers to rule on disputes, but again there is no way of enforcing their decisions. These institutions have some of the symbolic properties of a judiciary, but not much more than that.

Finally, there is no World Parliament. The UN General Assembly is sometimes instanced in this context, but it is not a law-making body, and it has no real powers of oversight or control. It resembles more the kind of consultative assembly found in hereditary monarchies, although some of its specialised committees have influence, and even some financial control, over some of the UN's own activities. In summary, nothing like the separation of powers can be said to exist at the international national level, which resembles as much as anything the Europe of the pre-modern era. What about other components of the traditional concept of the ROL?

Protection from arbitrary acts of government is generally regarded as a key element. To state the obvious, there is no such protection in the international system, either from arbitrary acts of states, or, more importantly, those of international organisations. The UN Security Council, to take the most obvious example, has given itself the powers to do anything at all that it wishes. Whilst in theory it should always be acting against threats to international peace and security, there is no independent

[12] Max Weber "Politics as a Vocation" in *From Max Weber: Essays in Sociology*, edited, with an introduction, by HH Gerth and C Wright Mills, London, 1991, p.82.

check on whether it is, and no forum in which it can be required to justify its activities, let alone defend itself against complaints. A nation affected by its decisions cannot go to an independent authority to argue that the Council has exceeded its powers, for example. It is also, inevitably, greatly influenced by the political interests and ambitions of its permanent members. Thus for some years the Security Council threatened Iran with various dire consequences if it did not change its policies towards civil nuclear power. This was presumably linked to the fact that the five Permanent Members of the Council are also nuclear weapon powers and are anxious to preserve their monopoly, and that a civil nuclear programme always, potentially, has the capacity to be militarised. Irrespective of the merits of the case, the reality is that there is no body to which the Iranians could turn to argue that the Council has behaved arbitrarily, and exceeded its powers, as one would expect in a law-governed system. Similar considerations apply to organisations like the World Bank and the International Monetary Fund. The latter, for example, is both more powerful than most states in the world, and disproportionately dominated by a few of the most powerful ones. It is able to overturn elected governments, but has no accountability other than to its shareholders. Likewise, many multinational companies are now more powerful than states. Yet, far from protecting states, the international system tends to favour multinational companies, through various trade regimes and commercial treaties.[13]

For this reason, few would seriously argue that, in practice, the international system is an equitable one, and that in practice, as opposed to theory all states are treated equally under international law. Indeed, it is hard to see that this equality could ever be possible, in the absence of an enforcement mechanism that would have to be more powerful than the largest state in the world, yet independent of all states.

For the more technical and formal issues relating to the ROL, we can say that the position is very patchy. Treaties, declarations and communiqués, for example, are for practical reasons negotiated behind closed doors, often by small groups of states that dominate the outcome. Otherwise, nothing would ever get done. Most treaties and similar documents are at least published, although many are never formally translated into the languages of the countries most affected by them. Again for practical reasons negotiations cannot take place in more than one or two languages at the same time, and it is normal for the final form of the treaty to be in English. (The Treaty of Paris, which ended the fighting in the Former Yugoslavia, was not translated into Serbo-Croat for some time afterwards, and some of the technical annexes remained in English). Diplomatic agreements also tend to be written in a contorted, mandarin style, which is often hard to understand and capable of various interpretations. This is inevitable when texts have to be agreed by large numbers of states, often working in second and third languages, and having very different objectives. Vagueness can be a virtue, indeed, in that it makes texts easier to agree.

The last criterion – that agents should act according to the law – has no real applicability in a situation where there is no world government. All that can be said is that there is no mechanism for ensuring that either states or their representatives act

[13] Scholars have recently begun to address this subject. See for example Thomas D Zweifel, *International Organisations and Democracy: Accountability, Politics and Power*, Oxford, Berghahn, 2005.

in accordance with the law, and that in practice international organisations tend to be above the law anyway, at least as regards enforceability.

So if we look at the international system as it actually operates, we find it hard to argue that it demonstrates many of the characteristics of the ROL, still less that it is law-based. This in turn has political implications that are now beginning to play out. It has resulted, for example, in the increasing political assertiveness of rising economic powers like China, Brazil and India, who primarily seek a world order they regard as more equitable, much as the middle classes disputed aristocratic power in Europe from the eighteenth century onward. It has also resulted in the international equivalent of vigilantism over the last decade or so, as unsatisfied and despairing non-state groups take the law into their own hands, against the West. Each of these developments is likely to continue unless and until the international system develops attributes of accountability and equality it does not currently display.

It is also true, however, that there are unspoken customary rules at the international level, just as there are at the national level, and they are just as important. In practice, states do not look at the detail of the rulebook before they have dealings with each other, not least because the rulebook itself corresponds largely to the articulation of how things are done in practice anyway. Custom and practice is an important part of international relations, reflecting the fact that diplomacy is one of the oldest professions of mankind, and many of the rules have continued in much the same form for centuries. It is even true that there are informal rules for things that could not possibly be codified anyway.

Espionage is a good example. Here there are understood rules and practices, which make what could be a disruptive and even anarchic business tolerable. Even in the Cold War, the two sides observed informal rules, because it was in their common interest to do so. So, whilst everyone accepts that intelligence agencies have a presence in Embassies, no one has tried to stop this (it would be impossible anyway). However, intelligence officers who are identified, or defence attachés, for example, who go beyond what informal rules permit, can be declared *persona non grata* (i.e. unwelcome) under the provisions of the Vienna Convention, and under such circumstances the sending state would always withdraw them, since they no longer enjoy diplomatic immunity. To prevent abuse of this right, it is accepted that the sending state may also expel someone in reprisal, who may or may not be an intelligence officer. The phrase “activities incompatible with their diplomatic status” is the well-understood and universally employed euphemism in such situations.

THE WRONG MODEL?

Perhaps the simplest way to understand the operations of the international system is by reference to the development of traditional states, and the codes of justice that they employed. The earliest form of political organisation was the village, the clan and the tribe, which would have customary laws to manage its own affairs, but would tend to regard all outsiders as enemies, who might be robbed or killed without any sense of a wrong having been committed. This attitude remained

important, even in parts of Europe, into the nineteenth century.[14] The next stage was the creation of larger political units, under the best strategist or the fiercest warrior, which subsumed other groups into small kingdoms, like those of medieval France. Some might achieve a temporary dominance over their neighbours, or make military or marriage alliances. Eventually, an undisputed ruler would emerge over a sizeable territory (a country or a series of possessions) and the size and complexity of this political system (as in the France of Louis XIV) would require the beginnings of a modern state. But that state would be the effective servant of the ruler, designed to protect and expand his or her power. The final stage – the kind of independent state described by Weber, above - emerged when states became more politically and organisationally complex, and new political forces demanded a state which represented their interests as well as those of historical rulers. This is quite a recent development and often followed war or other political upheaval. It happened in Great Britain after the humiliation of the Crimean War, and in Japan with the Meiji Restoration after the shock of the first encounters with the West.

It is only in the last phase than anything like the Rule of Law is possible at the national level, because until then the ingredients for it do not exist If the purpose of the security forces is to ensure the dominance of the King, then by definition citizens will not be treated equally, and the arbitrary use of power will be normal. So part of the confusion surrounding the issue of the existence, or not, of the ROL at the international level is because the wrong analogy is being applied. International law texts and procedures are modelled on those of modern nations where the state is, at least in theory, an independent actor. But the actual organisation of the international system is closer to something between the first and second stages of the domestic paradigm described above, and it is not clear that it could develop much further.

Following the national model would imply first a hegemonic state – effectively a world ruler – and then some kind of process by which an independent World State emerged, something like a vastly larger and more powerful European Commission. But the first of these seems improbable: empires and hegemonies have risen and fallen throughout history, and the present trend seems to be towards an increasingly multi-polar world. Even if it came about, it is hard to see how it could be transformed into the second. Is there another, more appropriate, model for understanding the international system?

As we have seen, the fact that the international system is not highly and overtly regulated does not mean that it is, in fact, anarchic, any more than it is a system of justice and equity. In this sense, it resembles the informal patterns of rules and procedure which exist in tribal societies, and which have survived even in places like Somalia. So perhaps the best analogy, building on Charles Tilly's equation of state-building with organised crime, is to see the international system as analogous to a group of organised crime families, settling disputes among themselves through real but undocumented rules, and disciplining other actors who may rebel against their dominance. To continue the analogy, new organised crime families from abroad are disputing the territory of traditional groups, demanding a share of the proceeds from the rent-seeking activities which organised crime specialises in. In such a

[14] Some would argue that, even today, traces of such thinking are to be found in places like Corsica and certain regions of the Balkans.

situation, there is no point in going to the police or the courts, because the police and the courts are owned by organised crime anyway. All that the weak can do is look to one of the organised criminal groups for protection.

As Tilly notes, sovereigns originally offered their subjects "protection" in the two distinct senses that organised crime does. On the one hand this was physical protection against enemies, on the other it was intimidation to pay money, in the form of taxes. We see both these characteristics in the international system today. Some states, at least notionally, provide protection and security guarantees for others. Likewise, some states (often the same ones) exploit their dominance to secure financial or trade rewards from their clients. In some cases, the analogy is extremely precise: for several generations, the Japanese have paid the full costs of the American occupation forces, which "protect" them against unspecified threats.

Paradoxically, this system has some elements of "rule by law" in the sense that the internal regulation of organised crime can be very rigid, not to mention harsh, and that disorganised crime is fiercely repressed. This is why people who live in a state of non-law often turn to organised crime, because they do at least get some protection from other threats. But clearly nothing like the ROL in any meaningful sense can exist in such circumstances.

In most modern states, as has been noted, the model of organised crime was replaced, over time, by power-sharing and political pluralism, and the rule of law displaced, at least in part, the rule of the strongest. Whether and if so how, this can happen at the international level is not at all clear, even in principle.

CHAPTER SIX
INTERNATIONAL CRIMINAL JUSTICE

"*I didn't agree with all the killing, but we were doing it because we had been told.*" – Sgt Charles Hutto, one of the My Lai accused.

As well as treaties and conventions that influence how the ROL is applied domestically, and the existence, or otherwise, of a rule-based system at the international level, there is, finally, the question of international justice. By this, we mean essentially what happens to those who violate International Humanitarian Law (IHL) and more narrowly the Law of Armed Conflict, and who for one reason or another cannot be prosecuted by courts in their own country. In recent years, there has been an explosion of political interest and institutional innovation in this area, and it has become a priority for many donors and international organisations.

SCEPTICISM IS NECESSARY

The standard presentation of these legal and institutional developments is teleological: a move from the darkness of historical "impunity" towards the light of "accountability", especially of national leaders who "oppress their people". As we shall see, the reality is much more complicated, and there are reasons both of principle and practice to doubt whether anything as simple as this teleological process is actually happening. Indeed, I will argue that the total effect of this frenetic activity has been, if anything, to damage the ROL as it is reflected in international justice. We can begin by noting the mismatch between the texts and the reality they purport to describe. The basic notion of International Humanitarian Law is defined thus by the International Committee of the Red Cross:

> … a set of rules which seek, for humanitarian reasons, *to limit the effects of armed conflict*. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict …

it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting."[15]

[15] See *What is International Humanitarian Law*, available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf emphasis in the original. Accessed 5 June 2012.

This is a very limiting set of criteria. First, it requires the existence of an armed conflict, which is nowhere defined in the Geneva Conventions or in the Additional Protocols that are described elsewhere. Indeed, there is no generally-accepted definition of an armed conflict at all, and therefore no agreed set of circumstances where IHL necessarily applies. The most popular definition, and one which has been used by international courts, is that proposed by the International Criminal Tribunal for the Former Yugoslavia in the *Tadic* case, where the judges decided that an armed conflict "exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State."[16]

It will be clear that both the definition of IHL, and that of armed conflict, presuppose that certain things about episodes of collective violence today must be true, for those definitions to apply to a usefully large number of cases. In particular, there must be "hostilities" as opposed to peace; it must be clear who is participating and who is not; the combatants must be organised, prisoners are expected to be taken, and so forth. Deconstructed, the various texts and definitions of IHL paint a picture of war as a kind of very rough game, but one with rules that must be respected, even if that means that one loses a battle or even a war as a result. Teams resemble each other, wear distinctive uniforms, carry weapons openly, and engage in ritualised combat whose sole purpose is the defeat of the enemy force. Attacks on non-military targets or personnel are pointless as well as wrong, since they could serve no rational purpose.

It goes without saying that warfare today is not like that, and has not been like that for most of history. Perhaps the wars of the Renaissance to the eighteenth century, when mercenary armies fought the minor territorial wars of kings and princes, came closest to this ideal. But even by the nineteenth century warfare was becoming more destructive, and irregular combatants were starting to appear (*guerrilla* is a word which comes from the Napoleonic era.) Non-combatants working in munitions factories and research and development were key to the outcomes of both of the wars of the twentieth century. In an era of total war, what a country could do on the battlefield depended very largely on its industrial base and the degree of the organisation of its society for total war. The civilian population was therefore explicitly made a military target by the British, for example, in both World Wars by blockade and starvation, and in the second by aerial bombing aimed at killing and terrifying enough German civilians that German society would collapse from within.[17] Subsequently, the prospective combatants in a Third World War in Europe assumed that nuclear weapons would be used quickly, which would in turn mean that any distinction between military and civilian targets would essentially be academic.

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[16] See *Prosecutor v. Tadic,* Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory
Appeal on Jurisdiction, (Oct. 2, 1995).

[17] The origins and (generally disappointing) implementation of the theory of strategic bombing of civilians has recently been magisterially covered by Richard Overy, *The Bombing War: Europe 1939-45*, Allen Lane, 2013.

Moreover, the defeat of the enemy forces on the battlefield, as Clausewitz could have told any IHL expert, is not the ultimate strategic objective. That is always political, and military operations are simply a tool for achieving it. In many cases, especially since the rise of the nation-state, the strategic objective has been political control of territory, or domination of territory by one ethnic group. In such cases, ranging from the Balkans over the last century, through India and Pakistan, Palestine, and various parts of Africa and the Middle East more recently, the civilian population, far from being an irrelevant bystander, is the basic strategic target, to be variously protected, destroyed, controlled or driven out according to the case. Moreover, in many modern conflicts in Africa, the forces involved are typically too small to physically control the territory they have captured, and the only real solution is to use violence and terror to force the population (or at least the hostile part) to flee. In other cases (as in Israel) the Army may be used as an instrument of population control and ethnic domination, designed to increase the area under the control of the government. And more generally, in democracies, where governments claim a popular mandate for their actions, it is not hard to argue that civilian populations should no longer be protected against the consequences of courses of action they have themselves endorsed.

In such circumstances, it is inevitable that a gulf has arisen between the reality of modern conflict and the instruments available to deal with it. The Second Additional Protocol to the Geneva Conventions, dating from 1977, and covering non-international armed conflict, made an attempt to address this problem, but with only limited success. Moreover, the rise of real-time media reporting over the last twenty years, the growth of concerns about human rights and the effects of the Internet have combined to create dangerous and uninformed surges of popular feeling, coupled with demands to "do something" to combat real or imagined episodes of mass violence. Such opinion surges are, of course, easy to manipulate. One result has been the effective merging of International Humanitarian Law with its younger sibling, International Human Rights Law, which applies at all times, and not just during armed conflict. Thus, the statute of the new International Criminal Court enables investigations to take place without the need to prove the existence of an armed conflict, so enabling the Court to investigate post-election violence in several African countries, for example.

GOVERNMENT RESPONSIBILITIES

International courts are only invoked by exception. In principle, states have the responsibility to control the way in which their armed forces operate. This applies even to treaties such as the Geneva Conventions, which are binding on individuals, even if actually signed by states. Governments that sign such treaties and conventions are expected to ensure that they are implemented, and to pass whatever national laws are required in order to achieve this. This applies equally to the conduct of military forces in wartime: indeed, given the decentralised nature of warfare, far from the control if governments, it is obvious that respect for the rules of war is only possible if it is enforced by commanders and leaders on the ground.

Since the middle of the nineteenth century, two broad traditions have gone to make up the corpus of law relating to armed conflict, named informally after the cities in which negotiations took place. One, often called the "Hague" tradition, is

concerned essentially with the mechanics of conflict between armed forces, and ways of making it less savage. The other, sometimes called the "Geneva" tradition, is concerned with the protection of non-combatants in war. This is not the same as the protection of civilians, though the two are often confused. Civilians who take up arms may be fired upon, for example, whereas soldiers who have surrendered may not. These two traditions have been converging for a while, and have essentially come together in the statute of the International Criminal Court, agreed in 1998.

Domestic legislation, and codes of military law, have to incorporate these provisions; military training should inculcate them, and military commanders should issue orders that respect them, and see them enforced. Once again, culture is the most important determinant here: many of the most central provisions of IHL (treatment of prisoners and the wounded, protection of non-combatants) are in fact part of the way in which well-disciplined and well-led military forces operate anyway, and good commanders throughout history have tended to adopt them instinctively. Likewise, units with high morale and good training and leadership almost always behave better than units without these advantages. (Conversely, announcing that prisoners will not be taken, or indiscriminate bombardment of cities before an attack, can be effective military tactics, at least in the short term).

As already indicated, actual respect for these various provisions has been patchy for most of modern history. There are a number of reasons for this. One, already mentioned, is the nature of the conflict itself: in the confusion of war, where guerrilla and partisan groups may be operating, the division between combatant and non-combatant may be unclear, or even non-existent. Poorly trained or untrained troops, badly led, may commit violations out of fear, ignorance or hysteria. This takes place generally at the tactical level, but such tactics may be adopted as part of a deliberate plan. The classic case is the German invasion of the Soviet Union in 1941, where written orders from the very top instructed the *Wehrmacht* that Russians were not civilised human beings, and would not themselves obey the rules of war. Therefore, they were not entitled to the protection of such rules themselves. In effect, the treatment of the Red Army was part and parcel of the policy of extermination that the Germans implemented towards Russians (and Slavs) as a whole. Thus, somewhere around 3.5 million Soviet prisoners taken in 1941 were left to die of cold and hunger, deliberately executed, or worked to death in concentration camps. (Casualties among Russian civilians were of course much higher).[18]

Much the same cultural mindset was revealed in colonial wars in Africa and Asia, from Algeria to Vietnam. The enemy was non-western and hard to distinguish from the civil population. So the response was often indiscriminate killings, imprisonment and torture and direct attacks on civilians. In the colonies, as indeed in Russia, there was no hostile media to deal with, and there was little concern either among the population at home. And even the fiercest opponents of colonial wars generally only called for them to be stopped. Prosecution of one's own forces was simply unthinkable. From the 1940s in Russia to the 1990s in the Former Yugoslavia (and, unfortunately in the last few years as well) such behaviour has been publicly

[18] A useful summary of current research on the *Wehrmacht*'s policy towards Soviet Prisoners is at http://www.historynet.com/soviet-prisoners-of-war-forgotten-nazi-victims-of-world-war-ii.htm/1 (retrieved 15 June 2012).

justified by arguments for necessity and the need to protect one's own people. Actual disciplinary action was rarely taken, and it was only massive media interest that caused the US Army to investigate the My Lai massacre, for example, although official documents suggest that such incidents were know, even at the time, to be very frequent. However, whilst US Army investigators turned up huge quantities of damning evidence, trials would have had the effect of exposing not only the senior military leadership, but the political leadership as well, which was obviously unthinkable. [19]

INTERNATIONAL INSTITUTIONS

By the time of the fighting in the Former Yugoslavia, news footage of white Europeans slaughtering white Europeans was available in every home, even if much of the accompanying commentary was incomplete or downright misleading. The inevitable demands to "do something" proved, for practical reasons, impossible to satisfy, and almost in desperation, the idea of a special tribunal arose, initially as a way of putting pressure on the combatants where there were few other means of doing so. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the Security Council in 1993. When the dormant Rwandan civil war erupted into renewed horrifying violence the next year, it was politically unthinkable not to establish a tribunal for that episode as well. The products of hasty decision-making, understaffed and underfunded at the beginning, the so-called "ad hoc" tribunals were not expected to last very long. In fact, both still exist (albeit in a somewhat attenuated form), and their combined budgets have now well exceeded a billion dollars in total.

The two organisations were subordinate organs of the Security Council, which gave them unprecedented authority, and allowed them to pre-emptively indict individuals in other countries, whatever the justice systems there might be doing. Indeed, it was recognised that none of the political units that had succeeded Yugoslavia would have much appetite, or indeed much capability, to put their own people on trial. The new government of Rwanda, on the other hand, was likely to prosecute its former enemies with indecent enthusiasm, whilst taking no action against its own leaders. This, indeed, has turned out to be the fundamental problem of accountability for such misdeeds: no country is happy to see its own nationals punished in this way.

PRACTICAL PROBLEMS

Courts are international organisations, which means they follow certain standard rules. Chief among these is a balance of staff by region and country, which is seldom compatible with recruitment on merit. Moreover, certain skills – criminal intelligence and military analysis, for example – are hard and costly to develop, and there are huge variations in the capabilities of different nations. Even where suitably qualified people exist, they may be reluctant to move to a foreign country whose language they do not speak and whose culture they are not familiar with. Indeed, unless they can speak English, it is often not worth them even applying. Moreover,

[19] A full account, based on official documents and interviews is Nick Turse, *Kill Anything that Moves*, Metropolitan Books, 2013.

there are many different traditions of investigation and the conduct of trials in the world, and a tribunal has to make choices between them, which may attract some applicants and deter others. The most likely outcome is an organisation that does not operate particularly effectively, but at the same time has been unable, for practical reasons, to attract as many non-westerners into its ranks as would be politically expedient. This has, indeed, been the story of the two ad-hoc tribunals.

Especially in Africa, where around 2000 languages are spoken, investigators are unlikely to speak the language of the area where investigations are taking place. They may not be familiar with the culture either. They will be dependent on the quality of their interpreters for the most basic investigatory activities. Witnesses, when found, may have to be persuaded to leave their homes and travel (often for the first time by plane) to a distant country, of which they have never heard, to be examined and cross-examined through interpreters in an unfamiliar and often frightening environment. Even witnesses from fairly sophisticated countries may come from a completely different tradition of law, and not understand what is going on. (This happened with witnesses from the former Yugoslavia for example).

Even this type of activity depends on several sorts of cooperation for its success. The active cooperation of a national government is generally required to locate and interview witnesses, to ensure that the investigators can move around safely, to facilitate travel by witnesses, and many other things. A simple refusal to cooperate may effectively sabotage an investigation, and of course a state that feels threatened can refuse visas, threaten or intimidate investigators, or just make witnesses disappear. Moreover, cooperation from major international actors or from regional powers is often essential in providing anything beyond immediate eyewitness evidence. Withholding this cooperation may make the investigation impossible.

The effect of all this is the actual quality of evidence collected may not be adequate to guarantee a conviction, or even present a serious case. Thus, crimes may go unpunished or even un-investigated because the practical difficulties are too great. The powerful or the well protected will survive, whereas the weak may well be targeted because it is easier. Paradoxically, well-organised official groups, like armies, can often be investigated fairly easily. By contrast investigations into militia groups, who may actually have committed much of the violence, may be abandoned because it is too complicated, or simply unsafe. There is, therefore, no guarantee that it will be possible to investigate and punish the right people, or provide convincing evidence against them.

If the prosecution case can sometimes be problematic, so too is the defence. In particular, the quality of defence counsel, and the resources open to them, has often left a lot to be desired. In theory, there should be what is called “equality of arms”, meaning that prosecution and defence have an equal chance to make their case. In the ad hoc tribunals this seldom happened. Not only were the prosecutors usually much more skilled, but they also had massive support from several western states, for whom the prosecution and conviction of certain individuals was a major political objective. This included making investigators and prosecution lawyers of major western states available free of charge, as well as providing evidence and witnesses. The defence was often hasty and improvised, and relied primarily on lawyers from

the region, who were often the only people the defendants trusted. Few western lawyers were willing to take defence briefs; such was the hysteria surrounding the trials, and the lynch-mob mentality of the media and human rights organisations, that they were unwilling to risk their careers by defending people the world had already decided were guilty of terrible crimes. Although an Association of Defence Counsel of the ICTY was formed in 2002[20] the overall standard of representation, especially in the early years, was low, as lawyers from the Former Yugoslavia struggled to work in a tradition with which they were quite unfamiliar. It is doubtful whether there were actually any miscarriages of justice on the scale of those described in earlier chapters, but there were certainly cases where it was the weakness of the defence, and not the strength of the prosecution case, which decided the result. (On the other hand, there were cases of bad prosecution preparation, or careless conduct by judges, which meant that some of the accused were unexpectedly acquitted on certain charges.)

