



THIS STAINED GLASS WINDOW REPRESENTING JUSTICE, SYMBOLIZED BY A SWORD AND SCALE, CAN BE FOUND IN THE CATHEDRAL OF SAINT RUMBOLD IN MECHELEN, BELGIUM. (ISTOCK.COM)

An “Almost Sacred Responsibility”: The Rule of Law in Times of Peril

BY GERALD J. POSTEMA

Retired Court of Appeals Judge Michael Luttig recently called his fellow members of the bar to action. “We lawyers,” he charged, “are weighted by an almost sacred responsibility” to defend American democracy and the rule of law. Lawyers and judges, he argued, are uniquely qualified, positioned, and obligated to take up this “high charge.”¹ These efforts are especially needed now, he insisted, because the rule of law in America is imperiled — a claim amply supported by the World Justice Project, which found that, between 2016 and 2021, “the United States was among the countries with the sharpest deterioration in the rule of law.”² Although 2022 saw an uptick, the 2023 Index shows that the recovery has stalled.³

It is, perhaps, not surprising that Judge Luttig should speak of the rule of law in this elevated moral register, but what has long been a lawyers’ byword is now also regularly on the lips of journalists, pundits, political leaders, and people on the street. Although it is much venerated, the rule of law is also vulnerable to intense contestation and enemy capture.

For years, academics have debated to the point of exhaustion a dizzy-

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ing array of proposed rule-of-law standards. And yet, bitterly divided political factions claim the flag of the rule of law. Dante once wrote that justice is so lovely that it is loved even by its enemies.⁴ This is even truer of the rule of law. The ideal imposes irritating constraints on those who exercise power, but it also enjoys a halo of legitimacy, which exposes it to rhetorical abuse by those who would retain the halo and minimize its costs.

Indeed, the rule-of-law idea is so widely claimed, contested, contra-


dicted, and captured that we literally don’t know what we are talking about. This is especially worrisome because the rule of law is subject to intense attacks in our national backyard, around the world, and recently in the international domain. (Witness Russia’s attack on Ukraine.) Never has it been more important to get a measure of this ideal.

The Rule of Law: What Is It?


A careful survey of the history of thought about the idea of the rule of law and struggles to realize it suggest that three thoughts have inspired the ideal.⁵

First, the rule of law is a normatively demanding and institutionally realized ideal. That is, the weighty duties it entails draw their moral force from the deeper moral values it serves; yet it is not merely abstract and aspirational. Rather, it makes its impact in our political communities through the range of complex institutions designed to realize it.

Second, the rule of law is concerned at its core with ruling power — not disorderly behavior, but disorderly, arbitrarily exercised, ruling power — and it engages law in the enterprise of disciplining power. Thus, when law ►



Protection of the independence and manifest impartiality of the judiciary is essential to a robust rule-of-law society. This is a nearly universal principle. Its importance is signaled by the fact that judicial independence is frequently the first target of would-be autocrats — witness recent attempts of ruling parties in Poland to secure power by subjugating its judiciary.



rules in a political community, it *provides protection and recourse against the arbitrary exercise of power through law's distinctive tools*. The organizing aim of the rule of law is to temper power, to constitute, channel, and discipline the exercise of power.⁶ Law is its chosen *means* of doing so. The rule-of-law ideal is not satisfied by the mere existence of laws or their vigorous execution in a political community. Law can be used to thwart the rule of law as well as to enable it to thrive. Thus, the rule of law makes demands on laws as well as on those who wield them.

Third, the rule of law recognizes that formal legal institutions are largely impotent on their own to do the work of tempering law. The rule of law bridle those who wield power. Those who exercise ruling power must submit to law, and to be bound by law is to be accountable to others, subject to their assessment and sanction. Thus, effective accountability must always complement law's guidelines. Law can *rule* only when there are sources and forces that hold those who exercise power accountable.

The core demands of the rule of law can be expressed in three fundamental principles:

- *Sovereignty of Law*. Law alone must rule over all other modes of ruling power. This entails: (a) *Exclusivity*: All legitimate governing power is derived only from and is ordained exclusively by law. (b) *Legality*: All governing power must be exercised through law and law must meet key standards of formal and procedural legality. (c) *Reflexivity*: Law governs all, especially those who govern by or with it. Law is not just a tool of power but also a constraint on power. All those who govern with law must likewise be governed by law.

