

Original Paper

Rule of Law Today

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Abstract

Witnessing the actual Trump presidency, one searches for conceptual tools to document US decline. The World Justice Project (WJP) comes to mind, attempting to measure Rule of Law (RL) comparatively. The WJP presents interesting findings for 2017-2020. Canada ranks higher than USA. Venezuela is bottom 128 country. Rationale of rule of law?

Keywords

limited government, countervailing competences, natural regularity, moral law of nature, Locke

1. Introduction

Screening planet Earth ahead of 2021, one is forced to admit that we have dictatorship on all continents. Do people really want to live under such a political dispensation?

Dictatorship includes old monarchy, the authoritarian rule as well as the totalitarian regime. The opposite is rule of law. How to theorize this notion?

A majority of people live under dictatorship. The dictatorial regime comes in a bewildering variety that has not been compared systematically. Dictatorships are to be found in religious regimes as well as military ones. But here we find also semi democracy where government tends towards specific authoritarian measures (Russia). One party states often combine with plebiscites. However, the common core is the absence of rule of law. What does it mean?

2. Measures of Rule of Law

There is no neat and tidy definition of the expression “rule of law”. The Oxford English Dictionary offers the following entry:

“[t]he authority and influence of law in society, especially when viewed as a constraint on individual and institutional behavior; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes”.

Now, this sounds rather complicated as well as somewhat legalistic: how to measure it in order to compare states?

One may deconstruct this concept with other concepts or criteria like:

- 1) Strong legal formalism promoting equality under the laws;
- 2) Individual rights covering contract, free labour and property;
- 3) Checks and balances, i.e. institutionalized mixed government with countervailing competences between executive, legislature and judiciary.

As a matter of fact, a dictatorship may satisfy the criteria 1) and 2) at least partly. Thus, the criterion 3) is most essential, namely countervailing competences or powers.

A political regime characterized by limited government and countervailing competences may have a variety of institutions. Let us look at a recent attempt to measure the dimensions of rule of law or countervailing rule.

The World Justice Project (WJP) has offered a measure of rule of states ranging from 0 to 1. It takes into account the determinate criteria. We look at the most recent attempt to measure the dimensions of countervailing rule. The World Justice Project defines a Rule of Law index as “a quantitative assessment tool designed by the offer a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice”. RL comprises eight factors:

- a) Constraints on Government Powers
- b) Absence of Corruption
- c) Open Government
- d) Fundamental Rights
- e) Order and Security
- f) Regulatory Enforcement
- g) Civil Justice
- h) Criminal Justice.

One notes that the WJP emphasizes accountability, judicial independence, legal formalism and balance of power between executive and legislature.

It is worth pointing out that democracy is not here mentioned. Rule of law was conceptualized before the advent of democracy after the Great War. Rule of law as legality, rights and countervailing rule may be combined with democracy as popular rule, but it has not always been so.

3. Mapping Rule of Law

Table 1 presents the results of the most recent survey of the Rule of Law Index for 128 countries around the world, presenting the mean value by region.

Table 1. Average RL Index by World Region by 2020.111

Region	Min	Average	Max	Number of countries
East Asia & Pacific	0.33	0.60	0.83	15
Eastern Europe & Central Asia	0.43	0.51	0.60	14
EU + EFTA + North America	0.53	0.74	0.90	24
Latin America & Caribbean	0.27	0.53	0.71	30
Middle East & North Africa	0.36	0.50	0.65	8
South Asia	0.36	0.45	0.53	6
Sub-Saharan Africa	0.34	0.47	0.63	31

Source: WJP 2020, p. 16.

Only so-called Western countries score above 0.6 on this scale with a few exceptions. Exceptions include: Japan, South Korea, Singapore, Chile, Costa Rica, Uruguay, United Arab Emirates, Mauritius and Namibia as well as Rwanda. Hong Kong is also given a high grade by the WJP, but that must be in the past now. As a matter of fact, it was never a democracy, much like the UAE and Singapore.

3.1 Western Civilisation?

The civilisation argument is overtly or covertly used by several scholars in the wake of globalization. Thus, one scholar on YouTube claims in an online course that western civilisation honours rule of law due to its 3 pillars: Greek, Roman and Christian cultural legacies besides Judaism (Flaten, 2020).

This is historically fallacious. Greek philosophy lacks major constitutionalism besides Aristotle (*mixed rule*).

3.2 Roman Heritage?

Roman law never codified constitutional or administrative law. *Corpus juris* is mainly private law from the point of view of justice. The Roman empire after Caesar amounted to “Occidental” Despotism.

3.3 Christian Heritage?

Christianity before the Reformation was based upon extreme hierarchy. It recognized only the Old and New Testaments as valid sources of law. Calvinism started to speak of a *constitution* (T. Beze) in Geneva) in the modern sense including individual rights such as religious belief. The master theoretical expose was done by John Locke in Second Treatise of Government from 1689.