THE LAW IS UNCLEAR

In most legal systems, there is little doubt whether a crime has been committed or not. Murder, robbery, fraud and so forth are clearly defined, and the defence attempts to cast doubt on the facts, not the law. This is not the case in trials of alleged IHL violations.

Even in the simple, tactical level of prosecutions for serious breaches if IHL, there are ambiguities. In ordinary life, if police find a person dead from bullet wounds, it is highly probable that a crime has been committed. War crimes investigators can assume no such thing. Not only do soldiers get killed in war, civilians get killed as well, even women and children. It is not the fact of the death that is significant, so much as the circumstances, the efforts made to avoid civilian casualties, and even what was in the mind of a commander, who may have been nowhere near the scene at the time.

The ad hoc tribunals had to deal with the problem that, long and detailed as the Geneva Conventions were, they had never been used as a basis for criminal prosecutions. There was no certainty about what even some of the most basic terms actually meant. The definition of “armed conflict” used above, for example, did simplify some things. But like most definitions, it then introduced new uncertainties. How long was “protracted”? What counted as “organised”? and so forth. Moreover, these issues were not legal, but practical, and mostly involved subjective judgement. The judges, from all sorts of background and of varying quality, soon found themselves hopelessly adrift, the more so as senior commanders began to appear before them. Decisions also turned out to have unexpected consequences. The Court accepted that an armed conflict had existed in Kosovo before the NATO attack of 1999, for example. This decision – surprising to some – set a precedent in classifying virtually any counter-insurgency campaign with a few hundred deaths as an armed conflict. It would have made the 25-year struggle against the IRA an armed conflict, for example, something the British government always refused to accept at the time.

[20] Its internet site is at http://adc-icty.org/index.html

WHO'S IN CONTROL?

Where individuals and groups were charged with direct participation in atrocities, these definitional issues were less of a problem. The crimes had either been committed or they had not, and the accused were either guilty or innocent. But quite quickly the courts were encouraged to go after higher-level targets, commanders who were not present at the scene, and may not, indeed, have known that the crimes were taking place. It was repeatedly said that these people bore "the greatest responsibility" for the crimes, and they were often pursued in preference to the actual perpetrators. There are practical and moral reasons to question whether this is so, but in any event the practical problems proved to be substantial.

The first was the concept of "command responsibility". It was recognised that commanders were responsible not just for the direct orders they gave, but also for the good order and discipline of their troops. If they had "effective control" of fighting forces, then if they "knew or should have known" that crimes were being committed, or might be, then their responsibility as commanders extended to preventing these crimes, or at least ensuring that perpetrators were punished. Yet none of these concepts is simple.[21] Especially in periods of confused irregular warfare, where normal hierarchies are disrupted, it is often not clear who is in control of what. Personal, political, or even commercial ties may be important, whereas formal hierarchies, inasmuch as they exist, may not be very relevant. Proving effective control, beyond a reasonable doubt, may involve painstaking assembly or largely circumstantial evidence. It may not be possible to prove that X had control over unit Y at all times, or at the specific moment of an atrocity, but it may be possible to prove a pattern of control extending over a long period of time.

Again, there is no obvious standard by which to judge a commander's responsibility for controlling their troops, especially in the middle of a war. On the one hand, a commander who takes no steps at all is clearly deficient in their duty. On the other, no one can seriously expect a commander to spend his entire time suspiciously overseeing the behaviour of subordinates. And how far does a duty to investigate and punish extend in a war, especially in the case of a senior commander? Does he have the right to assume that subordinates will have done their duty and controlled their own units? In the end, all of these are subjective judgements, no matter how informed by technical evidence from military experts.

A second problem was what is euphemistically described as "collateral damage". The Geneva Conventions are clear that only military targets may be attacked, and they are described as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[22] Nonetheless, targets may be attacked in error, ordnance may go astray and, of course, civilians or civilian assets may suffer, although this was not the intent.

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[21] For a thorough and realistic survey, see Mirjan Damaska, "The Shadow Side of Command Responsibility," *American Journal of Comparative Law*, Vol. 49, No. 3, (2001).

[22] Article 52(1) of the First Additional Protocol to the Geneva Conventions (1977).

Thus, the Statute of the International Criminal Court, benefitting from several years of difficult experience in war crimes trials, includes a long series of precise definitions of crimes, including ”Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”[23] So the prosecutors have to show, beyond a reasonable doubt, that the attack was deliberate, that it was known that such an attack would have the consequences listed, and that these consequences were excessive in terms of the advantage expected to be gained (not necessarily the advantage that was gained). It will be seen that the judgement is a relative one, not an absolute one: it is the subjective balancing against each other of two shifting sets of judgements, themselves subjective in nature.

These uncertainties and complexities did not prevent cases being brought, and defendants being convicted. In some cases the issue was straightforward: there was no military advantage, or only a very small one, and it was clear that civilians were, in fact, the main targets. But in other cases, the situation was much more complex. Commanders could argue that they did all that was reasonably possible to limit the damage to non-military targets, and that, if crimes were committed, they could not reasonably have prevented them. This does not mean, as the judges frequently insisted, that no crimes were committed. It simply means that the particular individual indicted could not be shown, beyond a reasonable doubt, to be guilty of them. So in the trial of Naser Oric, commander of the 28th Muslim Division, garrisoning the town of Srebrenica, the Appeals Chamber of the ICTY agreed that “grave crimes were committed against Serbs detained at the Srebrenica Police Station and the Building between September 1992 and March 1993 … However, proof that crimes have occurred is not sufficient to sustain a conviction of an individual…. Where an accused is charged with command responsibility … the Prosecution must prove, inter alia, that his subordinate(s) bore criminal responsibility and that he knew or had reason to know of his/their criminal conduct”. The Prosecution could not prove their case to this standard and Oric was acquitted on this charge.[24] Likewise, General Momir Talic, commander of the Bosnian Serb forces in 1992 was originally charged with a wide variety of crimes, including genocide, but was quietly released and allowed to go back to Bosnia on health grounds when the difficulty of securing a conviction became clear.

At least these two individuals were military commanders. But in recent years there has begun a fashion for indicting political leaders as well, sometimes even leaders of countries outside the area where the crimes were committed. Of course, political leaders do give orders to military commanders, and these orders may include directions to carry out illegal acts. The difficulty lies in proving that these orders were actually given, and that the political leader actually had practical influence, if not control, over how the military forces were used., what is sometimes called « superior responsibility ».

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[23] Statute of the International Criminal Court, Article 8 (b) (iv)

[24] Oric, IT-03-68, Appeals Trial Chamber Judgement, 3 July 2008, paragraph 189.

Much depends on the context. In the case of an organised state with clear lines of control, it is often obvious who gave orders and to do what. But many conflicts are not like that, and many political leaders have argued, some successfully, that they did not know what the forces were doing, and had given (and even signed) orders for them to respect the law. The distinction between political and military leadership that we take for granted is essentially a product of the modern western political system, and very different politico-military systems exist elsewhere. It is perfectly possible that the military commanders may have the real power, and that the ostensible political leaders may just be spokesmen: this was the case with the Kosovo Liberation Army, for example.

But public opinion, the media and human rights groups demand action, and they want the highly visible leaders featured in the media to be punished, ideally, but not necessarily, after having been convicted of something. There is a long tradition of demonising political leaders we do not like, and seeking a legal excuse to imprison or execute them. It arguably goes back to Napoleon, and certainly happened after the First World War, when "Hang the Kaiser" was not only a slogan in the British elections, but also the title of a popular song.[25] In recent years, the emergence of a well-organised and well-funded human rights community, sympathetic journalists and new media, have meant that influential parts of society can be brought to bay for the blood (quite literally) of someone they had never heard of a few weeks before. Once such individuals are declared to be morally guilty or politically responsible for alleged terrible events, it is a short step to supposing that they must be guilty of actual crimes as well. It is then the job of courts to convict them. Few of those involved in the wider human rights world have any experience of criminal law, and they are often shocked to discover that convictions require extremely strong evidence of actual criminal guilt.

Unfortunately the evidence required to secure a conviction to a criminal standard of proof is often lacking. Political responsibility, or even moral responsibility, does not easily translate to criminal guilt. The evidence may not be there, or the individual may, actually, be genuinely innocent. But, as was especially the case with the early years of the ICTY, acquittals, for all that they are expected in any criminal justice system, tended to be seen by the human rights community as moral failures, reflecting badly on the Court itself. As a result, the tendency in recent years has been effectively to invent or redefine crimes to make convictions easier. The favourite device (first used against Japanese leaders after the Second World War) was a charge of being a member of a "joint criminal enterprise" – effectively a conspiracy charge. The accused is not charged with a crime as such, but of being a member of a group, some of whom are alleged to have committed crimes. (The direct inspiration appears to have been the US Racketeer Influenced and Corrupt Organisations Acts of 1961, used to break up organised crime groups, by making membership of such groups itself a crime). Thus both Slobodan Milosevic (for Bosnia and Croatia) and Charles Taylor (for Liberia) were essentially accused of knowing or having influence over people who committed crimes, although no evidence was offered that they ordered the crimes or even knew they had taken place. The case

[25] See David Chuter, "The International Criminal Court: A Place for Africans and Africans in their Place", in Vincent Nmehielle, (ed) *Africa and the Future of International Criminal Justice,* Eleven International, 2012 for a more detailed discussion of this history.

against Milosevic was especially weak, but of course the nature of the charges themselves meant that hardly anything actually needed to be proved. Milosevic died before the trial was concluded, but, at the time of writing, Taylor has been convicted, apparently using this device.

It is hard to argue that the Rule of Law has been well served by these developments. In particular, the concept of responsibility has been pushed so far that it is now probable that people are being convicted for who they are, not what they have done. It is not an exaggeration to see this as a type of noble cause corruption, in which courts and prosecutors agree to pretend that evidence means more than it does, and to stretch definitions of crimes to breaking point, and even beyond. In addition, unhealthy precedents have been created, unconsciously, for other areas. Thus, it would be possible to bring a respectable-sounding prosecution against several British Prime Ministers for crimes committed by American forces in Iraq or Afghanistan, not because they ordered them, or were even aware of them, but because they were an "accessory" to them; the argument used against Charles Taylor.

But nobody cares. The sad fact is that, no matter how much we support the idea of the ROL in general, we all find ways to avoid applying it in particular cases where it would give the wrong result. But either we demand that a legal system should guarantee a fait trial, or we have to admit that the ROL is not in operation. We cannot be selective about that, although, in practice, selectivity is what most people feel. In a number of cases (Milosevic was one) political and even legal opinion seemed quite uninterested in whether the defendant was getting a fair trial, although all of us, of course, would demand a fair trial if we ourselves were accused of anything. Indeed, in the case of national leaders such as Milosevic, the situation is much worse than that, since the accused is only linked to the alleged crimes at all by a complex and frail chain of argument.

What is at stake here is the difference between arguable moral guilt and political responsibility on one hand, and provable legal guilt on the other. The first two cannot be proved, although historians may reach a consensus of sorts, whereas the third can. But we are inclined to blur the difference, and to assume that someone we dislike, and may believe morally or politically responsible for bad things, is therefore guilty of a crime, and it is the court's responsibility to find them guilty. Thus, one of the first responses to the Charles Taylor verdict was an article (by an expert on Liberia, not a lawyer) saying that she was "of course very happy that Taylor will be locked up, whatever the flaws in the legal process."[26] We can all think of people we would like to see locked up, just as there are, no doubt, people who would like to see us locked up, even as a result of flaws in the legal process. But a law-based society insists on tedious things like proof of guilt before that happens.

GAMES WITH NAMES

One of the consequences of moving away from those who allegedly committed the crimes to those who allegedly ordered or aided or connived at them is that the

[26] See Philippa Atkinson "Selective Justice", Prospect Magazine Blog, 7 June 2012, available at http://www.prospectmagazine.co.uk/uncategorized/international-criminal-court-charles-taylor-verdict-sierra-leone/?. Accessed 7 June 2012.

very existence of a higher-level crime needs to be proved. The traditional charge for this purpose, used at Nuremburg, was that of Crimes Against Humanity, crimes that, in the usual, rather optimistic, formulation, are said to "shock the conscience of humanity". The term appears to have first been used to refer to the African slave trade, and appeared sporadically up until the time of Nuremburg, when the major Nazis were tried for crimes against humanity, which targeted the civilian population, as well as what are usually called "war crimes." The technical definition has grown substantially since then, but the essence remains the statement, in the words of the ICC Statute, that the accused must be linked to crimes "committed as part of a widespread or systematic attack directed against any civilian population".[27] Thus, independent of whether the particular named individual crimes were committed, the prosecution has to demonstrate that they amount to crimes against humanity, because they are, taken together, widespread and systematic. Although there is some experience now of such trials, there is not, and there cannot be, any clear definition of either term, and different judges in different courts, on the same evidence, might come to different conclusions about whether the crime had even taken place. But these difficulties are as nothing compared to the misadventures of the 1949 Genocide Convention.

At first sight, there is little that seems unusual or difficult in the Convention's form. A group of nations get together, agree that something is a problem, and further agree to prevent or punish it where their jurisdiction exists. As always with international treaty texts (which this is) the language used is a careful compromise, and the text itself could have come out very differently if the negotiations had taken a slightly different path.

Although discussion preceding the Convention did nod back at the Nazi atrocities, the document is very much a product of its time: the early days of the Cold War. At that point, the victorious Communist regimes in Eastern Europe were punishing entire groups that had collaborated with the Nazis, and, in the case of the Soviet Union, they were also moving national borders around. Such groups often had wealthy and politically powerful members living in the United States. [28] More generally, western governments both genuinely feared a repetition by Stalin of Hitler's behaviour[29] and also saw what was then called the "nationalities" issue as a useful stick with which to beat the Soviet Union. This was all the more useful since the alleged crimes of Stalin (which did to some extent actually exist) could be used to justify the sudden swerve from wartime alliance to fear and enmity, and to mobilise populations against the new enemy by recalling the terms of the recent struggle.

The Convention, which is a surprisingly brief document given its subsequent profile, nonetheless contains within it a definition of genocide that is elaborate and carefully written. Article II says that genocide is:

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[27] Rome Statute, Article VII.

[28] Some useful background is Peter Novick, *The Holocaust and Collective Memory*, London, Bloomsbury, 2000, pp 100-101.

[29] See Beatrice Heuser, "Stalin as Hitler's Successor: Western Interpretations of the Soviet threat" in Beatrice Heuser & Robert J O'Neill (eds.): *Securing Peace in Europe*, *1945-62: Thoughts for the Post-Cold War Era*, London: Macmillan, 1992.

… any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

A few general points of structure need emphasising. To begin with, the two lists, of groups and of crimes, are complete, not illustrative. So other groups – political, economic etc – are not covered by the Convention. Likewise, some of the potential components of an act of genocide are not even things that would normally be considered crimes – transfer of children to another group for example. It is thus theoretically possible for a major campaign of terror against a civilian population to be defined only as a crime against humanity, whereas forcible transfer of children to another group (as happened with Aborigines in Australia for a century) would be considered genocide.

When this text was negotiated, it was never imagined that it would be used for criminal prosecutions, and certainly not before international courts. And indeed there are three problematic elements of the chapeau to Article II, any one of which would make prosecutions effectively impossible, if taken seriously.

Taking them in order, the first is the question of intent. In this case acts (and as has been seen they can be very limited in scope) can constitute genocide only if the *intent* to destroy one of these groups is present. In practice, intent is virtually impossible to prove beyond reasonable doubt. In a few cases, documentary evidence is available which strongly suggests conscious intent. The classic case, referred to above, is that of the Nazi invasion of the Soviet Union in 1941, where the high command of the *Wehrmacht* issued orders to its troops to fight a war of extermination against the sub-human Slavs. More generally, the so-called General Plan East, drawn up at around the same time, foresaw the populations of the conquered territories being either exterminated or used for slave labour. It was anticipated that some 30-40 million people would die as a result of this policy.[30]

But most cases are not like this, and intent (i.e. what is in someone's mind) has proven almost impossibly hard to demonstrate to a criminal standard of proof. As a result, circular arguments have often been used. For example, in the early years of prosecutions for the violence in Rwanda, it was widely assumed that intent would be easy to demonstrate in what were alleged to be cases of genocide. In effect, it was argued that the murder of hundreds of thousands of people could not have happened without planning, and someone must therefore have planned it, therefore, there must have been intent. Not everyone found this line of argument convincing, even at the time, and prosecutors, as they privately admitted, struggled to make a case in practice, and have, indeed, largely failed to do so.

[30] See Mark Mazower, *Hitler's Empire: Nazi Rule in Occupied Europe*, London, Allen Lane, 2008.

Second, the intent, once demonstrated, must be directed against a group "as such" (*en tant que tel* in French is slightly clearer) and "in whole or in part". The first qualification means that these must be actual groups, not collections of people retrospectively decided to be groups. The second introduces a confusion that has never really been resolved. Given the nature of the racially-based persecutions during and after World War II, the implicit assumption was that these groups would be very large: all Slavs west of the Urals to be killed or reduced to slavery for example. Fortunately, such terrible events have not recurred since the 1940s, but in turn that means that courts have to decide somehow how big a "part" must be before it meets the threshold, bearing in mind that what is intended may be different from what actually occurs. Thus, if an entire village of, say 100 people is wiped out in an attack, is that genocide if all the victims were of the same group? And the intent of the perpetrators is important: as we shall see, genocide is an essentially western concept, which often means nothing to the perpetrators themselves. Courts have generally decided that the victims have to be a reasonably important part of the whole group, but of course much depends on the level of analysis: a group can be significant at local level, but small and insignificant at national level. Once more, there is no prospect of objective standards being arrived at, in spite of much work by lawyers over the last two decades.

Finally, there is the problem of the four "groups". The distinction between at least three of these has never been clear, and that reflects the fact that the Convention was drafted by middle-aged white international lawyers, who were largely ignorant of culture, ethnicity and history, not to mention genetics. To be fair, though, in this they reflected the typical educated opinions of their time. Humanity, it was then believed, was divided into different "races," which were objectively distinguished from each other by physical and mental characteristics. These characteristics were essentially unchanging, and produced a clear racial hierarchy, with the white races at the top, and the Africans at the bottom. Africans were considered genetically lazy, thus justifying and condoning the practices of imperialism. But even within these groups, there were important differences, brought about by "blood". Italians were genetically excitable, just as Dutchmen were phlegmatic, or Poles foolishly romantic. Popular British antagonism to Germany was based, at least in part, on the notion that Germans were genetically aggressive and brutal.

It was in the case of Africa that this way of thinking reached its nadir. In pre-colonial times, the continent was a place of low population density, poor communications (there were no horses) and thus small political units ("kingdoms"). These units were essentially political groupings, and in most parts of the continent they contained various sub-groups, who could and did join another kingdoms in the event of a serious disagreement. When the whites arrived, armed with all of the benefits of nineteenth-century pseudo-science, they expected to find "tribes" and so that is what they found. The fact that poor communication meant that there were often differences of language and custom between even quite close neighbours confirmed them in their view that Africa was full of primitive ethnic groups, differing genetically from each other. In turn, because Islam had made inroads into the northern part of Africa, and down the eastern coast, it seemed logical to suppose that those "tribes" who practiced Islam were actually "Arabs" and thus racially superior to

the "Africans." In Nigeria and Sudan the British institutionalised this supposed ethic difference, with consequences we are still seeing today.

As a result, conflict in Africa was interpreted as ethnic rather than political in nature. It was seen as brute savagery inspired by the underdeveloped racial characteristics of Africans, instead of struggles between political units reminiscent of those in Europe at the same time. Nowhere was the confusion greater than in East Africa. In a society without money, wealth exists in kind. In pastoral areas, wealth is genuinely reckoned in cattle, and in parts of Africa, even today, young men have to pay a real or symbolic bride price reckoned in cattle before they can marry. In pre-colonial Rwanda and Burundi, hereditary kings had institutionalised this distinction through a cattle-owning aristocracy (the Tutsi) and an agricultural peasantry (the Hutu). This caste system was relatively fixed, though moving between castes was possible, by marriage for example. But when German and later Belgian colonists arrived, they excitedly seized on these caste differences as racial ones, and persuaded themselves that the Tutsi were not merely wealthier, but actually racially superior beings from the North, therefore Arabs, therefore nearly white.[31] (Indeed, the hysteria surrounding the 1994 massacres cannot satisfactorily be explained unless we recognise that the Tutsi were always seen as symbolically white).

The Genocide Convention could not be drafted today, because this kind of thinking is simply incompatible with what we know about groups, where they come from and how they are organised. And as the Rwanda Tribunal discovered, and noted in a 2001 judgement, acquitting an indictee of genocide charges, there is "no generally or internationally accepted definition" of these groups anyway.[32]The discovery of DNA has demolished old-fashioned assumptions about inherent racial differences between groups. We now understand that such differences (between blond Scandinavians and dark Italians, for example) are not only partly illusory, but also result from truly microscopic differences in DNA structures. And ethnicity, once thought to be fixed and invariable, turns out to be much more a cultural, constructed, concept. These days, indeed, scholars prefer to speak of "identity," if they speak of anything at all. In practice, people usually have several identities – cultural, religious, historical, social – and can combine or move between them. Indeed, in the conflicts of the latter twentieth century, "ethnicity" has proved to be little more than a means of group identification and a simple way of organising political parties. The "groups" referred to in the Convention turn out, on examination, to have little objective existence. In Africa, especially, they were largely the result of colonial administrative practices, and peoples' perceived primary identities might be much more as town dwellers, poor people, people from a marginalised region, hunters, farmers and so forth. The intellectual underpinnings of the Genocide Convention, such as they ever were, have largely been undermined by a better understanding of group identity.

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[31] Michael Neuman and Jean-François Trani, "Le Tribalisme explique tous les conflits" in Georges Courade (ed) *L'Afrique des idées reçues*, Paris, Belin, 2006, quote an astonishing article from *Le Monde*, dated as late as 1990, talking of "Nilotic" Tutsi and "Bantu" Hutu. More generally, see Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism and the Genocide in Rwanda*, Princeton, Princeton University Press, 2001

[32] ICTR *Bagilishema* case (ICTR-95-1A-T) judgement of 7 June 2001.

Nonetheless, the special, almost mythical status of genocide ensured that the concept would not go away: it was simply too politically useful. It first made its modern entry on the stage during the Bosnian crisis, beginning in 1992. The Muslim government in Sarajevo, inspired apparently by a New York public relations firm, began to talk of "genocide" and found a ready audience among the media and human rights groups.[33] This subsequently led to a series of attempts to put Bosnian Serb defendants on trial for genocide. Convictions proved impossible, however, because the evidence was simply not there. The ghastly wholesale massacres of civilians so often reported at the time seem to have been very rare, if, indeed, there actually were any. If we take the largest currently recognised figure of 100,000 fatalities in the conflict as a whole over three years (although that may be on the high side), then according to the latest detailed studies, about 60% of the total dead were battle casualties among soldiers of the different warring factions, and 90% of all casualties were males.[34]

The only really sizeable massacre of the war took place near the town of Srebrenica, in Eastern Bosnia, in July 1995. Why the massacre took place at all remains unclear: prisoner exchanges were more the norm then, and the Bosnian Serbs, short of manpower, were the main beneficiaries of them. In any event, an small probing attack by Bosnian Serb forces was inexplicably not repulsed by the much larger Muslim forces in the town, who retreated almost without resisting. Surprised, the Bosnian Serb forces managed to get into the town itself, at which point the defenders, and other males of military age, started to fight their way out to the north. They came close to succeeding, but the Bosnian Serb Army just managed to cut them off in time, and about half of the 15,000 escapees were captured. At first treated well, the prisoners were, for reasons that remain unclear, executed in batches at sites some distance from Srebrenica a few days later.[35]

No one doubted that the elements were all in place for indictments for Crimes Against Humanity. But at the time the Yugoslavia Tribunal was adopting a rather Anglo-Saxon approach to indictments (a "scattergun" approach as it was informally described) where anything that might conceivably be accepted by the judges was offered by the prosecution, on the basis that a percentage of the charges would be proved. Srebrenica scarcely seemed a promising example of genocide: the dead were all males of military age, captured during military operations. Nonetheless, the prosecution had nothing to lose by trying, and the first opportunity was the trial of General Radislav Krstic[36], the Drina Corps commander. To the astonishment of all, the judges found the defendant guilty, and the Appeals Chamber subsequently

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[33] See John Burns, "The Media as Impartial Observers or Protagonists: Conflict Reporting or Conflict Encouragement in Former Yugoslavia" in James Gow, Richard Paterson and Alison Preston (eds) *Bosnia by Television*, London, BFI Publications, 1996.