- *Equality* in the eyes of the law. The rule of law demands that all who are bound by the law must enjoy on an equal basis its protection and recourse. Law that binds must equally protect.
- *Fidelity*. The rule of law includes not only formal, procedural, and institutional standards, but it also comprises a set of relationships and responsibilities rooted in core convictions and commitments that are essential for the achievement of this ideal. Law *can* rule — can be sovereign — only if a robust ethos of fidelity takes root in the political community. Fidelity requires that all members of the community take responsibility for holding each other, and especially law's officials, to account under the law. *Fidelity is the animating spirit of the rule of law.*

Institutional Realization

The rule of law aims not to disable but to discipline power — to enable, guide, and monitor it. The rule of law does so through the design of institutions, norms, and practices guided by standards adjusted to the material and social circumstances of the specific political communities in which power is realized. Chief among these standards are the following:

The rule of law holds the *law* to formal conditions of legality, e.g., consistency, intelligibility, fair notice, prospectivity, and the like.⁷ And it holds institutions for the application and enforcement of the law, and those who run them, to principles of procedural fairness, impartiality, and universal access to justice.

The rule of law requires governmental institutions to constitute, constrain, and sanction the exercise of ruling power. These institutions include the

separation of powers and a network of mechanisms of *horizontal accountability* that mutually check and balance the powers distributed. Especially important among the checks are institutional guarantees of independence of the judiciary and intra-branch accountability mechanisms (e.g., general accounting and “ethics” offices).

Of course, the exercise of judgment by those charged with applying the law is unavoidable. All rules, no matter how determinate they may seem, require intelligent and responsible judgment. The rule of law does not oppose discretionary judgment, as long as it is guided by clear public standards (articulated in law), exercised in a fully public process, and subject to public accountability.

These formal mechanisms can function only if they are underwritten by informal constitutional norms and practices. Norms delineate and enforce the autonomy of governmental agencies while defining modes and limits of their accountability. And they provide scripts that enable parties to communicate their respect for constitutional values and for each other in ways that promote mutual trust.

Extra-governmental organizations and practices are also critical components of the institutional realization of the rule of law. Key institutions and practices of civil society include a robustly independent press, nongovernmental organizations, professional associations, labor unions, religious organizations, and universities. These institutions provide necessary mechanisms of *vertical accountability*, in which accountability efforts of citizens can be mobilized, focused, disciplined, and directed. To do their work, transparency of government must be legally guaranteed, and vigorous and independent media and freedom of speech must be protected.

Finally, the rule of law depends critically on a robust legal profession and judiciary that understand and are deeply committed to it. Lawyers and judges are conservators of the law and enablers of agents of accountability. Lawyers are essential intermediaries between law, citizens, and the institutions and officials of government, empowering ordinary members to move the levers of law to protect themselves and to participate in the network of mutual accountability. Judges are guardians of the integrity of law and its key processes, working in every way possible to secure public confidence in them. Protection of the independence and manifest impartiality of the judiciary is essential to a robust rule-of-law society. This is a nearly universal principle.⁸ Its importance is signaled by the fact that judicial independence is frequently the first target of would-be autocrats — witness recent attempts of ruling parties in Poland to secure power by subjugating its judiciary.⁹

As Judge Luttig reminds us, lawyers also play a crucial role in tempering ruling power: They are bound to speak law to power and act as first responders to crises of violations of rule-of-law standards. Their resources of power, position, and public recognition enable them to call out acts of subversion of law and sabotage of key constitutional norms, and to stand up against actions that defy core laws, institutions, and norms that serve the rule of law.

Why Is the Rule of Law Important?

By what right does the rule of law make such costly demands on governments, communities, and individuals?

Moral Foundations

The rule of law is grounded in a complex value I call *membership*. Membership offers a vision of a certain kind

of community in which members are bound by history, interdependency, and mutual regard. Membership comprises several complementary, but mutually limiting, values.

First, a membership community is a fellowship of mutuality — an engagement of mutual commitments, structured by a network of mutual responsibilities. Members care for each other and their community in ways structured by their mutual responsibilities. Second, it is characterized by a commitment to *peerhood*. Members stand face to face, on a footing of equality. Their practices and institutions publicly create and sustain opportunities to participate in community life as equals. Their equality is measured not by what they possess but by how they are publicly regarded. Third, membership demands inclusion in the community in a way that respects the *diversity* of those invited in. Peers are not *the same* but rather, in their diversity, occupy the same status. Fourth, the dignity and freedom of individuals are secured in membership communities. Dignity is guaranteed by diversity-respecting peerhood. Subordination of members to the will of others violates their dignity. Protection against subordination secures freedom in conditions of social inequality.