Yet, rule of law does not figure prominently in any of the world religions. Locke went to natural law theory (Suarez, Grotius) for his inspiration about foundations. Revealed law does not comprise rule of law, neither with Jesus or Mohammed nor Buddha – whether they were historical persons or not.

The negative impact of religion appears in the numbers in Table 1 for Latin America, the Koranic civilisation as well as the Buddhist countries. For the post Soviet states it is not so much Christian Orthodoxy driving down numbers as the Communist legacy in combination with corruption. It has happened that a country can overcome the negative consequences of religion for rule of law, like in Japan and South Korea. Shintoism supported authoritarian rule, which also applies to the religions of South Asia and South East Asia.

Revealed law could only bolster limited and countervailing rule when united with the theory of natural law. Grotius declared in 1625 that natural law trumps revealed law, if different at all. If natural law implies rule of law, then we arrive at a secular approach to limited and countervailing rule. Yet, Grotius still supported monarchy. However, Locke managed the transition: God must respect RL, because entailed by natural law.

3.4 Lawlike versus Moral Laws

The clear-cut distinction between Grotius’ moral laws and Newton’s mechanical regularities or lawlike phenomena is often not observed in the history of political philosophy. Thus, Leo Strauss, e.g., argued that Locke was basically similar to Hobbes. Completely erroneous!

To Hobbes, the state of Nature is the Darwinian *homo homini lupus*—the survival of the fittest or the war of all against all. Humans like animals have one right only, namely to fight for survival by whatever means. Law is the command of the sovereign and revealed law merely useful for political goals.

Locke on the contrary retakes Grotius’ idea of a binding moral law for both individuals and states, obligating everyone to keep their promises and respect others. To this he adds his own *trust* theory of government.

3.5 Locke’ Principal-agent Framework

The second treatise of government from 1689 is basically stoicism (Hobbes belongs to the epicurean tradition), but he makes the new claim that humans make 2 contracts in order to validate the laws of nature: life, liberty and property.

The laws of nature hold all the time, from the state of nature to the political stage of civil society and government:

- I) Do not harm someone
- II) Tell the truth
- III) Keep your contracts.

If somebody or government violates these natural norms—reprisals including uproar is legitimate. A trust forfeited can not be respected or constitute an obligation.

Government thus is a *trust* for securely providing the laws of nature, especially property, to its principal. To minimise the likelihood of mistrust the principal in the second contract binds government to restraints—limited government-and countervailing competences.

Hobbes astonishingly failed on the principal-agent nature of politics, as he argued that sovereignty of Parliament would simply introduce a new form of *bellum omnibus contra omnes*, this time not in society but in Parliament. Since monarchy is wielded by ONE man or woman, there will be no infighting! Hobbes suggested all competences be give m to the sovereign—in fact an authoritarian government. Perhaps the sovereign person could be at war with him/herself? Hobbes bypassed the relevance of institutions to constraining politics.

3.6 Outcomes of Rule of Law

The WJP states that limited and countervailing government is not only intrinsically good but also extrinsically. The WJP claims that rule of law is conducive to for instance economic development.

Take a quote from WJP: “Effective rule of law reduces corruption, combats poverty and disease, and protects people from injustices large and small. It is the foundation for communities of justice, opportunity, and peace -underpinning development, accountable government, and respect for fundamental rights. Traditionally, the rule of law has been viewed as the domain of lawyers and judges. But everyday issues of safety, rights, justice, and governance affect us all; everyone is a stakeholder in the rule of law” (WJP 2020, p. 9).

This is exaggerating—*confer* China. Lots of research needs to be done to establish these claims. Maybe the limited and countervailing regime is valuable, because it promotes justice?

3.7 Locke and the Protestant Ethics/Spirit of Capitalism

The most debated book in social science is The Protestant Ethics and the Spirit of Capitalism (Weber, 1904). A rational market economy—capitalism—arose around 1600 in Western Europe with its typical institutional set-up and personal zest—constituting for Weber its *SINN*. He searched for a similar MEANING in religious beliefs. He should have focused on Locke—a Presbyterian and Socinian putting private property equal to life and freedom. Locke even masterminded the labour theory of value, i.e., an argument for puritanism until Marx destroyed it. Maybe Calvinism was one vital source of not so much capitalism but instead RL?

4. Conclusion

China ranks low and *Norden* ranks very high. The present regime in China seems to return to old fashioned Communism that will not make the country more popular globally with civil society.

Rule of law as a political regime is path dependent. Its occurring has little to do with civilisations.

“Western Civilisation” (Huntington, 1996) is a myth, hiding incredible numbers of wars and atrocities.

Adding Judaism makes no difference, as anti-semitism was rampant in Christianity and Europe.

Civilisations are not homogeneous, not even the world religions. If Islam is a religion of warriors (Weber, 1978), then how to fit the Christian knights together with peace philosophy as with Kant or Kierkegaard?

One notes the rather low numbers for Poland, Hungary and the US. The WJP states that rule of law is declining globally—a great concern for mankind.

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