[34] See Lara J; Nettlefield, "Research and Repercussions of Death Tolls: The Case of the Bosnian Book of the Dead" in Peter Andreas and Kelly M. Greenhill (eds) *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Cornell University Press, 2010. The numbers may be high because they result from a statistical comparison of population records rather than actual proof of death, and so may count those who fled and did not return.

[35] See David Chuter, *War Crimes: Confronting Atrocity in the Modern World,* Boulder, Lynne Reiner, 2003, pp 233-9 for a documentary-based account of this episode.

[36] ICTY *Krstic trial* (IT-98-33).

upheld the prosecutions. The judges accepted, in fact, the argument that, because the women and children in the town were evacuated, unharmed, to Muslim-held territory, the Muslim presence in Srebrenica was "destroyed" and so the crime was one of genocide. The judgments themselves, with their tortured syntax and logic, strongly suggest a group of judges trying more than anything else to convince themselves. Why?

The simplest and most likely explanation, favoured by some insiders, is that the judges were, consciously or otherwise, trying to send a political signal. Although the real issue to be decided at the trial was the extent of Krstic's personal responsibility, the defence opted to deny even that the massacres had taken place. This meant that the massacres were recounted by the prosecution in all their ghastly detail, and the effect on the judges (and observers, including the author) was profound. Since the Bosnian Croat Tihomir Blaskic had already been sentenced to 45 years for crimes against humanity, it may well be that the judges felt they had no choice, if they were to demonstrate their disgust, but to find Krstic guilty of a more serious crime; and genocide, offered with little expectation of success by the Prosecution, fitted the bill.

In any event, the verdict remains a bizarre one, which has little to do with the Convention as it was imagined and written, although it does illustrate the dangers of trying to use such a confused and ill-defined concept as a basis for prosecutions. But it must be conceded that something like the "groups" in the sense envisaged by the Convention actually existed in this case, even if the practical differences between them were very small. This was not the case in Rwanda.

After the terrible events of 1994, journalists, NGOs and human rights activists descended on Rwanda. It is not a criticism to observe that few spoke French, almost none spoke Kinyarwanda, and hardly any had previous experience and knowledge of the country. The ruthless ethnicisation of Africa since colonial times gave all these groups a simple prism through which to view the events: a struggle between ethnic groups culminating in an act of genocide. For its part, the new regime in Kigali, in blood up to its elbows and with no mass power-base among the people, adroitly used the discourse of "genocide" to strengthen its precarious hold on power through foreign support.[37] The concept of "genocide" suited all sorts of powerful interests, and few could be bothered to look the definition up, or listen to the few genuine experts on the country, who tried to explain that it was all much more complicated than that.

The inevitable decision to establish a tribunal on the Yugoslav model led to indictments for genocide. Few of the investigators or prosecutors had much knowledge of the country (some had never been in Africa before) and their understanding of Africa came overwhelmingly from the store of popular myth and legend which saw Africa as a place of simple ethnic violence. Thus, in the first case to be decided, the defendant, Akeyasu, was convicted of genocide committed against the "Tutsi ethnic group." [38]Such an ethnic group, of course, did not exist, nor were

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[37] See John Pottier, *Re-Imagining Rwanda: Conflict Survival and Disinformation in the late Twentieth Century*, Cambridge University Press, 2002.

[38] ICTR, *Akeyasu* case, Judgement of 2 September 1998.

there any "racial" religious or "national" distinctions between the two groups. Moreover, a large number (some have even argued the majority) of the victims were Hutu, in what began as a vicious struggle for power among Hutu political groups.[39]

The judges dealt with this problem by changing the whole basis of the crime of genocide. Even if such "ethnic" differences between the two groups did not actually exist in practice, it was argued, some of the defendants thought they did, and therefore their crimes were of genocide and not crimes against humanity. This line of argument was criticised by legal scholars[40] and indeed is hard to take seriously as a thesis, but it served its political purpose. The drafters of the Convention, on the other hand, would have been stunned at such an interpretation: for them, the whole idea was that the four groups existed objectively, separately from each other "as such."

Taken together, the Srebrenica verdicts (there have been more since) and those of the Rwanda trials, in Arusha in Tanzania, have demolished any pretensions of the Genocide Convention to moral and intellectual legitimacy. Noble cause corruption has led judges and others to change the rules in order that people who are by all rational standards innocent of genocide (though certainly guilty of crimes against humanity) can nonetheless be convicted. That is scarcely in accordance with ideas of the Rule of Law.

But nobody cares. Human rights groups generally welcomed the convictions, and indeed were pleased that the definition of genocide had been tweaked, so that people they disliked could be charged with the crime. Those who pointed out the intellectual shoddiness of the process were furiously attacked, and sometimes accused of being apologists for genocide. The inevitable followed, of course, and the label of "genocide" was accordingly hung around every real or alleged incident of large-scale killing. Indeed, journalists and human rights groups would not get out of bed for anything less than genocide: it became the minimum atrocity allegation which would get any publicity. As a result, terrible events from the past, such as the massacres by the Khmer Rouge in Cambodia have retrospectively been decided to be "genocide," something logically impossible, and never suggested at the time, for fear of losing their importance. And, as we have seen, the race is on to reclassify all sorts of historical incidents from before 1949, anachronistically, as "genocide", for political reasons. Once begun, this game can be played effectively for ever: the 1943 Katyn Massacre in Poland, the bombing of Dresden or Hiroshima, and the Irish Famine of 1845-62 are only three of the higher-profile cases.

ENTER THE ICC

[39] A multi-year statistically based study by an American team suggested that most victims were Hutu, although the Tutsi community, being considerably smaller, obviously suffered proportionately far more. The work so far done is at online at http://web.mac.com/christiandavenport/iWeb/Site%207/GenoDynamics.html (accessed 14 June 2012). The original research-funding proposal (on the site) is an excellent discussion of the problems of conducting such enquiries. After 1994, the new RPF government originally claimed that over 2 million had died, which would mean that the vast majority of the victims were Hutu. The claim seems now to have disappeared. (Cited by Pierre Péan, *Carnages: les guerres secretes des grandes puissances en Afrique,* Fayard, 2010, p.104.)

[40] See for example, William Schabas, *Genocide in International Law,* Cambridge University Press, 2000

The ad hoc tribunals surfed, to some extent, on the humanitarian vigilantist tide of the 1990s, which led eventually to fulfilment of the much-discussed proposal for an International Criminal Court. The ICC, established by the Rome Statute of 1998, bore hopes that were probably always excessive, given the way it was designed. Unlike the ad hoc tribunals, it is a treaty-based organisation, and so states that do not wish to be bound by it simply have to decline to sign the treaty. Thus, whilst many small, weak states have signed it, two of the Permanent Five at the UN (China and Russia) are not involved. The US, after some initial enthusiasm, subsequently attempted to destroy the organisation, the limited French enthusiasm for it rapidly waned and only the British so far have really shown any enthusiasm. (Though all this has not prevented the Security Council collectively from referring the case of Sudan to the ICC). The ICC does not have the powers that the ad hoc tribunals had, and can only involve itself where the signatory state is "unable or unwilling" to prosecute, unless as, in the case of Sudan, it is invited by the Security Council. The fact that membership is optional, that many large states are not members, and that major players can generally protect not only themselves but their clients, means that the exclusive concentration so far on African cases was probably inevitable, and is likely to continue.

The limited action of which the ICC is actually capable is one of the most worrying signs that the ROL is not being advanced in this field, and may even be going backwards. Its defenders argue that it should be given time, and that, if only Africans have so far been indicted, others will be so at a later date. Whilst it is not impossible that leaders of small, weak and friendless non-African countries will be indicted in the future, any expectations of a universal regime of justice are hopelessly naïve, and always have been. Major states will simply refuse to cooperate, and will tend to stick together out of solidarity. They will also shield their clients, or states where they see advantage in the leaders remaining in place. It is not simply that major states can argue that they are investigating the allegations themselves, and so the ICC has no jurisdiction, but also that successful investigations and prosecutions require the active cooperation of major states if they are to succeed. Simply withholding this cooperation can be enough to derail the investigation. It is most likely, in fact, that the ICC will turn into a kind of Human Rights Theatre, where leaders of small poor states will be paraded as moral examples.

In fact, enthusiasm and political support for tribunals had already begun to wane by the time that the ICC statute came into force in 2002, as many of the practical and political problems of international justice became clear. The Special Court for Sierra Leone, established that year, was a much more modest affair, a so-called "hybrid" organisation, jointly responsible to the Sierra Leone government and the United Nations. The existence of the ICC makes it extremely unlikely that there will be any more such ad hoc organisations.

INSTITUTIONALISING IMPUNITY

The combination of the imminent demise of the ad hoc tribunals and the effective monopoly of international criminal justice by a heavily handicapped ICC does not bode well for the ROL. For political reasons, the ICC will be very limited in the areas it can address, which means that many alleged crimes will simply never be investigated. On the other hand, it is extremely unlikely that crimes outside the ICC's

remit will lead to the establishment of new courts, because the ICC will, in effect, occupy all the political space for such initiatives. Thus, major states or their clients will not have to worry about international justice coming to call. It is therefore better to see international justice today not at the beginning of an era, but at the end of one, where hopes turn out to have been greatly exaggerated, and impunity, far from being eradicated, will be institutionalised.

This does not mean, of course, that the ICC will have nothing to do. Genuine crimes will be investigated, and genuine perpetrators perhaps punished. But major conflict in Africa is now much less of a problem than it was, and the ICC will find itself increasingly obliged to go after smaller and smaller targets to justify its continued existence. Indeed, the most violent and destructive wars since the ICC became operational have not been in Africa at all, but in Afghanistan and Iraq. And no one has seriously suggested that international courts should investigate either.

In essence, the argument is between those who believe that these initiatives represent Some Justice, which is better by definition than No Justice, and those, like the author, who are not so sure. At the very least, we can imagine international justice as rather like a very corrupt legal system in a national state. The apparatus of courts, police and prisons exists, but only petty criminals are actually punished. Wealth and social position will always provide immunity, and embarrassing prosecutions can always be stopped. Few would argue that the ROL exists in such a situation. Moreover, the operations of the ICC, and pressure for international justice generally, can act as distractions. Well-funded publicity campaigns encouraged American students to protest not against their own country's wars in Afghanistan and Iraq, but against alleged (and greatly exaggerated) crimes committed by the Sudanese government in Darfur – a curious sense of priorities, to say the least. At the time of writing, much the same seems to be happening in the case of the Lord's Resistance Army, a tiny, if violent organisation originally based in Uganda, now attracting the kind of worldwide attention that much larger conflicts are being denied. Paradoxically, the ICC, by occupying the limited political space devoted to IHL violations, may well have the overall effect of increasing impunity in other and more important conflicts elsewhere.

So in effect, international justice itself has turned out to be much more difficult than anyone imagined twenty years ago. Some of the reasons are entirely banal, and have to do with issues of personnel and skills. Others are political, essentially the cooperation of states. Still others are fundamental questions of what the law can and cannot be expected to do.

A reasonable verdict on the operation of these institutions so far would be that, because of them, a small number of very unpleasant people have been removed from circulation, who would otherwise be free. But it is hard to go much beyond that. Unfortunately, wildly disproportionate hopes were placed on international justice, assuming not merely that "impunity" would be "ended" (which was never remotely possible) but that somehow peace and reconciliation would naturally flow from trials and punishment. In practice, this has not happened, although the idea that justice (however we choose to describe that) will lead to reconciliation, to rebuilding and to the acknowledgement of "the truth" is now very deeply embedded in post-conflict peacebuilding doctrine, usually hopelessly mixed up with the idea of reconciliation

through some kind of psychodramatic truth process. In reality, neither revenge no reconciliation seem to be effective strategies for building peace, and the former, in particular, has great potential for upsetting the political process and derailing peace processes.

In the end, no society likes to think that it is somehow guilty collectively, or that its representatives or leaders are criminals. Societies close ranks around those accused, and find excuses or rationalisations for them, as we have seen most recently in the case of the Bush government in the United States. In fact, this seems to be a universal trait, a belief that an attack on my country, my group or my ethnicity is an attack on me.

In addition, courts can never address all problems. Only a tiny minority of perpetrators will ever be prosecuted, some of the guilty will escape, and unfortunately some of the innocent may be punished. Judges will wrestle with intractable value-judgements about command responsibility, trying to decide whether the commander in front of them did just enough to restrain his men, and so free him, or whether he did not do quite enough, and so send him to prison for life. Far from truth emerging, trials and truth commissions often just add layers of uncertainty to an already complex and muddy picture.

In isolation, it is hard to oppose the idea that those suspected of grave crimes should be put on trial. The problem is that there is no such thing as a serious violation of international humanitarian law in isolation.

CHAPTER SEVEN

SECURITY, THE CITIZEN AND THE STATE

"They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." – Benjamin Franklin.

So far, we have looked at the origins of the Rule of Law and its many and varied definitions, as well as domestic and international influences upon it. We have seen where the concept differs from that of the law-based state. We then looked at the extent to which the international system can be said to operate according to rules of any kind. The last three chapters will be concerned with the practical application of these issues in the security sector. The distinction between the ROL tradition, and the law-based state tradition, important in other areas, is less important when we come to these practical issues.

But any discussion of practicalities depends first of all on the prior question of what the relationship between the citizen and the state is, or is intended to be, in the country in question. As we have seen, laws always uphold some ideas and repress others, and the agency that carries out these activities is the security and justice sector. But why should some ideas be upheld and not others? Who decides? And why should the component parts of the ROL be as described above, and not others? The dominant tradition in thinking about the ROL today is focused clearly on the individual, and the individual's right to be treated fairly, not to be subject to arbitrary state behaviour, and to have certain expectations both of the nature of a state's laws, and the duty of all, including the powerful and even the state itself, to obey them. But this is only a point of view, no matter how widely accepted it might be, and most political philosophers, and most states in history, have seen things rather differently. The principle that everyone should be equal before the law, for example, for all that it is found in every current ROL text, is only a normative theory. It cannot be demonstrated to be inherently true, and it cannot, in fact, even be demonstrated to be more logically desirable than a situation where some have more rights before the law than others. It remains a matter of personal belief, and, since everybody's rights cannot, by definition, come before everybody else's rights, an incoherent one, at that.`

The dominant ideology of the ROL today, with its emphasis on unrestricted personal economic freedom, its distrust of the state and its neglect of collective rights, has aspirations to be seen as universal. Indeed, variants of it are found in most ROL texts, and are accepted by most international organisations, donors and NGOs working in the area. It has found its way into declarations and documents of bodies such as the African Union. It forms an integral part of the neoliberal consensus which has ruled international politics for the last generation, and which Francis Fukuyama, in his well-known 1989 essay 'The End of History" assumed had

triumphed intellectually once and for all after the end of the Cold War.[41] Even at the time, this seemed a curious idea, notwithstanding the fact that, as the author stressed, he was thinking only in terms of a Hegelian progression of ideas, not the progress of history itself. These days, few would take the claim seriously, even at the purely intellectual level.

In that context, this chapter attempts to do two things. First, it looks at what the dominant assumptions behind ROL writing are, especially in terms of the relationship of the state to its citizens, and it also notes that these ideas have never been uncontested, even in the West. Secondly, it examines other traditions of this relationship, including some in the West, which have substantial implications for other traditions of the ROL.

First, a warning remark about theory. A numbers of major political thinkers are referenced over the following pages, but this book is not a work of political theory or an account of its development. Specialists will say, no doubt rightly, that I have oversimplified the thinking of a whole series of theorists, from Plato to Carl Schmitt, and that in practice all of them expressed themselves in a much more nuanced fashion than is presented here. But that is really the point. As we have already seen with Montesquieu, what political theorists actually said matters in general much less than what they are popularly supposed to have said. Ideas, in themselves, are seldom influential, unless they are taken up by those in power or seeking power, or unless they crystallise a common way of thinking, and even then they are usually taken up in a banalised form.

THE STATE AS CONTRACTOR

As already noted, the dominant tradition described above has ambitions to be universal. In fact, however, it is very specific in place and time, and finds its origins in the England and America of the eighteenth century. It is associated with classic Anglo-Saxon liberalism, and the concept of the Liberal State. As one might expect, there is no handy conspectus of the main elements of liberal state theory, but the following brief summary would generally be accepted as representative.[42] The rising middle classes in these countries, newly wealthy, chafed against the dominance of the King and aristocracy (foreign, of course in the case of the American colonists) and sought more power for themselves. Suspicious of royal power, wishing to promote the power of institutions like parliaments, where they dominated, they viewed the state with suspicion and sought to control it. Desiring security and a calm and ordered commercial environment, and distrusting war and imperial adventures, they naturally favoured a law-based state with its consequent strict limits on royal power. (They were also reacting in part to attempts by the last two English Kings to strengthen their own powers, along the French model). The state, in this way of thinking, was simply an agent, a kind of super-tradesman, to be tolerated only as long as it was effective and fulfilled the terms of the implied contract. The citizen had the right, and even the duty, to overthrow the state if it misbehaved. These ideas,

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[41] Francis Fukuyama, *The End of History and the Last Man*, London, Penguin, 1993, is the revised and expanded version of the original essay.

[42] A good summary is Erica Cudworth, Timothy Hall and John McGovern, *The Modern State: Theories and Ideologies*, Edinburgh University Press, 2007, pp. 37-62.

especially in the writings of John Locke (1632-1704) were immensely influential in the French and American Revolutions, and remain so today.[43]

Whilst standard accounts of Liberalism tend to avoid it, it is worth mentioning also that Liberalism was, from the beginning, an elite and elitist system. Rights were essentially property rights, and were to be enjoyed by those who had proved, by industry and intelligence, that they deserved them. The common people, on the other hand, were a threat to property ownership, and so powerful security forces were required to keep them under control. It's not an exaggeration to say that the essence of Liberal thinking about security has always been the protection of property, either from foreign invasion, domestic crime, or unfair commercial behaviour[44]. Classic Liberalism, indeed, saw many areas of even economic life as unsuitable for state intervention. Poverty, unemployment, occupational death and illness or even the health of the population, were the product of natural forces that the state could do nothing to influence. Indeed, it was dangerous, as well as immoral, for the state even to try. The influence of this kind of thinking can be found everywhere today in ROL theory and practice.

And this thinking arrived at a time of great economic changes. Two that are worth mentioning are the replacement of traditional collective ownership and management of land with a system of personal land-holdings, and the replacement of traditional trust-based systems of trade by enforceable contract law. It is not surprising, perhaps, that each of these problems is faithfully recapitulated in various ROL disasters in emerging countries today. It is also worth pointing out that the radical individualism of these ideas – human beings as Newtonian rational, calculating, benefit-maximising machines, pursuing their individual good with no requirement to think of others, or even acknowledge their existence – is the essence of the modern concept of the ROL as it has been promoted in various countries by donors and international organisations.

When Locke was writing, England was finally at peace, after decades of political and religious turmoil, and it was clear that the country would be a constitutional monarchy, with controls on the power of the monarch and would be of the Protestant faith. Locke, himself a revolutionary who had been obliged to flee to the Netherlands, understandably saw the power of the state as something to be feared and controlled. Locke represented a new class of urban intellectual, no longer particularly identifying with a group or a region, to whom it came naturally to think of personal freedom, and especially economic and political freedom, as the highest good. Although he was not himself a rampant individualist, he did as much as anyone to clear the ground for the extreme liberal and libertarian thought which is so powerful today.

These precepts only make sense, of course, if the state is strong, or at least strong relative to other actors, and so needs controlling in the first place. This was the case in the eighteenth century, when post-Westphalian rulers had largely succeeded in bringing the territories of Europe under central control, and where

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[43] See in particular the second of the *Two Treatises of Government* (1689).

[44] See very importantly Domenico Losurdo, *Liberalism: A Counter-History*, tr. Geoffrey Eliot, Verso, 2011.

other competing centres of power (notably commercial) had not yet arisen. They also presuppose a relatively settled political environment, free from war and internal conflict. None of this was universally true at the time, of course, nor is it necessarily always true today. Indeed, in many nations where ROL initiatives have been launched, the state itself is only one actor among many, and often not the strongest. In many African states, for example, it is not at all clear that the public needs protection from an over-mighty state, as compared to protection from militia groups and organised crime, or even multinational corporations. Paradoxically, the result of ROL initiatives is often to weaken the state further, and to promote the interests of non-state actors, from NGOs to organised crime groups, who will rush in to fill the void. And those groups, unlike the state, cannot even really be expected or required to behave in a law-based fashion.

Nonetheless, and to repeat, the theory of the Liberal state, even as vulgarised, is the fundamental ideology on which the theory of the ROL is essentially constructed. (For obvious reasons it has less influence in the law-based state tradition). To some extent, this results from the dominance of Anglo-Saxon political ideas in the discourse (if seldom the reality) of world politics. But it also reflects the influence of other actors, usually major donors. Other influential English-speaking nations, like Canada and Australia, have much the same intellectual heritage. Germany, another major donor, is still in the phase of reaction against the excesses of the twentieth century, which are ascribed, rightly or wrongly, to an excessively strong state, and its law-based state tradition has been intellectually very influential for two centuries now. The Netherlands with its political tradition of independence and decentralisation, and Sweden with its historic attachment to human rights, are also influential. Even France had a powerful Liberal tradition in the nineteenth century, and that tradition has recently returned to dominate French thinking about economics and politics. And because international organisations are always constructed from existing components and ideas, they have frequently tended to follow this tradition as well, if only for lack of a single articulated alternative. By contrast, states in which ROL initiatives are carried out tend to share neither the objective conditions that encouraged the growth of the ideology in the first place, nor the political and social assumptions that go to make it up. This is the single greatest obstacle to the success of ROL programmes today.

CONSEQUENCES

The Liberal concept of the state, and of the operation of the security sector, which both flow from this way of looking at the relationship between the individual and the state, has a number of consequences. Two are worth drawing special attention to here.

First, individuals are assumed to be deracinated economic actors, separated from their communities. Ethnic, national or religious identities still exist, no doubt, but they are secondary to a person's economic role. Politics, and by extension the inevitable conflicts of any society, are largely about access to power and wealth, and the role of the state, as far as it has one, is to act as a kind of umpire, to ensure things do not get out of control. The Liberal State cannot cope with a situation where people see their rights primarily as collective ones, or where there are genuine differences between identity groups, which cannot be solved by simple compromise. It is

therefore possible to have a situation of formal equality before the law which is in fact one of group inequality, because some groups have more access to the law, or more influence over it, than others. Moreover, elites from different groups may make common cause against the less powerful, and be able to enforce their ideas because of better access to the law and greater skill at using it. This may leave ordinary people of all groups very dissatisfied. Much real-life politics around the world is actually based on these kinds of concerns.

Second, because it is assumed that formal guarantees of political equality are all that is needed, the substantive freedom of the individual is essentially expressed in economic terms. Broadly, individuals should be free to do what they want in all areas of their economic life, without interference from the state. The latter, indeed exists not to control economic actors, but to protect their freedom. Thus, provided a system of enforceable contract law is introduced, and that courts settle commercial disputes fairly, there is actually little else for the state to do. In this context, it is worth recalling the modern Anglo-Saxon concept that "corporations are people," i.e. that private companies have the same human and other rights as ordinary people.