Membership grounds the rule of law's robust opposition to subjection to the arbitrary power of others. Domination of some members in the community by others, especially by those exercising ruling power, is inconsistent with respect for their standing as peers and their dignity as members. When law meets the demands of the rule of law, it plays a key role in securing and nurturing communities aspiring to realize the value of membership. ►



The rule of law is threatened by impunity, not by infractions. Violations of laws or rule-of-law standards themselves threaten law's rule only when the community's accountability response is meek or mute. Vigorous, principled, and articulate resistance by judges, lawyers, and public officials to attacks on rule-of-law institutions and norms can neutralize any threat and may even strengthen them.



With the value of membership and the rule of law's core aim and fundamental principles as guides — and taking into account the distinctive material and social circumstances of specific political communities — we seek to design institutions to bridle power and secure a valuable social bond.

Democracy, Human Rights, and the Rule of Law

The rule of law bakes no bread, delivers no loaves and fishes, Michael Oakeshott reminds us.¹⁰ On its own, the rule of law cannot give power to the people, feed the hungry, or ensure just distribution of wealth. Yet, where the rule of law is not robust, efforts to maintain democracy and secure respect for human rights will surely fail.

Democracy, respect for fundamental human rights, and the rule of law are distinct moral values; they make distinct normative demands that can, at times, conflict. Even when laws and governments meet exacting institutional rule-of-law standards, they can fall short of demands of justice or democracy. Nevertheless, these values are complementary and intertwined in a number of ways.

They often overlap. The institutions, laws, and practices that they each call for are similar in several respects. Some of the universally recognized human rights are also key concerns of the rule of law — for example, access to courts, rights to fair trials before impartial judges, and fair notice of the exercise of governmental power. Similarly, democratic rights of free speech, assembly, press, protest and dissent, and formal and informal institutions to bring complaints against officials — all these are equally important where the rule of law is robust.

Even more importantly, these values are *interdependent*, relying on

each other to serve their different functions well. Consider the relation between the rule of law and human rights. Fundamental human rights can adequately serve vital interests of human beings only with the assistance of law. Human rights ideals rely on law to give them concrete content and force. In turn, the law and its administration serve rule-of-law values only when the law adequately recognizes and protects these fundamental rights.

A legal system could meet rule-of-law principles and standards and yet fail to protect against systematic violations of basic human rights — an example may be laws that permit torture. However, where this is true, the government's commitment to the values served by the rule of law is fundamentally compromised. Respect for the dignity of persons is a value which both the right against torture and fundamental principles of the rule of law seek to serve.

Likewise, democracy and the rule of law exist in a unique relationship of interdependence. Democracy depends on law in several ways. The people can effectively rule only if their will is expressed in law. And the institutions that secure the people's role in ruling — free and fair elections, accountability at the polls, and freedom of speech, assembly, protest, etc. — can succeed only if enshrined in and protected by law. By the same token, the political will of the people must meet conditions of the rule of law. The rule of law is opposed to all forms of arbitrary power, even the arbitrary power of the people. Democratic governance, if it is justly to command our allegiance, must be structured according to fundamental rule-of-law principles.

The reverse is also true: The rule of law needs democracy. It is conceivable that a polity may be able to meet (to some degree) the basic principles

of rule of law, but lack the distinctive institutions of democracy. However, without truly democratic institutions, norms, and practices, the structures set up to meet conditions of the rule of law will be unstable, tending to lean toward authoritarian rule. Moreover, a polity that embraces and seeks truly to institutionalize the rule of law, but has no interest in building a democracy, looks like an unfulfilled promise from the moral point of view. The moral ambition that seeks to realize the rule of law is the same ambition that lies behind our striving for democracy. The rule of law without democracy is a moral ambition lacking conviction.

In sum, the rule of law supplies the necessary *infrastructure* of democracy, while democracy is the *natural completion* of the ambitions that motivate the rule of law.

Threats to the Rule of Law

The rule of law is robust in a political community when its institutions serve that community to a reasonable degree, and they are supported by a healthy ethos of fidelity. However, even well-designed institutions may fail under changing cultural and political circumstances, and public officials or the public at large may fail their institutions. H. R. Khanna, former justice of the Supreme Court of India, once wrote that three marks of decay of the rule of law are “a docile bar, a subservient judiciary, and a choked and coarsened conscience.”¹¹ I propose to build on Khanna’s observation.