To the very reasonable objections that commercial actors may exploit their workforces or the customer, or engage in anti-competitive behaviour, the response is that the mechanisms of what liberal theory calls "the market" will prevent this happening in practice. After all workers can always go elsewhere for better wages or conditions, customers can find another shop, and anti-competitive behaviour by definition anyway cannot exist in a market economy. As a result, and as the early theorists argued explicitly, legislation to protect the health of employees or the environment, or to regulate dangerous or harmful economic practices, is not only unnecessary, it actually undermines the ROL, since it seeks to restrict the freedom of individuals to act economically as they choose. By extension, laws to forbid the formation of trades unions, or to protect private companies against legal challenges, strengthen the ROL because they restore the purity of unregulated economic actions between individuals. Thus, the role of the security sector, may, quite legitimately, be to defend the interests of private companies against their employees and their customers.

It is for this reason that many ROL projects today are greatly concerned with reducing legislation that controls commercial activities. Indeed, no ROL programme today features increased rights for workers or consumers as part of its agenda. For that matter, modern human rights advocacy has practically ignored the rights of employees and consumers, and it is virtually impossible to find even a mention of the right to join a trades union in ROL texts, or even on the websites of human rights organisations, even though this right was set out clearly in the Universal Declaration on Human Rights. By contrast the "rights of business" are featured heavily by a number of such organisations.

All this, of course, is wildly divorced from the realities of everyday life, even in liberal democracies. But in those states, there are at least political and media actors who can protest, and perhaps force a change in policy or behaviour. In the kind of countries where ROL programmes are implemented, though, the private companies whose rights are being protected are often stronger than the government in the first place.

ULTRALIBERALISM

There is thus a set of ideas, reasonably coherent if not very realistic, which is politically powerful, if not very widely held by ordinary people, and which happens in addition to favour the interests of the wealthy and the powerful in most countries. Forces promoting these ideas have become much more powerful in the last generation, and societies around the world have been re-shaped in surprising ways as a result. This process began in the United States, and has made most progress there: as we have seen, significant parts of the security sector have been handed over to the private sector, and that same private sector extensively funds the election campaigns of everyone from Presidents to local judges. How far the explanation for the popularity of extreme liberal ideas of this sort lies in genuine cultural difference, and how far it is simply through de facto censorship and marginalising of opposite views, remains unclear, even to specialists.[45]

There is also a historical heritage, however. The drafters of the American Constitution were also from the Liberal tradition that feared and distrusted the power of governments, and they were keen to leave as much power in the hands of states, and individuals, as possible. The *Federalist Papers* of 1787-8, generally thought to be influential in persuading states to ratify the new Constitution, argued in favour of a text (finally adopted), which did not provide any rights for the citizen at all, but simply a list of government functions. The Federalists distrusted the powers of central government to the point that they believed that any list of rights would soon be interpreted as being *all* the rights that individuals had, and government would take the rest.[46] Unsurprisingly, there was resistance to keeping powerful security forces: no less a figure than George Washington considered that a standing army was invariably "dangerous to the liberties of a country" and majority opinion agreed with him. Rather, the last line of defence, not only against foreign enemies, but also an over-mighty state, was a trained militia force.[47] This tradition, in a degenerate form, has been revived by extremist modern militia groups, who refuse to pay taxes or recognise certain laws, and who see themselves literally at war with the government. Membership of anything up to 50,000 has been claimed for these groups, and violent incidents are common.[48] Similar groups are active even within the military and the police. A group styling itself the Oath Keepers is, according to its public statements, a "non partisan association of currently serving military, veterans, and peace officers who will fulfil our oath to support and defend the Constitution against all enemies, foreign and domestic, so help us God."[49] This means that they will disobey orders they believe to be unconstitutional. What they have in common with the militias, and extreme liberals generally, is that they take literally and

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[45] Thomas Frank, *What's Wrong With Kansas*, Holt McDougal 2005, is a classic attempt to understand why Americans vote so consistently against their best interests.

[46] A copy of the full text of the papers is at http://www.law.ou.edu/ushistory/federalist/index.shtml the argument is in Paper No 84, probably by Alexander Hamilton, later President.

[47] See the official US Army history of this period at http://www.history.army.mil/books/AMH-V1/ch05.htm

[48] See for example David Bennett, *The Party of Fear: The American Far Right From Nativism to the Militia Movement*, Vintage Books, 1995. The election of President Obama in 2008 seems to have given these movements a new momentum.

[49] See http://oath-keepers.blogspot.fr/2009/03/oath-keepers-declaration-of-orders-we.html

practically Locke's argument that citizens have not only a right, but also a duty, to resist government tyranny.

Here, the concentration is entirely upon the individual and the individual's judgement and interests, against those not only of the elected government but of fellow members of society. The dominant mode of liberalism in the United States, indeed, was classically described by CB MacPherson as "possessive individualism": the idea of the individual as "essentially the proprietor of his own person or capacities, owing nothing to society for them.[50]" He argued that this thesis, which in effect denies any duties or responsibilities of the individual to others, goes back to the earliest theorists in the eighteenth century whom we have already met. It is certainly true that extreme liberals, whether of the human rights or market economy persuasion, are strangely reluctant to talk either about individual responsibilities or collective rights. Thus in ROL debates, the assumption is that actors have total "ownership" of their bodies, which means they may act and speak in any way they choose, without being obliged to worry about the consequences for others. The fact that in practice this is never possible, and anyway leads to irresolvable conflicts, should not be allowed, in the eyes of ROL advocates, to detract from the purity of the idea.

Even this extreme view can be taken to further extremes. There is, of course, an old and venerable tradition of the total rejection of the state, if necessary by violent means. In Europe, this largely took the form of Anarchism, as well as its relative Anarcho-syndicalism, which emphasised the role of trades unions and voluntary associations in replacing government with other forms of organisation.[51] Anarchists saw the replacement of the state by a non-exploitative political and economic system in which voluntary cooperation would avoid the need for state controls, and the security sector would have nothing to do. Such ideas were very influential until modern times: indeed the large and powerful Spanish anarchist trade union, the CNT, was a major source of support for the Republican forces during the Civil War.

Such movements were not unknown in the United States, but they went underground following the violent suppression of radical trades unions by government and employers in the first part of the twentieth century. The ideas resurfaced in a peculiarly American form of Libertarianism. The name is not new (it had been used by some anarchists) but the precepts, a mixture of mythical frontier independence and classic antipathy to the state, have come almost from nowhere to dominate the American Right over the last generation. Although there have been attempts to produce a philosophy of libertarianism,[52] its primary appeal has always been emotional. Classic liberal theory, as expressed by Mill, essentially argued that individuals should be free to do what they wanted so long as they did not interfere with the freedom of others. Thus "every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable

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[50] CB MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press Canada, 1962.

[51] The classic study is by George Woodcock, *Anarchism,* Penguin Books, 1963.

[52] Notably Robert Nozick, in *Anarchy, State and Utopia*, (1974), although the author later disowned many of his original ideas.

that each should be bound to observe a certain line of conduct towards the rest."[53] More colloquially, your freedom ends where mine begins. The security sector thus enforces rules of good sense and decency that enable individuals to live together, but the state lets individuals alone unless they are harming others.

Libertarians deny all this. For them, personal freedom is an absolute value, and no limits are to be put on it, by government or society. Taxation is a form of theft because it decreases an individual's autonomy, and social justice is wrong and unnecessary because it can only be brought about by reducing the rights of others. Of course, if you and I both pursue our rights without consideration for others, eventually we will come into conflict. In a Liberal state, the state itself intervenes to enforce rules, but a libertarian denies any such outside role. Quite what is supposed to happen instead is unclear, but logically we compete, and the stronger of us wins, if necessary by violence. In turn, of course, this also means that in practice the rich and powerful have more rights than the poor and weak.

Naturally, we would all like to be able to make our own liberty an absolute good, and to pursue it independent of consequences. Indeed, libertarianism, if not a serious political philosophy, appeals nonetheless to the spotty adolescent in all of us, who resents having to tidy his room and do his homework, and wants to spend the time playing video games instead. As adult life imposes tiresome obligations upon us, it must be, literally, liberating to be introduced to ideas that, however incoherent, appear to justify that sulky mentality.

This is most obviously the case with the bizarre figure of the novelist and self-styled philosopher Ayn Rand. Born Alissia Rosenbaum in St Petersburg in 1905, she found fame in the United States with her philosophy of Objectivism, described by a recent critic as an example of the "vulgar Nietzschianism that has stalked the radical right … since the early part of the twentieth century." Almost unknown outside the United States, Rand's long, complicated and reputedly unreadable books sold millions of copies there, and regularly top lists of the most influential books of the century. Alan Greenspan, the pilot of American economic policy for a generation, was an uncritical admirer, and effectively the whole of the modern Republican Party worships her ideas. One candidate for the Republican Presidential nomination in 2012 named his son after her.[54]

Objectivism is, in essence, little more than an inversion of Judaeo-Christian values. Selfishness is its greatest virtue, and altruism the deadliest sin. The strong will inherit the earth and the weakest will, quite properly, go the wall where they belong. Society should be led by strong and ruthless natural leaders, and others should simply obey or be crushed underfoot. It is not an exaggeration to describe Rand's ideas as essentially Fascist, not least because of their evident common derivation from Nietzsche. Such a society sneers at equality of any kind, and the only law it respects is that of strength. We will deal with societies that actually put these

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[53] John Stuart Mill, *On Liberty*, (1869), Book 4. There is a searchable online edition at http://www.bartleby.com/130/

[54] Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin*, Oxford University Press, 2011, pp. 76-96.

principles into practice a little later, but here it is enough to remark that this is what you get when you push many of the Liberal state assumptions of the Rule of Law to breaking point. Libertarianism is not a perversion of Liberalism, as some Liberals like to claim, but a natural extension of it.

AUTHORITARIAN LIBERALISM

It is reasonable to ask whether Liberalism, pushed to its libertarian extreme, should not logically call in the question the very existence of the security sector. After all, the fact of the existence of that sector would seem to imply that there are public goods to be defended. But then as a libertarian, what concern is it of mine if my neighbour's house is burgled? Logically, the result of this way of thinking would be a nation armed to the teeth, with each person defending themselves against all others. Indeed, there do seem to be libertarians who think this, although relatively few of them have moved to the libertarian, stateless paradise of Somalia. In the real world, however, security and justice systems are inescapable, so how is this need to be reconciled with the violently anti-state rhetoric of the libertarians? Here, we should remember that, whereas anarchism was a variety of socialism, and foresaw the end of private property, libertarians celebrated private property to the point of believing that one might kill to defend the principle of it. So libertarians advocate disbanding police forces and replacing them with private forces run by insurance companies, competing for business. Wars would then be fought by mercenary armies. If this seems extreme, recall that already much of the prison system in the United States is in private hands, and mercenary armies have been employed in Iraq and Afghanistan.

Back on Earth, however, the limits of such ideas become quickly apparent. On the one hand, libertarianism has almost no popular support within the electorate. On the other hand, those who benefit most from economic liberalism have the most to lose from crime and insecurity, and the most to gain, because of the assets they control, from increases in security sector budgets. So a curious mishmash of ideology has emerged, combining extreme economic liberalism with extreme political authoritarianism, including unprecedented increases in the powers and budgets of security organisations. And whilst some libertarians are consistent enough to argue that people's personal behaviour is their own concern, most are extreme social conservatives, who have used the law and the security forces to try to control the personal behaviour of those they do not like. Again, it can be argued that this is only a logical extension of the thinking of Locke, Hamilton and others.

In the end, any consistent libertarian position would have to defend all forms of personal activity, even if only in the economic area. As well as slavery (which some libertarians have defended, as virtually all Liberals did) this would include the sale of hard drugs and child pornography, since both of these are economic activities that fulfil a need. The problem is that, if you exclude these examples as extreme, then it is not at all clear how and where you could draw a line at a more sensible and moderate stage, without finally arriving at the point where the ghost of John Stuart Mill waits patiently.

But in many ways, libertarianism, as has already been suggested, is a logical extension of the liberal philosophy that is at the heart of most ROL initiatives. If

personal freedom is the highest value in any society, and economic freedom is the most precious type of all, then a form of uncontrolled and competitive wealth seeking, without regard for the consequences, is the natural outcome. Similarly, if the security sector exists to promote and defend freedom, then by this definition, it will mathematically be obliged to defend the interests of the wealthy and powerful, before those of the poor and weak. This is the inescapable destination of ROL initiatives constructed on Liberal lines, and is one of the reasons why such initiatives are often treated with suspicion in the many parts of the world where western liberalism has made little impact.

ON NOT TRUSTING THE PEOPLE

Although the phrase "liberal democracy" is often used as though the terms were complementary, in fact it can reasonably be argued that they are opposed to each other. This is not just in the obvious sense that economic liberalism promotes huge disparities of wealth that undermine democracy. It is also because the founders of liberalism, from Locke to the modern day, were themselves opposed to democracy, as we understand it.

So long as Kings ruled, the question of popular decision-making did not arise, as we shall see shortly. But once ordinary mortals were allowed into the decision-making process to any degree, the question was immediately raised: where do you stop? If wealthy plantation and slave-owners were to govern the United States, how could it be argued that slightly less wealthy individuals had no right to participate? If middle class property-owners had the vote in Britain or France, why should non property-owners be denied it? And ultimately, why should everyone, including women, not have equal political rights?

This was a prospect that understandably terrified theorists of republics and liberal states from the beginning. The first person to reflect on this issue was probably Plato, who lived four centuries before the Christian era. His *Republic* (actually a mistranslation of the Greek title *Politeia*) is primarily a dialogue about virtue, but it approaches the subject through a discussion of an ideal society. This, for Plato, was not the democracy of his Athens, which, he argued, led inevitably to tyranny, as crowd-pleasing demagogues would inevitably take power. His ideal state was run by a class of philosopher kings (the Guardians), who were selected from birth to be trained in virtue and wisdom. Those who successfully completed the training would become a monastic, ascetic class of rulers, and those who fell out would become professional soldiers: a class unknown in Greece at the time. The *Republic* has spawned libraries of commentary, but its essential influence for our purpose lies in the twin assertions that common people cannot be trusted to govern themselves, and that an elite class of virtuous individuals is therefore required to do it for them. Whether directly or not, these ideas have inspired various schools of political thinking up to the present day.[55]

None of the early fathers of liberalism were in favour of democracy as we understand it, still less as the Greeks did. From Locke to Mill and Macaulay, they

[55] The full text is available on the Internet Classic Archive, at http://classics.mit.edu/Plato/republic.html

distinguished between the popular consent of the governed and the actual act of governing. They themselves constituted a Platonic elite, fit for government, and there could be no question of ordinary men (still less women) participating. So property qualifications limited the effective franchises of western nations until well into the twentieth century. Universal democracy was a threat to property rights, because people would naturally vote in favour of their own interests, which would entail redistributing wealth away from the rich. "The majority" noted Macaulay in 1857 "has the rich, who are always a minority, absolutely at its mercy.[56]"

Various steps were taken to delay the inevitable. The drafters of the American Constitution had specifically decided against the direct election of members of the new Senate. They were elected or appointed by state legislatures, in order to ensure, in the words of James Maddison, another Federalist, that it would consist of "a temperate and respectable body of citizens". It was not until 1914, after numerous scandals, and generations of – sometimes-violent - protests, that senators were directly elected. In France, the Senate is still elected indirectly, and manipulation of the system meant that the Right was able to maintain its overall majority every year right up until 2011. In Britain, of course, an un-elected House of Lords was a major political force until very recently.

The method chosen by modern democracies, in addition, is not one that the ancient Athenians would have recognised as democratic. In Athens, all major decisions were taken by gatherings of male citizens (to be fair only about ten per cent of the local population), and all offices, even those of military leaders, were elective in the same way, usually for a year. By contrast, even the limited franchise of the United States, had to be understood, said one of the founders, Benjamin Rush, as conferring very restricted rights on the voters. Power does not reside with the people as such: rather, "(t)hey possess it only on the days of their elections. After this, it is the property of their rulers, nor can they exercise or resume it, unless it is abused. It is of importance to circulate this idea, as it leads to order and good government."[57]

From the nineteenth century, as mass democracy approached, there came the creation of organised political parties and professional politicians, competing to take power. This system, known as representative democracy, parliamentary, or indirect democracy, is the one in use today, and is the one inevitably recommended to countries undergoing ROL assistance. If the ultra-participative system of Athens is not really feasible in large modern states, more direct forms of popular expression – such as referenda – are almost never used by governments either, except for tactical political ends. In many countries, this limits the choice before electorates to two or three elite parties, often well financed and organised. In proportional representational systems there is at least a chance that minority views will be heard but, even then, a threshold figure can be set which will stop smaller groups being elected. Campaign finance rules also play a big part, as does the simple ability to

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[56] In what was originally a private letter to an American correspondent, but was published in the *New York Times* in 1860. A copy is on line at http://www.nytimes.com/1860/03/24/news/macaulay-democracy-curious-letter-lord-macaulay-american-institutions-prospects.html

[57] Benjamin Rush, *Address to the People of the United States*, 1787, available online at http://teachingamericanhistory.org/library/index.asp?document=1779

make yourself heard. The French convention that all candidates for the Presidential election who receive enough mandates to run must be given equal time on television, certainly ensures a fairer outcome.

Then there is the law. As we have seen, different conceptions of democracy are possible, and versions exist in which elites play smaller roles, or even none at all. Such schemes seldom find favour with elites. Thus, when the British Security Service was given legal status for the first time in 1989, it adopted the definition of "subversion" which had long been in use in Britain, and which included "actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means." (Section 1 (ii).) Thus, the Security Service was (and presumably still is) intended to collect information on, and act against, those calling peacefully for changes to the current political system. States have always treated such acts very seriously, and in many countries they have been punishable by long terms of imprisonment and even death. As is often the case with such laws, the British definition includes words ("undermine", "parliamentary" or "political"), which can make virtually any act a crime.

Finally there is the security sector itself. The police, intelligence services and even the military of many nations were used over many generations to repress those seeking a wider democratic franchise, not least, of course, because the heads of those services were among the elite that felt threatened. Violent clashes with the military, often around Trafalgar Square, were a feature of British political life until a century ago. Other formal democracies, such as France and the United States, also used the military to suppress demands for popular reform. The most infamous case is the crushing of the Paris Commune of 1871, when tens of thousands of Parisians were slaughtered.

Eventually, after the First World War, the pressure for universal suffrage became irresistible. Liberal elites in various countries gloomily contemplated their own extinction. Why, after all, would ordinary people not vote for candidates who promised to expropriate them? Walter Lippmann (1889-1974) thought he had the answer.

Lippmann, a well-known journalist and intellectual, argued that public opinion was generally ill informed, impatient and easily manipulated. Wiser and better people, like himself, understood the issues better, and could be trusted to make the right decisions as a "governing class". But in a mass democracy, which Lippmann found deeply unattractive, the consent of the governed was required for the decisions of the elites. In Lippmann's view, this consent was unlikely to happen naturally, and so it needed to be "manufactured" – a process he regarded as helpful and positive. Journalists thus fulfilled a critical role in conveying the ideas of the elites to the people, in a way that would secure their consent.[58]

So Liberalism was from the beginning, and has remained, an elite idea. Its concept of freedom was and is elitist and largely economic in nature, and its

[58] Lippmann's 1922 book *Public Opinion*, where he spelled out many of these ideas, is available online at Project Gutenberg, http://www.gutenberg.org/ebooks/6456

adherents have been as much concerned with maintaining their own power as in taking power away from others. ROL initiatives are generally couched in liberal terms, partly because there is no ready alternative, partly because international elites tend to have Liberal ideas, irrespective of whether they see themselves as politically of the Left or the Right. The limited applicability and the highly theoretical nature of many Liberal ideas is a major reason for the obstacles that ROL initiatives have often encountered.

THE AUTHORITARIAN OPTION

If Liberal theory was prepared at least to contemplate formal political equality, and to award individuals theoretically equal rights before the law, there were many other traditions, even in the West, which denied this equality absolutely, and continue to do so. This section looks at authoritarian western concepts and their implications for the security sector, whilst the next section looks at non-western ideas.

For most western societies until relatively recently, the idea of individual equality before the law would have seemed incomprehensible. The function of the law, and the rudimentary security sector that enforced it, was the preservation and protection of a divinely ordained social and political system. Agitation against such a system was itself a crime. Practices varied enormously, and some parts of northern Europe had systems incorporating elements of democratic practice (popular assemblies for example) but the idea of everyone having identical individual rights would have been incomprehensible.

Most societies around the world have passed through a monarchical stage, in which families govern political entities, passing down this power from one generation to the next. Whatever the origins, such royal families rapidly came to understand the value of presenting this system as one ordained by a divine power. Indeed, the Japanese royal family, the world's oldest, was claimed to be literally descended from gods, and the word *Tenno* (usually translated as "Emperor") means literally "god-king." Such ideas were common in other parts of the world as well, not least in Europe, where the royal propagandists of Louis XIV's reign made no distinction between their king and God himself (and for that matter, Jupiter, king of the gods as well).[59]

In Europe, however, such ideas did not develop immediately or automatically. In medieval times, central authority was often weak, and the King of France, for example, was only one of a series of local warlords, who often allied themselves with invading foreign powers. At that date, and under the influence of theologians such as Thomas Aquinas, kings were seen as responsible to their people, even if chosen by God. This could mean, under certain circumstances, that a king who behaved tyrannically could be deposed, although such a move would generally require the consent of the Church, the greatest political and financial power of the era. As a result, a kind of unintended separation of powers was in force, although in this scheme there was no place for ordinary people or their representatives. In addition to the position of the king, society as a whole tended to be conceived in highly

[59] See Peter Burke, *The Fabrication of Louis XIV*, Yale University Press, 1992.

structured and static terms: the clerics, whose job was to pray, the aristocracy, whose job was to fight, and the ordinary people, who actually worked. This division, often called the "three estates" was common throughout Europe. Rights and duties were collective, not individual, and even the common people were organised into guilds and other groups with elaborate sets of rights and duties depending on the circumstances of one's birth (and even trades were frequently hereditary). Needless to say, heretics and rebels against the established order had no rights.

As states became progressively unified, and central power increased, kings began to see themselves in rather different terms. The rising middle classes had disrupted the old estates structure, the Reformation had undermined the secular power of the papacy, and economic growth provided new resources for states. Theoreticians stepped forward to propose a new theory of kingship, which saw all power concentrated into the hands of the monarch, whose only responsibility was to God. This was not a defence of tyranny or arbitrary power, since a king was expected to obey God's law. But what was called the theory of Absolutism placed all power (i.e. absolute power) in the hands of the ruler, to be delegated as he saw fit. This had the effect of reinforcing the idea that kings, even if not literally divine, were nonetheless chosen by God. The symbol of this choice was not the coronation, but the anointing by a representative of the Church. An anointed king was then a holy figure who could not be touched, and to overthrow one was a sin against God. Of course, usurpers and the unworthy could and did get themselves crowned, and so it was important that the king should be the "rightful" ruler, with the best claim to the throne, by birth or marriage. Legitimacy in this very limited sense was a fundamental part of the political system for hundreds of years: it is otherwise impossible to understand Shakespeare's history plays, for example.

The most important theorist of absolutism, although little-known in the Anglo-Saxon world was Jean Bodin (1529-96), whose *Six livres de la République* (1576) effectively invented the study of constitutional law. In particular, he argued that the king had an absolute authority to make laws, with or without the consent of the subjects. At first sight, it seems strange that such theories should triumph so rapidly. Why would anyone outside the king and his immediate circle tolerate such a concentration of power? Partly, of course, a strong state was simply able to enforce its will. Partly also, in the case of France at least, the theories enjoyed the support of a rising middle class, who "possessed wealth, and, as holders of public office, filled the senior posts in the administration." In addition, people were sick of endless dynastic and religious conflict, and longed for a strong figure to restore order.[60]

This episode illustrates a general rule, that concepts of the ROL tend to be based on reactions against earlier political systems. They thus tend to oscillate between extremes. The centralised absolutist state described by Bodin and others produced its own reaction in the form of the Revolution two centuries later, just as the attempted absolutism of James II produced the theories of John Locke. Current ROL thinking is based essentially on a reaction to the tyrannies of the twentieth century, and a search for the polar opposite of the ideas behind them, which we will deal with in a moment.

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[60] Pierre-Clément Timbal and André Castaldo, *Histoire des institutions publiques et des faits sociaux,* Dalloz 1993, p. 271.

With the passage of time, it became more and more difficult to argue convincingly that the king was a literal representative of God on earth. Traditionalists became extremely worried that the new doctrines of Liberalism would destroy the natural, organic society they prized, and replace it with anarchy and chaos.[61] In the end, they were unsuccessful, in that whilst the French Revolution was eventually defeated, and the monarchy restored in France in 1815, the resulting political system was closer to that of England than of Louis XIV. Yet the literal divinity of kings retained its defenders, even after the Revolution. For Joseph de Maistre, writing a few years later, the Revolution, and even more the execution of the King, were literal sins against God, whereas the Revolution itself could be seen as a punishment visited upon France, because of its undue tolerance of parliamentary and economic liberalism, as well as of the main enemy – Protestantism. This opinion was shared by a surprising number of people, including the peasants who took part in the 1793 rising in the Vendée, and whose motto was "God and the King.[62] "

For its part, the Catholic Church was not averse to this linkage. Viciously anti-democratic and violently royalist until after the Second World War, it saw the hand of a vengeful God in all of the misfortunes of France, notably the defeat of the nation in the Franco-Prussian War of 1870. Democracy was the enemy, to the point that country priests even a century ago warned their parishioners that it was a damnable sin to cast a vote in an election. Unsurprisingly, the Church in most of occupied Europe enthusiastically supported Hitler's New Order.

Generally, though, defenders of monarchy preferred secular arguments, even if they privately believed, as many did, that the social system, including a monarchy, was divinely ordained. This was the approach of Edmund Burke in his *Reflections on the Revolution in France*, published in 1790. Burke had no personal experience of the Revolution, although this did not discourage him from writing lurid descriptions of it, intended to convince the English to retain the monarchical-oligarchic system then in place, and under no circumstances to embrace these new democratic ideas coming from abroad. His opposition to democracy was essentially for the same reasons as Plato's: distrust of the common people, and belief that democracy led inevitably to tyranny and ruin. Not coincidentally, he was also an extreme economic liberal.[63] The French Revolution also exposed ideological differences within nations for the first time since the Reformation. A disturbingly large number of English people welcomed and supported the Revolution. What was to be done with them? Burke had the answer: he reckoned that about eighty thousand people were dangerous enough that they should be constantly spied on, and imprisoned if necessary. There could be no compromise with democrats.[64]

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[61] See Darrin M. McMahon, *Enemies of the Enlightenment*: *The French Counter-Enlightenment and the Making of Modernity,* Oxford University Press, 2001.

[62] See Michel Winock, *L'Héritage contre-révolutionaire* in Michel Winock (ed) *Histoire de l'extrème droite en France*, Seuil, 1993.

[63] Burkes complete works are available online at Project Gutenburg, http://www.gutenberg.org/browse/authors/b#a842

[64] See *Letters on a Regicide Peace* (1796).

LEVIATHANS

Other influential writers argued against democracy not from religious, or even ethical principles, but from what they saw as highly practical ones. The best-known and most formidable was Thomas Hobbes (1588-1679) whose *Leviathan* (1651) has been enormously influential, even if it is seldom actually read today. Hobbes did not argue for the Divine Right of Kings (he was, indeed, accused of being an atheist) nor even necessarily for a monarchy (he was also accused of being insufficiently royalist). *Leviathan* is presented as a quasi-scientific treatise on politics, leading inexorably to a clear conclusion about how society should be organised. Human beings, argued Hobbes are governed by what we would now call behaviourist rules. We automatically seek our own individual benefit, and our own self-preservation, whilst being frightened of harm from others. Theoretically, we could organise co-operatively, but in practice, this is not possible since we can never trust each other enough, and never agree on how to do it. In the absence of a powerful authority, therefore, human beings will quickly revert to what Hobbes described as the State of Nature, a situation of "continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short." [65]

Since human beings fear death above all things, Hobbes argued, they will avoid the terrible prospect of the State of Nature by entering into a "social contract" (he appears to have invented the term) through which they agree to sacrifice every one of their rights to an all-powerful and unaccountable Sovereign. Now clearly this cannot have been an actual historical event, and it is not clear whether Hobbes expects us to believe that a State of Nature is actually likely in real life. The best way to see it, perhaps, is, in the words of one editor an "apocalyptic myth" intended to persuade, rather than a description of an inevitable outcome.[66] That said, such has been the direct and indirect influence of Hobbes's work that it is important to establish whether the State of Nature he described had actually occurred, or could occur. If that were the case, it would make his argument very much stronger.

In fact, the evidence is very much to the contrary, and it seems likely that Hobbes's own vivid imagination was at work here, as well as a desire to reach a pre-determined conclusion. Although Hobbes was writing after the English Civil War, it seems that it was less war itself that bothered him than the social and political forces it unleashed, with their desire for fundamental change. As much as Locke and later Liberals, he believed that the common people, little better than animals, needed to be kept down by force. Hence the Sovereign.

Whilst popular media reports of countries where the state has collapsed often fall into Hobbesian rhetoric, the reality is usually quite different. During natural disasters, people tend to come together for mutual assistance and self-preservation,

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[65] Hobbes's complete works are on line at Project Gutenburg, http://www.gutenberg.org/browse/authors/h#a1133. This quotation, the only one that almost everyone will recognise, comes from Chapter XIII.

[66] JCA Gaskin in the Introduction to his edition of *Leviathan*, Oxford, 1996, p. xxxii.

often grouping themselves around natural leaders or institutions such as churches.[67] Where there is conflict, it is not between individuals but between groups, and individuals will seek the protection of groups rather than be left alone in potential danger. Indeed, conflict can arise from the fact that these groups are often ethnic or religious in origin, and may have conflicting agendas. In general, politics cannot tolerate a vacuum. When the state goes away, other forces, ranging from the kind of groups mentioned above, through foreign powers to organised crime will move in to take over.

Hobbes has been influential, then, not for the accuracy of his assessments, but for his conclusions, and the usefulness of his arguments. Every state which wishes to introduce new restrictions on personal freedom has the Hobbesian argument available: look, we are doing it for your protection, because the world is a terrifying and dangerous place and only we can look after your interests. Hobbes was correct, though, in saying that people are easily made afraid, and in that state they are equally easy to manipulate. By some sleight of hand that is not immediately obvious, but which we will return to later, Hobbes's argument has recently been inverted. Strong governments are not essential to protect you and me against each other, but to protect you and me from some unspecified external common threat.

Clearly, nothing like the ROL can exist in a society constructed on Hobbesian principles. The separation of powers, rather than being a virtue, is a threat, since it weakens the power of the state. No form of counterbalancing power to the Sovereign can be tolerated, since again this weakens the protective ability of the state, and brings the terror and violence of the State of Nature closer. Hobbes was therefore especially critical of the attempts of organised religion to play a political role. Even the expression of criticisms of the state was forbidden, because of the dangerous consequences; silent dissent was just about acceptable. Yet in spite of all of this, Hobbes argued that the result of such a system would be "freedom". What did he mean?

Essentially, he meant that, in his ideal society, people would be safe in their everyday lives, as long as they only did things that were legal. All commercial activity would be safeguarded, since commercial freedom was not regarded as dangerous, and people would be safe from violence by their neighbours so long as the Sovereign had effectively unlimited powers and no accountability (In reality, even the largest and most intrusive security apparatus in the world cannot prevent more than a fraction of crime, and certainly cannot guarantee to keep people "safe").

If these ideas sound familiar, it is only partly because they are invoked by every politician today seeking to place more controls on the freedom of their citizens. It also because of the long Hobbesian nightmare of western elites, expecting to be murdered in their beds as society broke down. Elites had always been afraid of the "mob," but this fear became much more acute after the events of 1789. In accordance with the dominant scientific theories of the time, the common people were considered little more than animals, ready to fall into a State of Nature the minute

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[67] An important recent study on this subject is Rachel Soint, *A Paradise Built in Hell: The Extraordinary Communities That Arise in Disaster,* Penguin Books, 2010.

that the iron hand of authority was weakened. Internal revolution, rather than external invasion, kept European elites awake at night, especially after the Russian Revolution. As late as the Cold War, the British government was at least as concerned about the social breakdown it assumed would follow a nuclear attack as it was with the physical damage such an attack might bring.[68]

It would be possible to trace the influence of Hobbes through the centuries, especially in Europe, where his ideas were more influential than those of Locke. But for our purposes it is more important to focus on more recent writers who have followed the same course, and who have, in many cases, directly influenced thinking about the ROL today. One such is Carl Schmitt, the German legal theorist who in 1938 actually wrote a critical book on Hobbes. He considered that Hobbes was too permissive.[69] In Schmitt's view, by allowing individuals to hold private opinions, Hobbes opened the door to the whole of modern liberalism, with its destructive emphasis on individual rights. Schmitt argued instead for a Total State, where people, civil society and the state itself were indistinguishable, utterly united against all threats to their safety. Like Hobbes, he argued that people would then be "free" at least in the limited sense that he allowed the term.

Schmitt wrote a very great deal in a long life, and by no means all of what he wrote has been translated into English. But his ideas, often understood at second or third hand, do represent probably the most powerful statement of the authoritarian view of "freedom" and provide a set of rational-sounding justifications for ever-increasing state power. And it is worth noting that, like Hobbes, he wrote at a time of conflict and insecurity, when people were prepared to trade rights for safety and where, in his case, the ignominious end of the Weimar Republic was a recent memory. Unsurprisingly, therefore, his idea of legitimacy had nothing to do with popular acceptability or accountability, and nothing to do with respect for the law, but derived from simple acceptance of the power of the state. His most enduring legacy, developed a decade before his book on Hobbes, is the idea of politics as fundamentally about a distinction between the "friend" and the "enemy." The latter was not necessarily a literal enemy, but rather an "existential" threat, an Other, different from us, whose very otherness was both a threat to our collective sense of self-preservation, and a call for us to unite against this threat. Schmitt considered enmity between groups to be the very nature of politics: conflict was therefore inevitable.

By the time he died in 1985, Schmitt had first fallen out of fashion and subsequently undergone a qualified revival. His influence can clearly be seen in the kind of neoconservative thinking about state power that we reviewed earlier. Like Schmitt, today's neoconservatives are scornful and dismissive of any limitations on the freedom of the state, whether in domestic law or international treaties. It is perhaps interesting that, according to one survey, citations of Schmitt in American law journals went from effectively zero at the time of his death to a hundred or more

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[68] See for example Peter Hennessey, *The Secret State: Preparing for the Worst, 1945-2010*, revised edition, Penguin, 2010, which is based on declassified government documents.

[69] Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, tr George Schwab and Erna Hilfstein, University of Chicago Press, New edition, 2008.

per year in recent times.[70] It is not surprising that the revival in interest in Schmitt has provoked debate, not least because some of the questions he asked about the Rule of Law are very fundamental.[71]

Unlike Schmitt, who remained in Germany, and worked as an academic lawyer, his contemporary, Leo Strauss, emigrated to the United States, and became the teacher, and the teacher of the teachers, of the neoconservatives who came to dominate the American Right in the 1990s. Strauss, although a Jew, was an early supporter of the Nazis, and a persistent story claims that he tried to join the party in the early 1930s but was refused on racial grounds. (At that point anti-Semitism was not a major plank of Nazi policy). He was essentially a traditionalist, a fierce opponent of democracy who looked back with nostalgia to the settled and ordered world of pre-1914 Germany. He was prepared to countenance and even support fascism as a way of destroying democracy, and reproducing, as nearly as was reasonably possible, the disciplined world that had been lost in 1919. He distrusted all forms of relativism and multi-culturalism, and promoted simple – if not simplistic – ideas of right and wrong, which provided the ultimate justification for the current War on Terror. Essentially, the means were justified by the ends. [72]

Strauss was yet another unapologetic elitist, who believed that political issues were too complex for the average person to grasp, and that lies (of the kind Plato had advocated) were necessary as a tool of statecraft, and not to be apologised for. One of his best-known students was Alan Bloom, whose *Closing of the American Mind* was a sustained attack on liberal education and a plea for a return to elitist concepts. Many of Strauss's students subsequently went on to occupy senior positions in government and administration in the United States. In particular, as indicated, Strauss is usually regarded as the father of the neo-conservative movement in that country.

If the influence of Strauss was indirect, through his students and their own students, the influence of FA Hayek, the third member of the neoconservative fatherhood, has been very direct indeed. Until the 1970s, Hayek was a rather obscure economist, whose extreme pro-market theories had a small cult following. He was best known for his 1944 book *The Road to Serfdom*, which argued that the measures of economic planning and social security provision then being discussed in Britain and elsewhere would lead, within a few years, to the installation of a Nazi or Stalinist-style tyranny.

Hayek became involved personally in the politics of Chile, following the military coup of 1973 led by General Pinochet. Although he approved enthusiastically of the economic policies being introduced into the country under the influence of right-wing American economists, his main interest was in the issue of freedom. In a famous letter to the London *Times* in 1978, commenting on a statement by the Conservative politician Margaret Thatcher that freedom was more an economic than

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[70] See David J. Luban, "Carl Schmitt and the Critique of Lawfare", Georgetown Public Law Research Paper No. 11-33, 2011 Available at http://ssrn.com/abstract=1797904

[71] See for example Jean-François Kervégan, *Que faire de Carl Schmitt*? Gallimard, 2011.

[72] See for example Nicholas Xenos, "Leo Strauss and the Rhetoric of the War on Terror", *Logos*, Vol 3, No 2, Spring 2004.

a political issue, he argued that, whilst economic freedom was indispensable for liberty, political freedom was not.[73] He went on to defend the Chilean junta in public, arguing that everyone he had spoken to Chile believed that personal freedom had been greater under the Pinochet regime than under the previous democratically elected Allende government in spite of the former's imprisonment, torture and murder of opponents.[74]

As will by now be apparent, this argument – that economic freedom is the only real freedom, and a dictatorship may be needed to achieve it – is a logical political (if not necessarily theoretical) consequence of the Liberal political legacy on which, ironically, the ROL is ultimately based. What Hayek understood, intuitively, was that true political freedom necessarily implies constraints on economic freedom, especially that of the powerful, and this he, and his followers today, have not been prepared to accept. In a curious fashion, therefore, Liberalism, on which the ROL is supposedly based, eventually embraces political authoritarianism, and the unrestricted use of the security forces to suppress opposition, since the first ultimately depends on the second for its survival.

[73] "The Dangers to Personal Liberty", *the Times*, 11 July 1978, p.15.

[74] Cited by Greg Grandin, *Empire's Workshop: Latin America, the United States, and the Rise of the New Imperialism,* Metropolitan Books, 2006., $.173.

CHAPTER EIGHT

AGAINST EQUALITY

The rich man in his castle, the poor man at his gate
God made them high or lowly and ordered their estate.
19th century English hymn.

The incoherence between the advertised theories of Liberal societies and the way in which they tend to work in practice, is one of the reasons why ROL initiatives conducted by western states very often come to grief. But another reason is that the Liberal tradition has very shallow roots in most parts of the world, and that there are many societies that have entirely different traditions of the relationship between the individual and the state, and the role of the security forces. Even in the West there are authoritarian traditions whose influence has by no means disappeared, which is one of the reasons for the sometimes awkward contrast between advice given by itinerant ROL experts to foreign governments on one hand, and the domestic practices of their own governments on the other. In this chapter, we look first at the authoritarian tradition as it has been applied in the West, and then go on to briefly examine why and how other traditions, found in many parts of the world, also come to different conclusions from that of the liberal state, and the consequences for the ROL.

It will be recalled that equality before the law is one of the basic principles always quoted in the ROL literature (and it is an even more fundamental a principle of the law-based state.) But obviously equality before the law depends on the prior political judgement that human beings should be treated inherently as fundamentally equal, or the concept would make no sense. Yet for much of human history, and in many parts of the world even today, the idea that human beings are all equal in any important sense would have seemed bizarre and even incomprehensible.

All known societies developed according to hierarchical principles. In some cases these hierarchies were internal to the group, in others there were hierarchies between different sub-groups. Often they were both. We have already noted the medieval European tradition of the division of society into aristocracy, clergy and peasantry, which survived in France until the Revolution. But there was a similar division in China between scholars, merchants and the common people. Indeed, in many parts of Asia even today, civil servants, as "scholars" have more prestige than businessmen, as "merchants". As we have seen, the idea of rule by elites lingered nostalgically for centuries in the West, and is by no means dead even today. But some political systems have applied rule by elites of different sorts as a deliberate political

ideology, and it is to those, and the consequences for the security sector, that we now turn.

BORN TO RULE

There are a number of grounds on which it could be argued that people are not equal. The traditional argument was based simply on observation: some people are stronger, more intelligent or more gifted than others. People should therefore be treated according to their natural abilities rather than everyone being treated equally. In particular, some are wiser, holier, braver or more knowledgeable than others. Thus, elites of different types will necessarily rule. They may be social, economic, racial, religious or other types of elites, but in any case the purpose of security sectors is to ensure that they remain in power, and that their orders are obeyed. In such systems, legitimacy does not come from competitive election or some process of accountability: it is inherent. Various cultures have tried to produce a virtuous and moral ruling class, who would rule wisely and with justice, and whose authority would therefore not be questioned. The idea that ruling and managing society was a skill akin to being a novelist or a doctor was deeply ingrained in many parts of the world (in Classical Greece, for example), and is not entirely dead even today.

The result was inevitably a social and political system based on difference and subordination, and a series of different rights for each group. In ancient Athens, for example, there was a separate legal status for every group: one for citizens, one for foreigners, one for women, one for slaves, and so forth. There were also examples of different religious rights. Under the *Millet* system of the Ottoman Empire, different religious groups had different rights, and different systems of justice. These rights applied everywhere; that is, all Muslims had the same rights irrespective of where they lived, and one could gain rights (and also reap certain financial advantages) by converting to Islam.

For a long time, ruling classes were hereditary and aristocratic. Aristocrats in most cultures were believed literally to be “better” than ordinary people, and so fitted to rule. (We recall that *aristokratia* in Greek literally meant ”rule by the best people.”) Even in cultures where the ruler was not literally considered divine, aristocrats were considered physically and morally superior to ordinary people. Expressions such as “well bred” and “noble blood” were meant literally rather than metaphorically. Indeed, the idea that there are people with inherently higher status because of their birth lingers on in popular culture: it is the whole point of Hans Christian Andersen’s *The Princess and the Pea,* for example, and most European literature until the end of the nineteenth century depends on it to some extent.

In such a situation, the ROL means the maintenance of the natural order of things, where the best rule by right. This is why popular revolts were always put down with such ferocity. In some cultures, this order was believed to be divinely ordained, and so rebellion, or even dissent, was a rebellion against a divinely ordained political system. But even where this belief had lapsed, ruling elites were able to trade on the mystique of superiority, and to present their dominance as part of the natural order of things, or even divinely tolerated. Until well into the twentieth century, for example, schoolchildren in England were taught to sing of:

> The rich man in his castle, the poor man at his gate.
> God made them high or lowly, and ordered their estate [1]

In theory, the more meritocratic politics of the last hundred years should have undermined this sense of superiority, but there are reasons to think this may not be so. Whereas traditional elites were ultimately hard to defend, since they depended on accidents of birth, or access to patronage, modern elites are, at least in theory, the result of open competition. Success therefore becomes its own justification, and this success is allegedly linked to ability and hard work, rather than the more mundane explanations of luck, ruthlessness, and advantages such as family wealth, education or personal connections. As the German sociologist Robert Michels observed a hundred years ago, all organisations and societies ultimately turn into oligarchies.[2] This applies to formally liberal and democratic societies, since meritocracy creates winners (who have often themselves started with considerable inherent personal advantages) and these winners select their subordinates and replacements from people they are familiar with. In practice, therefore, the natural order of things has simply evolved, and the order that is now being enforced by the security sector is in practice an oligarchic one, of which the leaders of the security sector themselves form part. In societies where this oligarchy is socially, ethnically or religiously-based, this tendency is more visible, but it is doubtful if there is any society in the world which escapes it entirely.

BORN TO SERVE

The idea that some people, and some races, are naturally superior has the obvious corollary that some others are inferior. This was reflected in various historical practices, including domestic service by the "lower" classes in many societies. But the most striking, and the most relevant for our purposes, are the institution of slavery in the Caribbean and the United States until the middle of the nineteenth century, and the practices of some colonial powers in Africa.

Although it is true that slavery is an old institution, and that it was practised by the Greeks and (on a massive scale) by the Arabs, as well as domestically in Africa, there are certain important differences in this case. In many societies, slaves were originally prisoners of war or citizens of conquered states or cities. They were bound to their owners, but in some societies (such as the Ottoman Empire) free to pursue trades and professions, and even to rise to positions of power and influence. The Atlantic slave trade, by contrast, is probably the only example in human history before the 1940s of the systematic exploitation of large groups of people as objects, and as simple economic assets.[3] In addition, whilst slavery had been endemic in

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[1] The (now suppressed) third verse of the children's hymn *All Things Bright and Beautiful*, originally written by Mrs CF Alexander in 1848.

[2] Originally published in German in 1911, the text is available in English at http://socserv.mcmaster.ca/econ/ugcm/3ll3/michels/polipart.pdf

[3] A good popular treatment is Hugh Thomas, *The Slave Trade: History of the Atlantic Slave Trade, 1440-1870*, new edition, Phoenix Books, 2006. For a more international approach, including discussion of the slave trade within Africa itself, see Olivier Grenouilleau, *Les Traites négrières: Essai d'histoire globale*, Folio 2006.

Africa for centuries before white traders arrived, the trade, like the trade with the Arabs, was essentially commercially based, and lacked the explicit racial dimension of the Atlantic trade.[4]

This trade was brought about essentially for economic reasons: the expansion of planting in the Americas by generations of immigrants hoping to get rich quickly produced a huge demand for labour, which could not be satisfied locally. But the costs and uncertainty both of procuring the labour, and transporting the crops, were high, and so running plantations profitably depended on reducing labour costs to the bare minimum. The result was the treatment of slaves as assets like any other, to be used up, thrown away and replaced. It was not that slaves were discriminated against, but rather that they had no rights at all. Indeed, they had no legal existence.

The economy of the southern United States was completely dependent on this system of slavery for its viability. Thus, the American Constitution was agreed not to apply to slaves, who had no legal rights at all – not even the subordinate status they enjoyed in other societies. They were rather objects, like tables and chairs, or akin to farm animals, over which the owner had the power of life and death. Moreover an 1857 judgement of the American Supreme Court found that slaves were legally the property of their owner, and, under the Fifth Amendment to the Constitution, slaves could not be freed (i.e. taken away from their owners) without "due process." Indeed, defenders of slavery argued that opponents of the system wanted to violate the Rule of Law by arbitrarily seizing private property.[5]

The formal abolition of slavery after the American Civil War did not, of course, change the attitudes that had produced it. The concept of the fundamental inequality of human beings had been around for so long (and Aristotle himself had defended slavery on the basis that some people were just happier that way) that it would also take a very long time to change. Many American states introduced discriminatory laws against blacks, preventing them voting, or even being physically in the same place as whites. Such laws, of course, required the security sector to enforce them, and the police and courts not only did so with enthusiasm, but also believed that they were upholding the ROL in doing so. After all, it was argued, the State should not interfere in peoples' private preferences, in search of some great social engineering project. What one popular right-wing journalist of the time called "the precious right to discriminate" against "inferior" blacks had to be defended.[6] The ROL, in this view, meant that a restaurant owner had to be "free" not to serve blacks if he wanted to.

Segregation – in effect, different rights for different groups – remained a popular cause with the American Right until the 1970s. Barry Goldwater, the Republican candidate for President in 1964, and accounted an intellectual by some,

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[4] Not that this made it any more pleasant for the slaves of course. It is worth adding that in parts of Africa today (such as Sudan) this heritage lives on in mutual dislike between north and south "Arabs" versus "African slaves."