First, we should note that the rule of law is threatened by impunity, not by infractions. Violations of laws or rule-of-law standards themselves threaten law’s rule *only when* the community’s accountability response is meek or mute. When the rule of law is adequately realized, it is a kind of

homeostatic system. Violations may temporarily disturb the system’s equilibrium but not destroy or greatly weaken it, as adequate accountability mechanisms supply a major equilibrating force. Vigorous, principled, and articulate resistance by judges, lawyers, and public officials to attacks on rule-of-law institutions and norms can neutralize any threat and may even strengthen them. But, as Justice Khanna reminds us, this response is compromised when first responders or the public at large lack the integrity and courage to hold those who wield ruling power accountable. Corruption of their commitments to the rule of law directly threatens its vigor and distorts its equilibrating forces. Further, he suggests, this failure may signal a deeper form of decay.

Conscience and integrity need education, models, support, correction, and reinforcement. The moral climate of a political community is a kind of commons from which personal conscience must draw strength. People add to, sustain, or weaken this commons through their interactions, practices, and engagements with other members of the community. The personal conscience and commitments of individuals live and breathe in the moral environment of their political community. When toxins invade that environment from without, or breed within it, they can choke and coarsen the conscience of those who draw on it. This is Justice Khanna’s lesson.

Public conscience can be choked by apathy, alienation, or a narrowing of the horizons of mutual concern among members of the community. Where solidarity is weak or limited to one’s circle, fidelity struggles. Coarsening of this kind was evident, for example, in the disheartening difficulties faced by local authorities when they

tried to mobilize effective community responses to the COVID-19 pandemic. On the streets and in the public buildings of cities and towns across the United States, the desire to go without a face covering took shape in the minds of many as a fight for a fundamental individual right, and any attempt to infringe upon that right was seen as reason to man the barricades in full-out revolt. This marked a deeper lack: the inability of people to entertain the mere possibility of a common challenge that calls for common effort.

The inability to conceive, let alone sustain, common purpose entails an inability to recognize mutual obligations. People find it hard to conceive of obligations that arise from interdependence and common needs, obligations that we owe to each other. When this toxin invades a political community, the idea that honoring a common bond expresses respect for each other and recognition of common membership will be unavailable for members of this community. This represents a serious threat to the rule of law because the ethos of fidelity leans heavily on the capacity to recognize common needs and the commitment to honor mutual obligations.

The moral environment is also vulnerable to active efforts at corruption. The moral-political environment and public discourse are corrupted, and responsible participation is driven out, by concerted efforts of those who seek to slip the bridle of law’s rule. Of course, misinformation, spinning the facts, and ordinary lies are commonplace in politics. In a healthy polity, active, aware, and critical citizens, with the help of a responsible press, can recognize spinners and snake oil sellers; they can separate lies from the underlying realities distorted ►

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by them. However, a dizzying deluge of information and disinformation, amplified to a deafening roar by social media, overwhelms this critical capacity. The confusion people experience is the work of leaders and their enablers who act with utter disdain for responsible discourse and flood the public domain with disinformation, exploiting and exacerbating tribalization.

The especially sinister result is that all forms of accountability-holding, regardless of their foundations in fact and law, are portrayed and widely believed to be nothing more than hyper-partisan vendettas or hostage taking. Enemies of the rule of law create a witches' brew of confusion of fact and fantasy, law and corruption, good and evil, my guys and my enemies, where the public is encouraged to believe whatever they want — or rather whatever their tribe wants. In this political environment, the currency of accountability is debased, and mobilizing to hold public officials accountable is reduced to rallying around one's tribal flag. This is the product — the fully intended product — of a campaign to corrupt the moral-political environment in which alone social practices of accountability can thrive. It represents a clear and present danger to the rule of law.

Our Response

Facing this kind of moral environment, we must agree with American constitutional scholar Richard Fallon, who wrote, "The most urgent challenge to those who care about . . . the rule of law today is to find ways to rehabilitate the ethical commitments that our political and judicial institutions need to operate successfully."¹² We must seek to revitalize and reorient the moral-political environment of our political communities. We must work to build

trust across social and political divisions and especially to reinforce — and where necessary rebuild — trust in our justice system and public institutions.

To this effort, Judge Luttig has called on lawyers and judges. The duty of first responders is not merely Hippocratic — do no evil — it is positive and demanding. Ultimately, the rule of law thrives in a polity when its members, committed to the rule of law and the vision of community that it serves, are, in the words of Adam Ferguson, "determined, by their vigilance and spirit, to make [its] terms be observed."¹³ Isaiah Berlin once wrote that the work of philosophers is "socially dangerous, intellectually difficult, often agonizing and thankless, but always important."¹⁴ I doubt that this is true of philosophers, but there is no doubt that it is true of the work of conscientious and committed lawyers and judges.