[5] This was known as the "Dred Scott" case, after the name of a slave who sued for his freedom. See Paul Finklerman, *Dred Scott vs. Sandford: A Brief History with Documents*, Palgrave Macmillan, 1997.

[6] Cited by Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Workplac*e, Harvard University Press, 2006, p.63.

defended it stoutly in his book *The Conscience of a Conservative*, which was published in 1960, but is still mentioned with respect today. The journalist and novelist William Buckley, accounted an intellectual by others, went further and argued in 1957 that violence could be justified to preserve white supremacy in the South, to maintain "civilised standards"[7] Curiously, Buckley and others were in favour of "negroes" trying to improve their status, but not of government doing it for them.

Behind all this, sometimes acknowledged and sometimes not, was a deep conviction that blacks were racially inferior to whites, and so could not reasonably enjoy the same legal status. Such attitudes were not, of course, unique to the United States, although the severe racial tensions and the large non-white population meant that they were particularly evident. Indeed, as late as the 1990s, a bestselling book was partly devoted to the idea that blacks were inherently less intelligent than whites.[8] But where did these ideas come from?

Partly, they came from tradition. The first westerners to reach Africa noted that Africans had no written language, relatively small political units, and a (relatively) lower level of technology than that known in Europe. (They were little more impressed by the natives of South East Asia, who they believed were congenitally lazy[9].) From this, they jumped to the conclusion that Africans and Asians were inferior species, although ideas of race and species before the nineteenth century were somewhat rudimentary. The pseudo-science of phrenology, as it developed in the nineteenth century, claimed to demonstrate that Europeans were the most evolved form of the human race, but its practical effects were not great.

This changed with the disastrous misunderstanding and misapplication of Charles Darwin's ideas about animals to humans, in the latter part of the nineteenth century. Darwin was partly to blame for this, and he hesitated about publishing his ideas for as long as he did because he could see the potential for their misuse. His conviction expressed in Chapter 6 of *The Descent of Man* (1871) that one day the civilised races would exterminate the "savage" races was intended as a pessimistic statement of scientific probability. Ripped from its context, it could easily be seen as a programme of action. It may be true that neither he, nor the English philosopher Herbert Spencer, who actually coined the term "survival of the fittest" intended their works to strengthen the belief, already becoming widespread, that humans themselves were divided into races battling for survival. However, without going into the question of whether "Social Darwinism" ever really existed, and if so how far it

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[7] William Buckley, "Why the South Must Prevail", available at http://cumulus.hillsdale.edu/buckley/Standard/downloads/showoriginal/whythesouthmustprevaildotpdf_1703_buckleybuckleyarchivepublicationsbyyear1957articles/WhyTheSouthMustPrevail.pdf

[8] Richard J Hernnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life*, Free Press, 1994. Stephen Jay Gould, *The Mismeasure of Man*, Revised edition, Norton, 1996, is a magisterial dismissal of such theories since the nineteenth century, updated to deal with Hernnstein and Murray's book.

[9] See Syed Hussein Alatas, T*he Myth of the Lazy Native: A Study of the Image of the Malays, Filipinos and Javanese from the 16th to the 20th Century and Its Function in the Ideology of Colonial Capitalism,* Routledge, 1977.

was related to Darwin's work,[10] it is clear that the end of the nineteenth century saw the rise of extreme, allegedly science-based, theories of competition to the death between humans, both individually and collectively. This was not because such theories were themselves necessarily intellectually compelling, but rather because they served a useful purpose. Interest in imperial possessions, support for unrestricted markets, and opposition to social legislation protecting the poor, would all be easier to bring about if crude "Social Darwinist" became popular and accepted. And indeed it did, and they were.

Abroad, such ideas led naturally to a conception of international relations as aggressive and even genocidal. In a famous speech in 1897, the British Prime Minister, Lord Salisbury, divided the states of the world into the "living" and the dying" and predicted that, as "dying" nations declined, the "civilised" nations of the world would fight over the remains. Although Chamberlain was not an uncomplicated imperial expansionist, uncomplicated imperial expansionists could and did take comfort from his words.[11] His ideas were not especially controversial at the time – indeed the idea of national competition was deeply ingrained in the politics of the day, and had been strongly supported by distinguished Liberals such as John Stuart Mill. As well as making war inevitable and even good, it made imperialism acceptable and even necessary. What we can for convenience call "Social Darwinism" gave a scientific and even moral basis to colonialism, as the strong nations and races took over the territories of the weaker ones. Such an outcome might be regrettable for the exterminated races, it was argued, but it was sadly inevitable given the iron laws of history, and no good would come of trying to prevent it[12].

The great age of imperialism, the "scramble for Africa" between about 1880 and the First World War, was energised and legitimised by these attitudes, and nowhere more than in the Belgian Congo. Like many other colonies, the Congo (then the Congo Free State) was less a colony than a commercial enterprise. But unlike the British colonies of East Africa, which were originally joint-stock companies, subsequently nationalised, the Congo was the private property of King Leopold II of Belgium. Given the size of the territory (some 2.5 million square kilometres) and the need for at least some investment to be made there, reasonable commercial returns were only possible if the population were treated essentially as slaves, and regarded as expendable assets. The cultivation of rubber – the main export at the time – was organised with such brutality and ruthlessness that it is hard for us to believe, today, that civilised human beings were actually capable of such behaviour. Yet Joseph Conrad, who had worked in the Congo at the time, was later to insist that his famous book *The Heart of Darkness* (1902) was essentially based on real events, and not at all the melodramatic fantasy it might appear. Villages which failed to produce rubber quotas were routinely exterminated to the last individual, and the *Force Publique*, the white-officered native paramilitary force responsible for keeping order, was

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[10] See for example Mike Hawkins, *Social Darwinism in European and American Thought, 1860-1945: Nature as Model and Nature as Threat*, Cambridge University Press, 1997.

[11] See Andrew Roberts, "Salisbury, The Empire Builder Who Never Was," *History Today*, Vol 49, No 10, October 1999.

[12] Sven Lindqvist, *Exterminate all the Brutes*, Tr. Joan Tate, Granta, 1996 examines the exterminatory colonial legacy and its influence on the twentieth century.

required to produce a severed hand to justify every bullet expended.[13] Over a twenty-year period, these tactics brought about a minimum of several million deaths (some estimates are much higher). Comparisons with Auschwitz are fair if we recall that the Congo covered a much larger area and involved many more people for much longer. Eventually, even the robust conscience of high imperialism had had enough, and Leopold was forced to hand the colony over the Belgian state after a series of damaging media revelations.

Whilst it may be unfair to hold individual well-known writers and scientists directly responsible for the spread of these attitudes, the fact is that what Darwin, Spencer or others actually said is of less significance than the way in which their ideas were presented by a print media catching up with the increase in literacy. By the end of the nineteenth century, there was a firmly established popular myth of apocalyptic struggle to the death between racially distinct nations. So prevalent was this myth that it could be satirised by HG Wells in *The War of the Worlds* (1895). Wells had been a student of TH Huxley, a noted populariser of Darwin, and his novel is both an ironic inversion of imperial literature (with the technologically superior Martians representing the British Empire) and a serious attempt to foresee the kind of exterminatory total war that Social Darwinist attitudes would inevitably produce in the next century.

If the conclusion about Africa was that it was necessary to "exterminate all the brutes" in the words of Conrad's main character Mr Kurtz, it was no less true that there were brutes at home as well. As we have seen, the idea that intelligence varied among races, and was an inherited trait, was well established. But even within the same "race" scientists felt they could distinguish the "feeble minded," who, they argued, were a danger to society. The term "eugenics" was coined by the British scientist Sir Francis Galton in 1878, and was inspired by the simple observation that selective breeding of plants and animals could improve the quality of the population. Surely, reasoned Galton, the same would be true of humans. Eugenics became a major concern of governments until after the Second World War, when the excessive enthusiasm for it shown by the Nazis was thought to have dealt the idea a fatal blow. In its milder and more positive form, as advocated by many progressive thinkers, its purpose was to encourage the "useful classes" to breed more, to "improve the inborn qualities of a race", as Galton described it in a lecture delivered in 1904.[14]

But of course the same effect could be achieved if the "less useful" classes bred less. Governments around the world began ambitious sterilisation programs, intended to prevent harmful genes being passed on to children, and in some cases these programmes were also directed against immigrant and minority communities. They proceeded from the simple assumption that human beings were unequal, and

[13] Adam Hochschild, *King Leopold's Ghost*, Macmillan 1999, is the standard popular treatment of the subject. David van Reybrouck, *Congo: Een Geschiedneis*, Amsterdam 2010, has been translated into French, but not yet into English.

[14] The text was subsequently published in the *American Journal of Sociology*, and is online at http://web.archive.org/web/20071103082723/galton.org/essays/1900-1911/galton-1904-am-journ-soc-eugenics-scope-aims.htm

that the law should recognise and enforce that inequality.[15] In Sweden, such policies continued into the 1970s.

Clearly, the struggle for supremacy between races, and the requirement to ensure that the best bred and the worst did not, were intimately linked. Success in both war and commerce depended on maintaining a healthy, vigorous race, from which the weak and feeble-minded had been weeded out (gardening metaphors were common). Competition to survive among individuals would, it was argued, produce a race that was better fitted to compete at global level. Consequently, anything that suppressed this competition, from old-age pensions to trades unions, and from safety legislation to paid holidays, could only weaken the race and bring about its replacement by a more virile and competitive one. If these ideas sound uncomfortably contemporary, it is because they are: the current ideology of economic "competition" between nations is essentially Social Darwinism with the biology taken out. The post-1945 era has seen not only a revulsion against the racial policies of the Third Reich, which took these ideas to their logical conclusion, but also a guilty attempt to turn the page away from a chapter of European intellectual history of which the Nazis were a logical, if not necessarily inevitable, outcome.

These ideas of racial competition were influential outside the West as well (in Japan for example), and often appeared attractive because they seemed modern, and based firmly on scientific theory. They also complemented traditional, more diffuse ideas of racial and cultural superiority elsewhere in the world, such as the Chinese view of themselves as the "country in the middle of the world" surrounded by barbarians.[16] Because there are few states or societies with a firm conception of their own insignificance, most societies, in practice, fall prey to this kind of thinking. For some it is a glorious past, for others a glorious destiny in the future, for others still an economic, social or even moral superiority over others.[17]

Likewise, there are many parts of the world where social and economic distinctions are deeply ingrained, and may be the basic structuring element of a society. In Africa, we have already noted the socio-economic distinction between the aristocratic Tutsi (owners of cattle) and the Hutu peasantry, found in many Eastern parts of the continent. Such a system, notably in Rwanda and Burundi, was only workable if the Tutsi class could retain control of the security forces, as their equivalents in Europe did for a long time. Other systems were more inclusive and democratic. The Oromo people of Ethiopia and parts of Kenya ran their internal affairs through the *Gadaa* system, which has left its traces even today. This was a highly complex system based on age and clan affiliation, where each clan had defined

[15]The United States implemented such policies with enthusiasm: there is a large archive of original documents at http://www.eugenicsarchive.org/eugenics/

[16] In Mandarin, the country is called *Zhong Guo*: the two characters mean respectively "middle " or "central" and "state" or, today "nation."

[17] A friend recalled attending a conference in Ottawa some years ago, under the title: "Canada: a Moral Superpower".

duties and rights for a period of eight years, performed by different age groups.[18] None, however, was based on any principle of formal equality.

Partly, this was a question of context. In societies where there were only a small number of roles to fulfil, and where these roles were carried out in much the same way over time, the rights and duties of individuals were essentially a function of which group they belonged to. In rural societies, this was, and is, especially true. Once individuals move to cities, on the other hand, social and economic differentiation becomes much more pronounced, and the question of the rights of individuals as individuals, and not as group members, starts to be important. This is why the concept of the Rule of Law in its modern form is closely linked to the development of an urban middle class.

In some rural areas, moreover, the very survival of the group depended on cooperation and discipline. The relative authoritarianism of Confucianism, for example, is based not only on philosophical ideas, but also on the fact that many communities in China and elsewhere in the region lived permanently on the edge of starvation, one bad harvest away from disaster. In such situations, the group had to take priority, and the individual did what they were told. "The nail that sticks out gets hammered in" as the Japanese proverb has it, because individualism in such societies was literally a danger to the survival of the groups. Rather, individuals were expected to sacrifice themselves for the general good.[19] Even in kinder physical environments, farming was a collective activity in which individual initiative had little place. All such communities were inherently self-regulating, not only because of their isolation, but also because potential crimes (food hoarding, for example) were clearly against the common interest, and were punished as such.

Finally, there are also societies where political rights are dependent on access by groups to power. In Europe, the construction of nation-states required that the traditional independence of regions like Catalonia and Brittany had to be suppressed – by force if necessary – and that regional cultures and languages be replaced by national ones. Likewise, until the nineteenth century, most of Europe saw institutionalised discrimination against minority religious beliefs. In the more relaxed post-1945 security environment, the tendency has been in the opposite direction, but the balance between local and national rights remains a real issue, not least in the common situation of the protection of the rights of minorities within minorities. In Africa, where population densities were lower and conquest was difficult and largely pointless, political systems often involved power relationships between senior and junior clans, the latter offering tribute to the former. This system has left its imprint on African politics even today.

In summary, the individual, rights-based concept of the ROL with which we are familiar is not a traditional idea, but a very modern and recent one, the product essentially of an urban middle class and the development of new systems of social

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[18] I was first told about the *Gadaa* system by some of my students in Addis Ababa. There are also written descriptions of the system (which has been much studied by anthropologists), eg at http://www.ethiopolitics.com/articles/The_Gadaa_system.htm

[19] The 1983 film *The Ballad of Narayama*, which shows elderly villagers going into the mountains to die, appears to be based on real historical events.

and economic organisation. We should therefore expect three things, all of which do we indeed find. First, in many parts of the world social and economic developments have been slower, or at least different, and our view of the ROL is not the dominant one there. Second, attempts to apply our concepts of the ROL to societies that have developed differently have usually failed. Thirdly, and most interestingly, even in the West there have been alternatives to the liberal concept of the ROL, as well as overt resistance to it. We look finally at examples of these other concepts of the ROL, noting in doing so that most actual historical cases are mixtures of types, and indeed of the factors mentioned above.

NATURAL RULERS

The *Authoritarian State*, based on hierarchy, duty and the respect for tradition is the best-known alternative model. People have responsibilities, rather than rights, and their position is determined by their function, age and social and economic role. Whilst this is not necessarily a repressive model, in the sense that rank or status may also carry responsibilities to those below, individual rights, as opposed to a status drawn from group membership, do not really apply. The state acts as agent to protect and reinforce the system, and its overall objective is social and political harmony. Its legitimacy derives from its performance of this role. The good of society is to be preferred to the good of the individual. Pretty much the whole of the world was organised in variants of this model until a few hundred years ago, and large parts of it still are.

Much of the West followed this model until the nineteenth century, and the transition from it was frequently violent, and often incomplete until modern times. The state – and even more the security sector – existed to uphold the power of the traditional rulers of society, which was legitimated by custom and tradition, and often by the Church as well. In many cases, also, this model returned under the stress of war or political crisis, or as a result of a deliberate attempt to halt, or even reverse, political and economic progress. Such regimes appealed to the certainties of the past, and condemned what they saw as the laxity and decadence of the contemporary world. They often had significant popular support. In the 1930s, such regimes often took power in Eastern Europe and the Balkans in an atmosphere of political and economic crisis. A similar regime was imposed by force in Spain after the Civil War of 1936-9, and in France after the defeat of 1940. Regimes installed violently in Latin America lasted until the 1990s.

The strength of such regimes lay in their base in the trinity of Church, Army and political and financial establishment. They traded on the doubts and uncertainties of ordinary people, their fear of the new and different (especially when it could be presented as “Communism”) and the nostalgia for a past when everything had seemed simpler. They were elite, not mass, regimes, and their appeal was unashamedly to obedience to traditional patterns of power and natural leaders. Legitimacy came from the past, from custom and practice and from the blessing of the Church (which is why such regimes almost always appeared in Catholic or Orthodox countries). There was no pretence of individual rights: obedience and deference were demanded instead, and the state used the security forces for objectives as various as murdering its political enemies, and enforcing its laws on women’s’ fashions.

Although the end of the Cold War undermined the ostensible rationale for such regimes, and most faded away quite quickly, the mentality behind them has, if anything, grown more influential since then. It was, after all, their opposition to the modernising and secularising influence of Communism that provided these regimes with their raison d'être, and gained them the (sometimes unacknowledged) support of western states. Post-communist states after 1989 generally experienced significant regression in terms of education, health, and social security, whilst political culture became more authoritarian, backward looking and religious. Likewise, many in the West took the fall of Communism as a sign that their traditionalist, hierarchical, authoritarian and religious attitudes had triumphed, and these tendencies were thus reinforced in the generation that followed. The way seemed to be clear for a broadly Liberal concept of the Rule of Law that emphasised economic freedom for those able to use it, combined with personal submission of ordinary people to a powerful state, and that, indeed, is what seems to be happening in a number of countries.

Traditional authoritarian regimes try to preserve the structures and ideas of the past. *Radical authoritarian regimes*, on the other hand, try to overthrow existing structures, and often come to power in times of political crisis, when these structures are faltering. The Fascist parties of the inter-war years came to power during periods of political turmoil and economic collapse, and depended partly for their legitimacy on their willingness to try to find radical solutions to these problems. Fascist regimes, and fascist parties generally, also believed in the idea of natural leaders, but these issued from the ranks by a process of competition, rather than from traditional hierarchies. Such a leader (often presented as a semi-divine figure) simply led and others willingly followed. Such parties were essentially a non-socialist alternative to tradition: they were popular, modernising, science-based movements, but ones where the job of the masses was not to lead but to follow.

The outcome of the Second World War, and the social and political reforms which followed it, made such regimes a historical curiosity for the most part, although there were later isolated examples, such as the 1967-74 Greek junta. This was made up of relatively junior Army officers, who claimed to be conducting a National Revolution, to forestall a Communist takeover. Or something. Interestingly, the seizure of power was directed as much as anything against existing structures – the Greek King led the opposition to the original coup in 1967. Nonetheless, the widespread economic failures of the last generation have produced the kind of desperation upon which radical authoritarian regimes build, as well as the hunger for an authoritarian leader who will sort everything out. Political forces capable of producing these regimes do exist – especially in the former Communist nations – and may very well triumph in the foreseeable future. Indeed, so long as an ideology of strong natural leaders exists (in business as much as in politics) this kind of regime is always a potential risk.

Radical authoritarian regimes have a complicated relationship with the security sector. On the one hand, they usually come to power by force, and cannot rely on the reflexive obedience of the security forces, who may well have supported other candidates. On the other hand, their legitimacy arises, not from a popular electoral mandate, but from much more speculative arguments about destiny and natural leadership. Such regimes need the security sector to stay in power, but are also very wary of its capacity for independent action. As a result, they usually try to

keep it under firm political control, and to set up party-based militias and intelligence services to keep an eye on it.

Although less common than they used to be*, One-party states* still exist. Some of them are Marxist states, where the state itself is an extension of the ruling party, and derives its legitimacy from the struggle that produced the one-party state in the first place, and the leading role of the Party in building the future. This is why complaining about the lack of political opposition in such states is largely beside the point. Sometimes the party is a party of *national liberation* rather than of revolution, and there the state draws its legitimacy from the struggle for freedom that the party conducted, against a colonial power or an invader. In such a system, such debate as there is will be within the party, which is often more powerful than the state, and the state itself is responsible for enforcing the party's rule.

Such states do not necessarily have to be repressive. Debate within the ruling party may be allowed, and elections may be a genuine test of the popularity of individuals. In a number of African countries, the first leaders made a decision to create one-party states, not out of a hunger for power, but out of a desire to unite the country. They worried that western-style political parties would be organised along ethnic lines, and that ethnic competition would tear the fragile new countries apart. Later history has proved them at least arguably right: the move to multi-party systems in the 1990s has on the whole brought instability, notably in countries like the Cote d'Ivoire.

Once more, the relationship of such regimes with the security sector will be complicated. In some countries (ranging from Algeria to Zimbabwe) the military draw their legitimacy from their historical role, rather than their present functions, or how they are described in the Constitution. Its leaders may think and act as much like political figures as military ones, and may overtly involve themselves in the political process.[20] The political leadership may be suspicious of them, and seek to control them with parallel forces, or alternatively to bring them formally into the decision-making process. In other contexts, it may try to keep them weak and divided, and to make them compete with each other.

A close relative is the *ideological* or *theological* state. The ruling party or tendency may not have the credibility that comes from revolution or national liberation, but it does occupy all the political space. It rules by virtue of being right about everything, and does not entertain alternative views. Its ideology or religious belief is beyond rational challenge, and the state exists to enforce this ideological hegemony. Again, parallel power structures, more influential than the state itself, generally exist in such societies.

Such states have existed for a long time. Arguably, states in medieval Europe incorporated elements of this approach, in that rulers were influenced by the

[20] The Zimbabwean Army has frequently threatened to disobey orders from any leader who did not participate in the "liberation struggle." See for example "Army General 'Threatens Coup'", online at http://www.thezimbabwemail.com/zimbabwe/11688-army-general-%E2%80%98threatens-coup%E2%80%99.html

Church's opinions, and required its sanction for their actions. But this was as much because the Church was a major political (and financial) power as it was for theological reasons. The full identity of Church and State came with the development of extreme form of Puritanism, notably in Calvin's Geneva, and in the early Puritan colonies in the United States. A contemporary religious example of such a state is Iran, where Islamic clergy are influential in policy matters, and may issue religious judgements about them. A number of Muslim countries have constitutions which give a special status to the edicts of Shari' a law, against which there is no appeal. But there are non-religious examples as well, notably the Libya of Colonel Ghadaafi, run according to the secular ideology of the Green Book. What these regimes and others have in common is an ideology which sees itself, and is in principle accepted by others, as simply correct, and against which no appeal is possible. Other concepts of legitimacy (such as popular opinion) are simply not relevant.

Finally, there is the *nationalis*t, or identity-based state. Here, the political base is not the residents of a single, defined territory political territory, but rather an ethnic or identity group, wherever they may exist. Conversely, those without the correct identity who may happen to live within the boundaries of the formal state are not really part of the political base, and something needs to be done about them. Nationalist and identity states often have defensive, if not actually paranoid political cultures ("we are surrounded by enemies") and the state, and especially the security forces, exist to protect the identity group, and, as necessary, ensure that they have rights over members of other groups. Genuine nationalist states are not very common now, after the Second World War made nationalism seem less palatable, but Israel and some states in the Balkans are examples of states constructed on ethnic grounds, where the security sector is used to defend and enhance the rights of the group in whose name the state exists. Some African nations (notably the Cote d'Ivoire) have also taken steps in this direction. The problem with nationalist states is that they are seldom "ethically pure," and that their security policies have to find a way of dealing with the "Other". This is easier if the dominant group is a majority (as is currently the case with the Jews in Israel or the Croats in Croatia). It is much more difficult if the group that controls the security sector is in fact a minority, as was the case in apartheid South Africa.

Because nationalist states are built on ideologies that give them an exclusive right to certain territories for religious, historical or cultural reasons, these ideologies cannot accept rational criticism or proposals for change or diversity. Often, indeed, the dominant group is so deep in its ideology that it will deny that a problem actually exists. The security sector is merely the tool of those who feel the land belongs to them, and change, in such circumstances, is almost always violent The problem is especially complicated when there are contrasting views among the inhabitants of a state about whether it should even exist. For many Catholics living in Northern Ireland, that state (as a province of the British Crown) is an illegitimate entity created to produce an artificial and local Protestant majority in an island the majority of whose population is Catholic. For many Protestants, on the contrary, the state is entirely legitimate, and those who wish to bring it to an end are terrorists and criminals. Since Protestants historically controlled the security forces, the latter became, in essence, a means of enforcing a particular political interpretation of a geographical space. In Bosnia, large, if varying, proportions of two out of the three communities have never accepted the idea of the existence of a unitary Bosnian state

anyway, and it is doubtful if any particular concept of it has ever been supported by a majority of the population. Quite what the security forces are supposed to be for in such a situation has never been clear.

The kinds of states are not tidily distinct from each other, of course. Many traditional authoritarian states set out to make substantial, even revolutionary, changes to society. Many radical authoritarian states have eventually made their peace with traditional power structures. Many (though not all) one-party states are ideological in nature, and many national-liberation states are authoritarian and ideological. Nationalist states effectively have to be authoritarian if they are to survive.

The single state which best embodies all of these authoritarian ways of looking at the ROL is probably Nazi Germany between 1933 and 1945. This example is the more important because the Nazis are so often presented as monsters from outer space who inexplicably took over a European country. As we have seen, there was nothing original in their ideology (a mish-mash of received ideas about race and destiny) except that its deadly consequences were applied to Europeans. But there was nothing original in the organisation of the Nazi state, either.

Essentially, the regime was a Radical Authoritarian one, in the classification used above. That is to say it was a mass movement, revolutionary in its own way, which derived its initial legitimacy from its claim to speak for the German people (or "race", *Volk* means both), and seeking to overthrow established authorities. Its leaders were from the fringes of society, and it distrusted traditional elites, and was distrusted by them in turn. Hitler's appeal to the German people was based on a mystical belief in his divine mission to lead them out of the economic and political crisis of the end of the Weimar Republic (and, it must be admitted, his relative success in doing so).

But the Nazis did not take power by force, neither did they ever receive the support of more than about a third of the German electorate. They were invited into power by a Traditional Authoritarian regime (the Weimar Republic had by then collapsed) that believed that it could use the Nazis to destroy the Left. The Nazis, for their part, made their peace with many traditional elite components of German society, helped by the fact that their social and cultural ideas (insofar as they really had any) were old-fashioned and conservative. In some cases the Nazis made tactical alliances with powers they theoretically opposed. The Catholic Church, for example, was too big a target to bring down, in spite of the militant atheism of the Nazis. In turn, the Church agreed to overlook some of the Nazis nastier domestic habits, since they shared a common desire to eradicate Communism, at home and abroad. Likewise, the Army was too tough a nut to crack, and indeed retained some independence until the end (it tried to kill Hitler on several occasions). The Nazis tried to deal with this anomaly by requiring every soldier to swear a personal allegiance to Hitler, and by setting up a parallel security structure under the SS, including both police and military elements.

Nazi Germany was also an ideological state, although the Radical Authoritarian preference for action rather than thought meant that this ideology was never very fully developed. But the first and most important targets of the Nazis were

ideological ones: Communism and Socialism, which represented an alternative route to popular support, but international and inclusive, rather than racial and exclusive, were therefore deadly enemies, and the parties were crushed within months of the Nazis taking power. Nazi Germany was a true totalitarian state, where only the Party's voice was to be heard, and where ideology did dictate many government policies: for example, the Nazi state made much less use of women in the war effort than its opponents did.

Finally, Nazi Germany was a nationalist state, which is to say that it was the state of the German *Volk*, wherever they lived, and not that of the population who lived within the poxt-1919 borders. Large numbers of ethnic Germans (the so-called *Volksdeutsche*) now lived outside the newly shrunken Germany, often as minorities in Slavic states. The two most important communities were in Czechoslovakia and Poland, and both of these played roes in the crisis that led to the Second World War. Conversely, there were few national minorities within the shrunken borders, except for Germany's small and well-integrated Jewish community. For the Nazis, however, for whom biology was destiny, the Jews were not Germans, and never could be: they represented an international presence that could not be tolerated, and they were progressively expelled from the country until the start of the War interrupted the policy.

The Rule of Law, insofar as it can be said to exist in such a context, essentially amounted to the preservation of the *Volk* by any means necessary. The Nazis had entirely swallowed the fashionable Social Darwinism of the time, and for them life was a zero-sum game of competition between different peoples. Domestically, they enthusiastically supported unbridled competition within and between institutions, in the belief that the best and most ruthless would thereby rise to the top. Success became its own justification, and rule by the strong was considered a virtue. As earlier theorists had suggested, the weak would have to be dispensed with, since they handicapped the race as a whole. This became the justification not only for the sterilisation of the "weak-minded", as happened in other countries, but also their wholesale elimination, under the so-called "T-4" [21] programme, probably the most secret of all Nazi racial programmes. Similarly, abortion and homosexuality, which threatened the large-scale production of racial warriors, were both vigorously repressed.

Internationally, opponents in the struggle for survival had no rights. Indeed, it was assumed that other nations would do the same to the Nazis if given the chance: which explains why the *Wehrmacht* fought on until the bitter end in 1945. This also explains why, when about five million Soviet prisoners were taken in the first six months of the War, the Germans had no resources to keep them, nor any idea what to do with them. Some two-thirds of the prisoners were either shot out of hand, or left to die of cold and hunger in improvised camps. Others went into the first proper concentration camps (actually labour camps) where the healthy were worked to death, and the unfit killed immediately. The same pattern was repeated with Jews, resistance workers and Gypsies. Where this was all too difficult (as with a large part of the Jewish population in Poland) they were simply exterminated. Although the idea of treating human beings as simple economic units of production, to be kept or

[21] From its address at No 4 *Tiergartenstrasse,* in Berlin

not depending on their utility, was not new, it had never been applied to Europeans before.

Obviously, the ROL means something different in all of these different cases. The classic liberal figure of the undifferentiated, autonomous individual, seeking to expand their economic freedom and demanding fair and equal treatment from the state, scarcely exists in most of these models, and indeed would hardly be understood in the societies that produced them. Rather, in most societies, people derive their privileges (if not actually rights) from their membership of a group of some kind. This may be an objective group (nationalist or ethnic) it may be elective (religious or political) it may be hereditary (membership of a powerful clan or family) or even competitive (member of the ruling political party). But the security sector in such a society makes no pretence of treating everyone equally, and exists to reinforce the social and political norms of the society.

Now as we have seen, all security forces, even in western democracies, do this to some extent. It cannot be avoided. The difference is that in some of the examples given above, inequality of treatment and arbitrary use of state power are written into the very fabric of the state: the party has a leading role, an identity group is singled out for protection, dissidents who might disturb the smooth functioning of society are specially targeted, and so forth. Consequently, groups who are not favoured by such systems will often withdraw from the state, and even set up their own parallel informal structures, or make use of existing ones. Thus, attempts to set up instant Liberal states, full of autonomous individuals, without a larger identity, demanding nothing more than freedom from state interference, customarily take a little longer than originally hoped.

WHY NO RESISTANCE?

The obvious question that arises, from this survey of different types of authoritarian states, is why people accept them. Why do people simply not rebel, and demand the kind of things that we regard as “freedoms”. More concretely, why do they not demand the Rule of Law or the law-based state in the form that has been described earlier, and which is currently espoused by international organisations and donors?

There are many answers to this question, and here I will only sketch in a few that directly impact on ROL-type activities today. Firstly, as has already been pointed out, legitimacy may come in many forms. An authoritarian state may be regarded as quite legitimate, whatever its methods, if it protects you from something worse or something that you fear. For many middle-class people living in Latin America during the Cold War, authoritarian states were greatly preferable to political chaos, or to rule by what was described as “Communism”. Such fears are still around: according to a recent survey, 28% of American voters believe that “ a “secretive power elite with a globalist agenda is conspiring to eventually rule the world through an authoritarian world government, or New World Order.” [22] In such a situation,

[22] The full details of this and other conspiracy theories are online at http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_ConspiracyTheories_040213.pdf

support for a state based on law as a principle necessarily suffers. Safety first is the order of the day.

More generally, governments frequently tell us that losing our freedoms will make us safe against nameless, terrifying fears. We obey them as we obeyed our parents who told us that a monster under the bed would eat us if we did not do as we were told. As we have seen, extending the protection of the Rule of Law to those you do not like is never easy, and the more threatened you feel, the more you will be willing to compromise on the ROL. So societies will generally accept, quite calmly, massive damage to the Rule of Law provided repressive measures are overtly directed at marginal groups, whether political, social, religious or ethnic. In addition, many countries have a political tradition of vigilantism. This may be from myth, legend and Hollywood cinema, it may more seriously arise from the incapacity of the security sector to do its job, or frustration with the difficulties of criminal prosecution. In any case, it tolerates irregular and often illegal action by the security forces to stop the "guilty" going free. All of these factors can legitimate extreme behaviour by the security forces, and decrease support for the ROL.

Second, and for all the talk about "repressive" governments, such governments actually do very little repressing. Regimes want to stay in power, which usually means co-opting support and building coalitions of those they can trust. Gratuitously "repressing" the general population is pointless, as well as counter-productive, since it just increases the number of potential opponents. As a result, most of those who live in "repressive" states do not feel repressed, because they have no reason to overtly challenge the power of the state, and to thus be threatened by it. And in most cases, challenges to the state's authority (as seen since 2011 in various Arab countries) result from the regime's perceived inability to satisfy material needs, rather than for abstract political or ideological reasons.[23]

Thirdly, and by extension, such societies do not have a relationship between "the people" and "the regime". Rather, there are an immense number of Foucauldian micro power-relationships between individual citizens and individual figures in the regime. The question in practice is, do I follow what this individual representative of the regime tells me to do, or do I disobey? Even in the most faultlessly democratic systems, there is a great deal of experimental and anecdotal evidence to suggest that most people will obey those they perceive as authority figures, even if those figures are obviously exceeding their powers, or asking us to things which are immoral, or even illegal.

In turn, and fourthly, this is because most of us identify with tradition, authority and power, even if in theory we are aggressive democrats and egalitarians. We often feel uneasy about opposing authority and exercising our rights, a factor which political parties in various countries have not failed to exploit.

In any event, it depends what the alternative is. The virtues of a state controlled and limited by law may not always be obvious, and the advantages of a strong state may be correspondingly rather more evident. In periods of crisis or

[23] See the case of Syria, for example, where the state was unable to provide either "bread or freedom" in the classic formulation.

conflict, people seek security and protection from their enemies and those they fear, and the sacrifice of a few theoretical freedoms, especially for others, may not seem that much of a problem. Even in peacetime, the benefits of the ROL may not be obvious. Multiparty systems (let's not get involved with arguments about "democracy" here) are in practice often corrupt, ineffective and divisive. The theoretical benefits of freedom of expression etc may be less a concern than the very practical problems of political instability and violence, corruption and crime.

Where authoritarian regimes are installed, (as opposed to always having existed) it is usually because of the failure of regimes that they replace. Although the military coups of the Cold War were deliberate acts, sometimes overthrowing functioning democracies, it remains true that many such countries were in a state of political crisis at the times, and also that the governments, no matter how distasteful, did enjoy a measure of popular support. Healthy democracies, on the other hand, rarely lose power in this way.

This explains why authoritarian regimes are often accepted, at least at the beginning. To take the case of Nazi Germany again, the real issue is not the virtues (such as they were) of the new regime, but the agonies of the Weimar Republic, which by 1933 was pretty much dead anyway. In the ten years of its existence, Weimar had presided over a disastrous peace treaty, the loss of much national territory, hyperinflation, political violence on the streets and an unprecedented economic depression. It was hardly surprising that many people looked back with nostalgia to the ordered pre-1914 world.

It follows that international initiatives that promise essentially theoretical or ideological benefits (freedom of speech, economic rights etc) may receive little support because they do not address issues that people believe are important. Experience suggests that such abstract rights, important as they may be in some contexts, only really become important when more basic needs have been satisfied.

It should be stressed, finally, that these different types of authoritarian states are not the same. The western tradition is primarily concerned with preserving traditional hierarchies and "values" in the face of change, and appeals to those for whom change is a threat, especially in times of crisis or when change is especially rapid. The temptations towards this type of authoritarianism lie deep in every society, including our own. But it is not clear that this kind of society is more secure. To an extent, larger, more powerful and more intrusive security forces, harsher penal regimes and reduced rights for the citizen may have some indirect effect on levels of crime, but it is not at all clear that the connection is a close one. If anything, crime seems to have increased in the first years of Nazi Germany, for example.

By contrast, what is often described as the "Asian" tradition (though it is found elsewhere) does actually seem to have some real advantages in providing personal security. Here, society itself and its informal structures, are in the front line, and the resources of the state are only invoked when things become too serious for the community to cope with. But for that you need a community, and in such societies crime and insecurity are on the increase as communities break up, families are separated and social and geographical mobility increases.

CHAPTER NINE
PROVIDING SECURITY IN DAILY LIFE

Keep calm and carry on.
- British government slogan in World War II, much parodied since.

We return, finally, to more practical considerations. How should we manage the security sector, and how should we seek to achieve justice, in such a way as to maximise the good done by each and the efficacy with which they function? This is not the place for more theoretical discussions of the nature of justice: some remarks on that have already been made.[1] Rather, we are concerned here with issues that are essentially pragmatic: what citizens and taxpayers demand is a system of justice that *works* because in turn it is part of a security sector that functions properly, and so provides practical security in their daily lives.

However, just as "security" has meanings well outside the activities of the security sector itself (from food to education to health) so "justice" should not be interpreted simply as a set of technical processes. "Justice", and its analogues in all languages I am aware of, are distinguished from "law", which is precisely a set of technical processes. "Justice" means effectively "doing the right thing" and the justice sector, supported by the security forces as necessary, exists to make sure that the right thing is done. Moreover, "justice" is recognised to cover a very large field indeed. Many books on the subject do not even refer to the "justice system" at all, but rather to subjects such as the distribution of income, and the rights of different groups.[2]

In theory, law and the justice system should be the articulation of what society feels as a whole is just. But "just" itself has many meanings. For some, it means "according to tradition", for some it means "treating everyone equally" to others its means "treating everyone according to their status", for still others "treating people according to what they deserve". And circumstances, of course, alter cases. In every society, there is necessarily a gap between what most people think is "just" and how the justice system works in practice. This difference fluctuates in size and scope, and varies from subject to subject and from group to group. In general terms, the gap is widest among the traditionally minded, among religious groups, and amongst minorities.

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[1] But see for example Michael Sandell, *Justice: What's the Right Thing to Do?* Farrar, Straus and Giroux, 2009.

[2] See for example David Miller, *Justice for Earthlings: Essays in Political Philosophy*, Cambridge University Press, 2013.

It is a pragmatic fact that some systems of justice work, and some do not. By "work" here we mean essentially that they function correctly so as to meet their desired objectives, whatever they may be. Whilst technical and organisational characteristics of justice systems are part of the equation, the real determinant of whether a justice system works or not is the degree of public support it gets, and indeed a system which is technically excellent may be ineffective in practice if it does not get this support. If the general population does not report crime in the first place, or cooperate in investigations, or give evidence freely in trials, then there is little chance of having an effective justice system. If good people do not join the police, the police will be ineffective, no matter how much shiny equipment they have. In turn, people will only support a justice system if they think it is effective. The argument is thus effectively a circular one. It is not possible to improve a poor system with more and more "controls" or more "accountability". It is possible (though not usual) for controls to prevent a situation getting worse, but there is no way that they can make a bad system better.

EFFECTIVE JUSTICE

The characteristics of an effective justice system are not difficult to list. Crimes are reported because it is worth reporting them. There are police stations within reach, and they are open and staffed all the time. They have trained personnel, complainants are received with courtesy, and statements are taken in a professional manner. As a result, there is no temptation to use non-state methods to deal with complaints. Crimes are investigated expeditiously, and in a professional manner, using technical and other assets as appropriate. Those against whom a good case can be made are investigated, arrested and put on trial, if guilty they are convicted, and given an appropriate sentence, if innocent they are freed, if convicted they are sent to prison and if sent to prison they stay there. This is what ordinary people have a right to expect of a justice system, but in many countries they are partly or wholly disappointed.

Crimes may not be reported in the first place, because there is no faith among victims that they will be investigated properly. There may be no police station within easy reach, or a station may frequently be unmanned for financial reasons. The policemen concerned may be poorly paid, and therefore see investigation as a financial opportunity, or they may investigate crimes more or less willingly depending on which community the victim comes from. The technical and manpower capabilities of the justice system may be inadequate, and some complex crimes, like fraud and large-scale trafficking, may not be investigated because the technical capability does not exist to address them properly. The wrong people may be arrested, deliberately or not, and the guilty may go free. Wealth or political contacts may effectively protect some people from investigation or prosecution. Trials may take so long to organise that judges may have to set prisoners free, juries may convict the wrong people from ignorance or prejudice, judges may be suborned or biased, and even convicted prisoners may be freed because there are no jails to accommodate them. It may therefore make much more sense to ordinary people for them to deal with the problem using traditional, irregular or even illegal methods, as a way of providing security for themselves in everyday life. This last point is key: justice systems ultimately exist not to satisfy theoretical criteria, but to enable ordinary people to live secure lives.

In an inadequate system, therefore, the public see little point in cooperating with the forces of the state, since they derive little benefit from doing so. And because the public does not cooperate, the system itself is much less effective. And because the system is ineffective, public confidence declines further, in a vicious circle. This does not mean, of course, that the public is indifferent towards crime itself: indeed, public opinion often becomes highly inflamed about crime and demands action. Ordinary people suffer from crime disproportionately in every country, and also lack the ability of the rich to protect themselves, by private security forces, for example. In such circumstances, parts of the justice system itself may even take the law into their own hands, and vigilantes may also appear from the local population. It is this question of effectiveness that is most important. As we have seen, people will put up with brutal and even corrupt justice systems so long as they produce effective results. But they will not tolerate systems that are simply ineffective. Initiatives to improve transparency and accountability, to bring the police closer to the community and so forth, are valuable enhancements to a justice system which is effective in the first place, but they cannot substitute for this basic capability; something that ROL initiatives sometimes have a tendency to forget. Likewise, systems that rely on oversight, controls and the intimidation of security sector personnel will not be effective at all unless the system is basically healthy, and sometimes not even then.

One major reason for public support of justice systems is that the guilty are convicted and punished. As we have seen, public opinion is often not concerned about miscarriages of justice as such, but is much more concerned if supposed criminals go free. ROL initiatives are often constructed on the opposite principle: what is needed, it is argued, are more rights for the accused, more controls over the security forces and more safeguards in the system. Then it is argued further, public confidence will be increased. Whilst such an approach is very appealing, and may well be pragmatically justified by the situation in the country, its consequence, at least in the short term, will be that it will produce fewer arrests and convictions. If crime is (as often in traditional societies) a major public concern, the effect can be discredit ROL initiatives generally, and governments and donor organisations as well.

Of course, no system of justice is perfect, and all justice systems suffer from one or more of the problems described above, to some degree. But we can say that visibly effective criminal justice systems demonstrate a minimum of four principal characteristics, without which it is hard for any system to gain credibility, and therefore to be effective. The first is that the personnel of the justice system must be properly paid. This does not mean they should be rich, but it does mean that they should be paid sufficiently well that they are not obliged to turn to corruption simply in order to live, and they should have pensions on which they can survive after they retire. This simple measure would probably do more than anything else to improve the level of policing and overall security in many countries. It also enables anti-corruption campaigns to be much more effective, since it removes the classic justification for corruption in the first place. In addition, pay always functions, in some sense, as a surrogate for the relative value placed by society on certain functions as opposed to others. If policemen or justice officials, or judges, are badly paid by comparison with other members of society, they feel resentful that society does not value their role, or understand the difficulties they face, and they look for

ways of taking their revenge on this uncaring society. For example, judges who feel that their years of training and their qualifications and experience are not adequately rewarded will look for ways of making up the deficit. In extreme cases, low pay is a deliberate policy by some governments, to save money by effectively obliging members of the justice system to make up their wages from corrupt activity, or even from second jobs which often conflict with their main function. It is worth adding that, in such circumstances, anti-corruption measures and "oversight" are largely useless, because they are addressing the wrong issues, and, indeed, the wrong targets.

Secondly, the individuals in the system must be properly led and managed. Organisations take their ethos and values from the top, and those in high places have a positive responsibility to provide this example. But leadership is also a technical skill that can be learnt, and well-led and well-managed organisations are happier and more effective than poorly managed ones. The risk (not confined to developing countries) is of a leadership cadre which is too politicised, too close to political and financial elites, often disproportionately well paid, and which has lost touch with how their own personnel have to operate on the ground. The more a leadership cadre has contacts with the political and business worlds, the more its members can look forward to comfy jobs and consultancies on retirement, the more their lifestyle and their salary makes them identify with their peers outside the organisation rather than their colleagues within it, the more ineffective the organisation as a whole will be. Leadership cadres have to show, and not merely assert, that they share the interests and priorities of their subordinates. Above all, if a justice system is well led in this sense, it matters less if it is indifferently managed. But even a brilliantly managed system will be of little value if it is badly led. The blurring of the distinction between management and leadership in recent years, and the exaltation of the former at the expense of the latter, has been harmful everywhere, but nowhere more than in the security and justice sector. The wholesale importation of the commercial vocabulary of "service delivery" has led to an approach, now being exported as part of ROL initiatives abroad, which prioritises statistics and management objectives, as well as complex and time-consuming management processes, over actually doing the job. In the end, security and justice are not services: they are the difference between security and insecurity in daily life, and even between life and death. Remote and uninterested management is not only a cause of poor capacity; it can also directly produce bad behaviour, including corruption, as a compensation mechanism on the part of ordinary members of the organisation.

Thirdly, the organisations and personnel must be properly equipped. Sometimes this requirement is very basic. A number of rural police stations in Africa have no vehicles, so only crimes in areas reachable on foot can be investigated. Needless to say, real-time response to crimes, or pursuit of criminals is impossible: all that thieves need to escape justice is a cheap motorcycle. The provision of radios, simple computers for record keeping, simple forensic tools and even video cameras can transform the capability of a justice system to do its work.[3] Mundane initiatives such as secure accommodation for holding the accused, video recording of testimony

[3] The author recalls being told by a senior police officer in Kinshasa that, whilst the police were happy enough to receive victims of crimes in stations, reports could only be taken if the victim agreed to pay for the paper.

and a basic forensic analysis capability are among the foundations of a proper justice system. They enable the right people to be arrested and charged, and actually permit initiatives such as prison visits to be organised much more easily. The individual has to be properly equipped for their role also. Nothing is more dangerous, for example, than to put a semi-trained policeman or paramilitary with a lethal weapon in a situation of public disturbance. On the other hand, properly equipped public order units, with body armour, shields and non-lethal means of crowd dispersal, will be able to react calmly to violence and to de-escalate the situation. Of course, equipment by itself is not enough: training has to be provided as well, and doctrine and procedures have to be written to make the best use of the equipment. Nor is there any point in providing equipment that requires expensive and complicated support that may not be forthcoming.

PUBLIC ORDER

There is no subject more sensitive in the ROL debate than public order and how to improve it.[4] In some ways this is not surprising, because the concept is associated, especially in transitional or developing countries, with violence and brutality, and with the repression of political dissent. In fact, in most countries at most times, the issue is really the peaceful management of crowds, bearing in mind the risk of crime, violence and injury to those present. Anyone who has ever been in a large crowd (which is most of us) knows that people can and do get hurt, panic, get lost and become disoriented, without any malign intent. Large crowds in confined spaces, uncertainty about exits and entrances, people pushing in different directions, heat, cold and lost tempers, all can produce potentially dangerous situations, especially in combinations.

When some or all of these conditions coexist with political tension or even crisis, sharp differences of opinion and limited capability to control crowds, the result can be disastrous. In some political cultures (Lebanon is a typical example) getting your people onto the street in large numbers is a recognised tactic of political intimidation, and a move in various complex intra- and inter-sectarian games. In many places where peacekeepers have been deployed (the Balkans and West Africa come to mind) demonstrations are bought and paid for, often in the hope of provoking violence and over-reaction, and thus discrediting the international community.[5]

Being caught up in such events, even on the fringes, is not fun, and populations naturally want protection from them. But the politics of such events, which run the whole gamut from football crowds getting out of hand to deliberate mass violence, are very complicated, and different factions of public opinion may expect or demand different or even opposed means of dealing with them. The political consequences of a single badly handled incident can endure for many years. The January 1972 killing by British soldiers of 13 unarmed demonstrators in

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[4] For a general survey, albeit from a largely European perspective, see the articles collected in *Policing*, Vol 1, No 4, 2007, partially online at http://intlpolicing.oxfordjournals.org/content/1/4.toc

[5] For obvious reasons, formal tariffs are seldom published, but in Bosnia fifteen years ago, you could earn easily 25-50 Deutschmarks for taking part in a demonstration, more if you were hurt. A decent wage at the time was 250 DM per month.