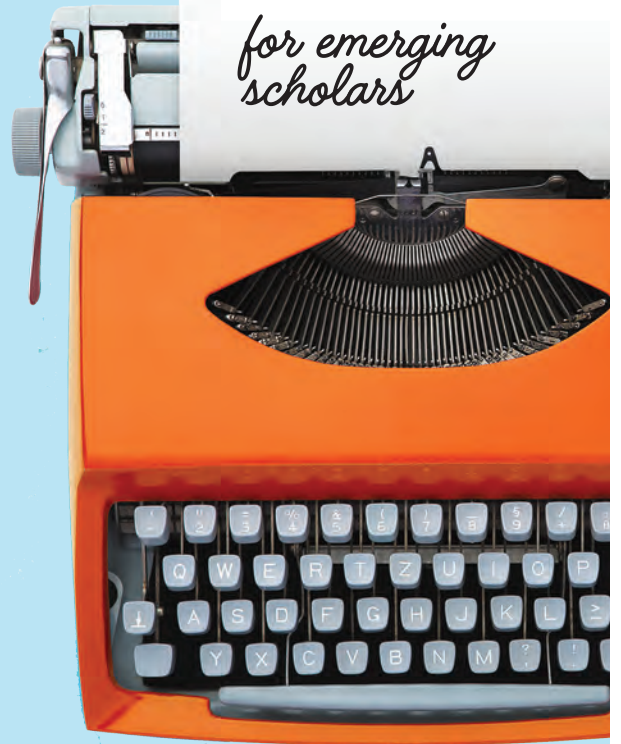
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- ¹ Michael Luttig, Address to the American Bar Association Annual Meeting of the National Conference of State Bar Leaders (Aug. 4, 2023) (transcript available at https://cdn.ymaws.com/ncbp.org/resource/resmgr/2023_annual_meeting/handouts/judge_michael_luttig_aba_ann.pdf).
- ² *New Challenges Threaten U.S. Rule of Law Recovery*, WORLD JUST. PROJECT (July 27, 2023), <https://worldjusticeproject.org/news/new-challenges-threaten-us-rule-law-recovery>.
- ³ See generally WORLD JUST. PROJECT, RULE OF LAW INDEX 2023 (2023), <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIIndex2023.pdf> (annual report on the rule of law); see also William C. Hubbard, *Stalled U.S. Rule of Law Recovery Demands Systemic Change*, TAXPROF BLOG (Oct. 27, 2023), https://taxprof.typepad.com/taxprof_blog/2023/10/hubbard-stalled-us-rule-of-law-recovery-demands-systemic-change.html.
- ⁴ DANTE ALIGHIERI, CONVIVIO bk. I, xii, at 63 (William W. Jackson trans., Clarendon Press 1909).
- ⁵ GERALD POSTEMA, LAW'S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW (2022), at 3–22; Brian Z. Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 114–26 (2004).
- ⁶ Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM 40 (Maurice Adams, Anne Meuwere & Earnest Hirsch Ballin eds., 2016).
- ⁷ LON L. FULLER, THE MORALITY OF LAW 33–94 (2d ed. 1969).
- ⁸ See CENT. & E. EUR. L. INITIATIVE, MANUAL ON INDEPENDENCE, IMPARTIALITY AND INTEGRITY OF JUSTICE: A THEMATIC COMPILATION OF INTERNATIONAL STANDARDS, POLICIES AND BEST PRACTICES (2022), <https://ceeliinstitute.org/wp-content/uploads/2022/08/Judicial-Manual-Edition-2022.pdf>.
- ⁹ See WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 61–70 (2019).
- ¹⁰ MICHAEL OAKESHOTT, *The Rule of Law*, in ON HISTORY AND OTHER ESSAYS 178 (1983).
- ¹¹ H. R. Khanna, Rule of Law (Sep. 9, 1977) (transcript available at: <https://www.ebc-india.com/lawyer/articles/77v4a3.htm>).
- ¹² Richard Fallon, *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 492, 493 (2018).
- ¹³ ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY 249 (Fania Oz-Salzberger ed., Cambridge Univ. Press 1995) (1767).
- ¹⁴ ISAIAH BERLIN, *The Purpose of Philosophy*, in THE POWER OF IDEAS 42 (Henry Hardy ed., 2013).

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