Londonderry in Northern Ireland has haunted successive British governments for forty years, and led, among other things, to the longest and most costly legal enquiry (at nearly £200M) in British history. There s no sign that the controversy will be over any time soon.[6]

TRAINING

Finally, in this and other roles, adequate training is essential at all levels in all organisations. Law is a complex issue in every country, and properly trained officials are essential if the system is to work correctly. Laws do not draft themselves, and manuals and procedures need to be put together by experts. There are new disciplines, such as criminal analysis, which require lengthy training of high-quality personnel to be effectively employed, against organised crime for example. At the individual level also, training is critical. An untrained policeman, overworked and underpaid, will often resort to beating confessions out of habitual criminals, simply because it is easier. And more complex – and often more serious – crimes go unaddressed because the technical expertise to deal with them does not exist. Public opinion usually wants a good justice system without paying for it, and the system itself is often obliged to cut corners to satisfy this demand. Among other benefits, training makes the recipient feel better about themselves, since they have new skills they did not possess before. In many societies, moreover, acquiring skills is a very powerful reason for joining organisations and then staying with them.

Experience suggests that very few people begin by being corrupt, or brutal, or deliberately trying to do a bad job. Human beings can be motivated to do a good job under the most unpromising circumstances. But they can also easily be de-motivated and corrupted by systems, and much bad behaviour in the security sector, such as corruption and brutality, is actually a reasonably rational response to the impossible situations in which people often find themselves. It is for this reason that abstract lectures on morality and human rights are generally beside the point, unless accompanied by fundamental systemic change. Most people ultimately want to do a good job, but if they cannot do this job properly they will do it improperly or not at all.[7] Survival, after all, has to be the greatest priority, and if survival means the sacrifice of honesty, then, very well, it will be sacrificed. It is sobering to reflect upon how many of us would be honest, if we were not paid. Poor pay, therefore, leads to corruption, and to the police themselves becoming criminals. The sources of corruption will either be ordinary people, or the criminal fraternity themselves. In the first case, public support declines as a result, in the second, the fight against crime obviously suffers.

The lack of equipment and resources to fight crime means at its simplest that this fight is conducted less effectively. But it also means that the justice system will

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[6] The so-called "Bloody Sunday" enquiry has its own website, with a full copy of the report, at http://webarchive.nationalarchives.gov.uk/20101103103930/http://bloody-sunday-inquiry.org/

[7] After the end of the Sierra Leone civil war in 2000, British advisers were brought in to reform the police. When details of proposed reforms were first circulated, policemen were invited to submit their comments on an attached piece of paper. Large numbers did so, and the response was overwhelmingly one of frustration at not being able to do a proper job, and hopes that things would change. (Personal communication).

primarily pursue those it has the capability to address: traffic violations and street crime will be pursued, while more important crimes remain unaddressed, because of lack of capability. In turn, this often alienates ordinary people. Why should I pay my taxes honestly, it will be asked, when those with expensive lawyers and accountants, and bank accounts in tax havens, do not pay theirs? Indeed, one of the most curious developments of recent years has been the transformation of major banks and financial institutions into organisations that are fundamentally criminal, but that are claimed to be "too big to jail". Such institutions may indeed be impossible to penalise without without hazarding the entire financial system, but this is hardly a good argument for ordinary people to conduct their financial dealings honestly.

Poor leadership produces low motivation: if they are feathering their nest, it will be said, why shouldn't I? If they accept free holidays, why should I turn down a free lunch? Technically incapable leaders, or those appointed for flagrantly political motives, often have a depressing effect on morale. And finally lack of capability and training means that the system will resort to short cuts to get what is wanted, and may itself behave illegally. Public opinion is also complicit here. Few politicians or media pundits will publicly criticise policemen who use underhand methods to secure convictions against those whom the public is afraid of. Ultimately, this can lead to the fabrication of evidence, witness corruption and even murder.

By definition, a justice system can only be effective if the state preserves the monopoly not only of the use of force, but of the exercise of judicial power. It is pointless to seek transparency from a vigilante group. The state will not ultimately preserve this monopoly without an effective justice system, but the effectiveness of this system, as already indicated, requires the public to identify with it. A system that is reactive to public needs, that treats all groups equally, and that is consistent and fair, will be one in which the public has confidence. In turn, that system will be effective because it receives public support. When attempts to introduce reforms fail – as often happens in Africa for example – it can be because the proposed system is seen as a foreign import, in which the public can have no confidence, since it is alien to their traditions. This is often because the changes implied by the new system are far too ambitious. Unfortunately, there is a standard shopping list of desirable characteristics of justice which is radically beyond the understanding of most societies to which it is applied: indeed, it is often beyond popular understanding even in donor societies themselves.

This issue is all the more important, because, as we have seen, it is clear that security and justice systems by themselves, no matter how large, well funded and well equipped, can never maintain security without public support. Indeed, it is better to see security and justice systems as a kind of superstructure balanced on top of a whole set of procedures and understandings within society as a whole. This is to say that in most societies at most times, unofficial structures exist to support and enforce social norms. In a properly organised society, laws are expressions of majority social norms, and they are enforced with the approval of the ordinary citizen. In donor initiatives, however, we frequently find that laws are drafted and procedures are introduced which do not reflect majority social norms. In such circumstances these initiatives usually fail precisely because they are not based on any underlying infrastructure of norms and practices. The difficulty, of course, is that such initiatives are very often completely at variance with traditional norms. This

means, for example, that new laws regulating the position of women in society, introduced under foreign pressure, may not be enforced correctly, because majority opinion in society as a whole does not support them. It is not obvious what the answer to this problem is, or even if there is one.[8]

More generally, in societies where there is a strong correlation between the formal apparatus of justice and underlying social attitudes and structures, the first, in principle, always depends on the second. If security and justice systems in even the wealthiest states were obliged to intervene and settle every case on disagreement among citizens, they would be overwhelmed. In well-organised societies many social tensions and disputes are settled by society itself. The police and courts are only invoked when the situation becomes unduly complex, or escalates beyond what society can control. It is the existence of these underlying social structures, and their health, which has more than anything else to do with the level of crime in a society, and the proportion of crimes that are detected.

To go into to a village or a small town in Japan, for example, is to see older women spending the majority of their day sitting in the entrance to the house, talking to passers-by and watching everything that goes on. One result of this is that crime in such a society is almost unknown because the opportunities for committing it scarcely exist. Likewise, in such societies, social cohesion is very strong and all members of society cooperate in fighting crime, if it is threatened or actually committed. Indeed, in such societies crime is seen in the first instance as a failure of collective social control, and only secondly as an offence against written statutes (which in the Confucian tradition, influential throughout the region, had lesser importance). So even very small children walk safely to school and back, under the gaze of every adult they pass, because the protection of children is considered a mutual social obligation. Likewise, children who misbehave are likely to be told off by the first adult passing by.

By contrast, western societies, which half a century ago still had a few of the same characteristics, have become increasingly atomised in the last generation, as the ravages of market economics have split up families and destroyed traditional social structures. When you do not know who your neighbours are, and you feel no particular connection to them, it is unlikely that you will put yourself out to help them, or they will help you. If you moved into an area recently, and will move out again soon, there is no point in making a long-term investment in the safety of the area. Better to buy a stronger lock for your door and engage a private security firm. (As it happens, the overwhelming evidence is that such measures do not reduce crime: they merely displace it to areas that are less well protected.) In such

[8] It is worth reminding ourselves that western "norms" have been slow to change, and are often of surprisingly recent origin. Homosexuality has always been mentioned, but moves to improve the position of women in society are also relatively recent. When Ibsen's play *A Doll's House* was first performed in 1879, it provoked huge protest, because Nora, the heroine, leaves her unfulfilling and stifling family at the end of the play. The ending had to be changed before it could be performed in some countries, and famous actresses refused to play the part. As always, the law lagged behind changing social attitudes, and it was a century after Ibsen's play before legal divorce was generally available in western countries. But the West did not refrain from lecturing the rest of the world on desirable social norms in this period.

circumstances, even massive and well-funded funded justice services cannot expect to be able to defeat crime.

MEN WITH GUNS

So far, the concentration has been on the police and justice system, but in many countries the military also find themselves drawn into aspects of daily security, including public order, and even criminal investigation. How should such cases be handled? In all societies, there will be a grey area where the level of violence reaches a point that the police cannot easily cope with. Here, the choice lies between a militarisation of the police, in the form of a gendarmerie, or the use of the military in a police role. Neither is without its problems. If the military proper are used, it really should be in situations of large-scale violence, which go beyond merely law and order issues, and which the police cannot confront without changing their fundamental nature. The use of the military for crowd control or public order, on the other hand, is almost always a bad idea. When it is necessary (as was in the case in Northern Ireland in the 1970s) it may be because the police are perceived as the enemy in the sense that the military are not, or simply that the police are incapable.

A preparedness to use the military in public order situations implies certain judgements about an acceptable level of force. Deploying the military does not necessarily imply the willingness, still less the intention, to use a high level of force to control the situation, but it does imply the ability to do so if needed, which in turn can act as a deterrent. In much ROL literature (and much practice as well) the problem is usually seen as one of a brutal military repressing popular dissent. This may be the case, but is not always so. In many countries, all major political parties have their own street militias, often drawn from the young unemployed and criminal groups. Their function is to control the streets, attack supporters of other parties, and intimidate the public, and the government, if their patrons do not already control it. Protecting ordinary people against such behaviour is a component of upholding the ROL, and there may be occasions where the military, or at least paramilitary forces, are the best forces to deploy. This is because military units can exert what is called “escalation dominance” – i.e. there is no level of violence to which these militias can escalate which the forces of order cannot overmatch. As a result, the militias often give up and go home without any violence.[9]

But when the military carry out such roles, they remain, it needs to be re-emphasised, citizens and members of the public for most purposes. A soldier who is alleged to have used excessive force, just like a soldier who is alleged to have committed robbery or murder, has allegedly broken the law of the land and should be tried before a civilian court. This is an important general principle. Military courts, on the other hand, are reserved either for trivial offences, or for offences under military law. The latter include charges like hazarding a ship, or disobeying an order, for which there is no civilian equivalent, and where a normal court would have

[9] It was this logic that led to the deployment of the Multinational Specialised Unit in Bosnia in 1998. Made up of military police and gendarmerie contingents, it was used to fill the gap between the police and the military in a tense political situation. See, for a short summary, http://www.nato.int/sfor/factsheet/msu/t040809a.htm

no expertise. By contrast the use of military courts to try civilians – as has been happening in the United States – is repugnant to the very spirit of the ROL.

Finally, it is often suggested that the military, or even the security sector as a whole, has a "right" to use force that others do not have. This is untrue. The use of force by the military, when there is no armed conflict, is subject to exactly the same rules as the use of force by civilians. The military have no special rights to use force that civilians do not have. Although the precise detail varies from country to country, in general, the military – like any other citizens – can use reasonable force to protect themselves or someone near them. This can include lethal force if someone's life is threatened. They can sometimes also use force if that is necessary to carry out their duties, although, once more, that force has to be proportionate. But any attempt to give the military a special legal status, or confide certain sensitive and distasteful tasks to them, is usually a symptom of something wrong in the political system itself.

The position in war is actually quite similar. It is not so much that the military have a "right" to use force in armed conflicts: it is rather that there is a special series of rules to govern how they do so. Everyone has a "right" to use force in an armed conflict, whether they are military or not, and no one can be prevented from doing so. But, as we have seen, the purpose of the law of armed conflict has generally been to limit the scope of fighting, and impose rules on the combatants. Fighters who do not accept these rules (i.e. they do not behave like soldiers) are not protected by these same laws.

CONCLUSION

This brief introduction has attempted to make three main points. First, the Rule of Law (or the law-based state) is not primarily about the Law, or indeed about Rules. It is not primarily about not processes, documents and structures. It is rather an issue of political culture, and the willingness of that political culture to subject itself to controls. If the will to respect the ROL does not exist, processes, documents and structures are irrelevant. If it does exist, they are only of limited importance anyway. Moreover, the ROL is never actually implemented by organisations, but only by people, and it either exists in the micro-level power relationship between the citizen and the representative of the state, or it does not exist at all.

Second, the philosophical basis for the current ROL (and law-based state) discourse is essentially arbitrary. This does not mean it has been chosen randomly, or that it is necessarily without merit. What it does mean is that other bases could have been chosen, and have indeed been chosen in other epochs and by other civilisations today. Failure to understand this, or the tendency to assume that ROL thinking in other parts of the world is necessarily either wrong or insufficiently developed, has undermined much theorising about the ROL, as well as attempts to turn theory into practice.

Finally, politics, as always, is key. Undifferentiated enthusiasm for the ROL is not found in any society. We demand fairness and equality for ourselves, but are often reluctant to accord it to others, especially those we dislike. We therefore do not object when the rights of those we dislike are taken away, and may indeed demand that the authorities treat them even more harshly.

Most people, in the end, would prefer to live in a society based on law than one which is not, at least as regards their own situation. There is little doubt that such a society is better than its alternative, even if, in the last analysis, that remains a value judgement rather than something that can be proved.

FURTHER READING

INTERNET MATERIAL

The vast majority of the authors, events and concepts referred to in the main text have Wikipedia entries. These can be used to get a general idea of the subject, and suggestions for further reading, but, as always with Wikipedia, the entries should not be used as primary sources, nor considered necessarily authoritative.

However, a number of peer-reviewed online encyclopaedias do exist, with entries written by experts, which may be freely cited. Examples are:

THE ONLINE ENCYCLOPAEDIA BRITANNICA
Superior to Wikipedia with more academic credibility and a very good selection of further reading. (http://www.britannica.com/)

THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY
(http://plato.stanford.edu/) has a series of excellent articles on many of the subjects covered in this guide.

THE ENCYCLOPAEDIA OF LAW AND ECONOMICS
Hosted by the University of Gent, a huge collection of online articles. (http://users.ugent.be/~gdegeest/tablebib.htm)

HOME PAGES OF ORGANISATIONS

The principal organisations mentioned in this book have their own home pages, including some sections specifically devoted to ROL issues, with useful essays and collections of documents. Examples include:

UNITED NATIONS ROL PAGE
http://www.unROL.org/

UNITED NATIONS INTERNATIONAL LAW PAGE
http://www.un.org/en/law/

INTERNATIONAL COURT OF JUSTICE
http://www.icj-cij.org/

INTERNATIONAL COMMITTEE OF THE RED CROSS
http://www.icrc.org/eng/index.jsp

INTERNATIONAL CRIMINAL COURT
http://www.icc-cpi.int/

EUROPEAN UNION
http://europa.eu/pol/rights/index_en.htm

EUROPEAN COURT OF HUMAN RIGHTS

http://www.echr.coe.int/echr/Homepage_EN

ORGANISATIONS WITH MATERIAL AND COMMENTARY ON THE RULE OF LAW

RULE OF LAW RESOURCE CENTRE
http://law.lexisnexis.com/webcenters/RuleofLawResourceCenter

INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE
http://www.ictj.org/en/index.html

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, SOUTH AFRICA
http://www.csvr.org.za/

INSTITUTE FOR SECURITY STUDIES, SOUTH AFRICA
http://www.iss.co.za/

THE WORLD JUSTICE PROJECT
http://www.worldjusticeproject.org/

ESSAYS AND COLLECTIONS ON THE RULE OF LAW

Essay on International Law
http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+147+%28autumn+2004%29

International Understandings of the Rule of Law
http://wikis.fu-berlin.de/display/SBprojectROL/Home

Pim Albers essays and articles
http://sites.estvideo.net/laurens1/web-content/publicationspim.htm

Stefan Voigt: How to measure the Rule of Law
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420287

INDIVIDUAL TOPICS

WHAT IS THE RULE OF LAW?

For a stringent critique of the whole governance and nation-building enterprise, of which the ROL is part, see Kate Jenkins and William Plowden, *Governance and Nationbuilding: The Failure of International Intervention*, Cheltenham, Edward Elgar, 2006. For a general presentation, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory,* (Cambridge 2004). A brief

and lucid introduction, from an Anglo-Saxon standpoint, is Tom Bingham, *The Rule of Law*, Penguin, 2010. Thomas Carothers has edited a very interesting collection of essays, *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie, 2006. A standard presentation of the World Bank/IMF view is Helen Yu and Alison Guernsey, *What is the Rule of Law*, at http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml. The World Bank also has a substantial list of publications on its site http://www.worldbank.org/reference/)/ For the *État de droit* tradition, see Jacques Chevalier, *L'État de droit*, 5th edition, Montchrestien 2011. A useful, if demanding, exploration of the problem of multiple, mutually uncomprehending traditions of ethics, is Alasdair MacIntyre, *After Virtue*, Third Edition, London, Duckworth, 2007. There is a good discussion of collective and group rights, which have received less attention than individual rights at http://plato.stanford.edu/entries/rights-group/
A useful introduction to the ethical dimension is Michael J Sander, *Justice: What's the Right Thing to Do?* Farrar, Strauss and Giroux, 2009.

LAW AND POWER

On theories of power in general, see Barry Hindess *Discourses of Power: From Hobbes to Foucault,* Oxford, Blackwell, 1996. Michel Foucault wrote extensively about power all his life, and often in a legal/judicial context. See especially *Surveillir et punir: naissance de la prison,* (1975) translated as *Discipline and Punish: The Birth of the Prison,* Pantheon Books, 1977. There is a useful collection of resources at www.michel-foucault.com. Steven Lukes, *Power: A Radical* View, revised edition Palgrave Macmillan, 2005, has been highly influential. A popular account of the actual production of laws in the US is Ken Silverstein, *Washington on 10M$ A Day: How Lobbyists Plunder the Nation*, Common Courage Press 2002. A sceptical view of the politics of criminal justice is William J Chambliss, *Power, Politics and Crime*, Westview Press, 2000. On the UK, see also Philip Rawlings, *Crime and Power: A History of Criminal Justice 1688- 1998*, Longman 1999.

DOMESTIC INFLUENCES ON THE RULE OF LAW

The separation of powers is described in Montesquieu's *De L'Esprit des lois* (1748). A modern edition of the text is online at the University of Quebec's site: http://classiques.uqac.ca/classiques/montesquieu/montesquieu.html. A modern edition in English is by Cohler, Miller and Stone (Cambridge University Press, 1989). A large collection of documents leading up to the American Constitution of 1787 is at http://press-pubs.uchicago.edu/founders/. The development of the French system is described in the standard textbook *Histoire des institutions et des faits sociaux*, published under various editors since 1957 by Dalloz, Paris. JAG Griffith's classic *The Politics of the Judiciary* is now in its fifth edition (Fontana Books 2010). On the police more specifically see David Rose *In the Name of the Law: The Collapse of Criminal Justice*, Jonathan Cape 1996. The reluctance of US courts and parliament to challenge their government's activities in the security area has been exhaustively documented, see for example "Obama Wins the Right to Invoke 'State Secrets' to

Protect Bush Crimes," in http://www.salon.com/news/department_of_justice/index.html?story=/opinion/greenwald/2010/09/08/obama

INTERNATIONAL INFLUENCES ON THE RULE OF LAW

The principal treaties referred to in the text are available online, as follows:

Convention Against Torture
http://www2.ohchr.org/english/law/cat.htm

Convention on the Rights of the Child
http://www2.ohchr.org/english/law/crc.htm

European Convention on Human Rights
http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

Universal Declaration of Human Rights
http://www.un.org/en/documents/udhr/index.shtml

The United Nations Treaty Collection http://treaties.un.org/Home.aspx?lang=en contains a useful database of signatures and ratifications of the various treaties.

Amnesty International has a substantial page of statistics and other information about the progressive abolition of the death penalty worldwide at http://www.amnesty.org/en/death-penalty

THE RULE OF LAW AND INTERNATIONAL RELATIONS

The basis of the way the world is intended to work is the Charter of the United Nations http://www.un.org/en/documents/charter/index.shtml. The Dag Hammarskjöld Library site contains a wealth of documents: http://www.un.org/depts/dhl/index.html A useful analysis by a group of African scholars of the weaknesses of the Security Council and possible solutions is Afoaku, Osita G "United Nations Security Council reform: A critical analysis of enlargement options". *Journal of Third World Studies*., copy at http://findarticles.com/p/articles/mi_qa3821/is_200110/ai_n8976233/. Most textbooks on the international system are either legally based, and describe the system as it notionally works, or are exercises in western realism or neo-realism. A better alternative is Hedley Bull, *The Anarchical Society*, Third Edition, Palgrave Macmillan 2002. From the security perspective, see Buzan, Waever and de Wilde, *Security: A New Framework for Analysis*, Lynne Reiner 1998. The reality of the international system for a quarter of the world's states, and how weak states survive, is described by Christopher Clapham, *Africa and the International System*, Cambridge University Press 1996.

INTERNATIONAL JUSTICE

The ad hoc tribunals have their own websites (http://www.icty.org/ and http://www.unictr.org/) as does the Sierra Leone Special Court (http://www.sc-sl.org/). Many of the organisations referred to earlier have useful material on their sites. There is now a large literature on war crimes and international justice, but of very varying quality. See however Roberts and Guelff *Documents on the Laws of War*, Third Edition, Oxford University Press, 2000, and Geoffrey Best, *War and Law Since 1945*, Oxford, the Clarendon Press, 1994. David Chuter *War Crimes: Confronting Atrocity in the Modern World*, Lynne Reiner 2003 may be of interest and has an extensive bibliography. William A. Schabas, *An Introduction to the International Criminal Court,* Cambridge University Press, 2001 is exactly what it says. A scathing commentary on how the Court has evolved is Julie Flint and Alex de Waal, "Case Closed: A Prosecutor without Borders", in *World Affairs*, Spring 2009 available at http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html

See also Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror*, Pantheon Books, 2009, for the political manipulation of suffering. David Chuter, "The ICC, A Place for Africans and Africans in Their Place," is available at http://www.davidchuter.com/Texts/ICC.PDF

THE RULE OF LAW AND THE PROVISION OF SECURITY

The text of Locke's *Second Treatise of Government* is online at http://www.gutenberg.org/ebooks/7370. The Peter Laslett edition (Cambridge University Press 1988) has a good introduction and notes. An excellent introduction to different theories of the state is Cudworth, Hall and McGovern, *The Modern State: Theories and Ideologies*, Edinburgh University Press 2007. For an idea of what it must have been like to live in a state where the ROL had entirely disappeared, see Richard J Evans, *The Third Reich in Power*, Allen Lane 2005. An interesting counter-perspective is provided by Rindova and Starbuck "Ancient Chinese Theories of Control" *Journal of Management Inquiry*, 1997, 6: 144-159, at http://pages.stern.nyu.edu/~wstarbuc/ChinCtrl.html . An edition of Hobbes' *Leviathan* is online at http://www.gutenberg.org/ebooks/3207. Richard Tuck, *Hobbes: A Very Short Introduction* (Oxford Paperbacks, 2002) is precisely that. Few people today read Hegel unless forced to, but a number of Carl Schmitt's works have been translated into English, notably *The Leviathan in the State Theory of Thomas Hobbes*, new edition, University of Chicago Press, 2008, which has an excellent introduction. A good summary article is at http://plato.stanford.edu/entries/schmitt/ and an attempt to trace a direct line of influence through Schmitt and Strauss to John Woo and the Bush White House is at http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html

THE SECURITY SECTOR AND JUSTICE

Bruce Baker's site http://www.africanpolicing.org/ has a wealth of material on African justice, both formal and informal. A clear-sighted look at corruption and the

reasons why its exists in Alex De Waal; *Dollarized*, available at http://www.ssronline.org/edocs/alex_de_waal_dollarised_240610.pdf . See also Joseph Hanlon "How Northern Donors Promote Corruption" available at http://www.thecornerhouse.org.uk/resource/how-northern-donors-promote-corruption . There is increasing interest in traditional justice mechanisms, see IDEA, "Traditional Justice and Reconciliation After Violent Conflict" at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf . A collection of material on public order issues is at http://www.usip.org/programs/initiatives/stability-policing-initiative