

Jurisprudence: The Study of the Rule of Law in a Republic

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When we understand the ontological, political and legal underpinnings associated with the concept of freedom, liberty and rights, we understand the relationship between rights and laws. Rights can be understood as liberties or as laws. Liberties can be understood as de facto rights or as de jure rights. It is de jure rights that are recognized as laws that provide the basis for the rule of law. It is the rule of law that provides the basis for equal rights and equal justice in an ideal republic. Rights, laws and the rule of law are distinct. Rights are self-evident truths. Laws are imperatives backed by sanctions (John Austin). The rule of law is a principle that purports that the recognition de facto and de jure rights provide the basis for political, social and economic justice. People live by the rights recognized by law. As such, the rule of law advocates two fundamental underpinnings in a republic: (1) the recognition of rights as the basis for equal rights and equal justice, and (2) the recognition of law as the basis for governance. (H.L.A. Hart). However, since the recognition of law is the recognition of rights, the recognition of rights precedes the governance by law principle. What is fundamental to the rule of law is that it recognizes rights, legitimizes political rule and administers equal/blind justice (Meyers, 1213). As such, no branch of government can weaponize laws to terminate recognized individual rights. The maxim of the republic should be – while anyone can be the ruler, everyone lives as free as the ruler. Majority rule and protection of self-evident individual rights is fundamental to an ideal republic.

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Introduction: Philosophical Underpinnings that Define the Relationship between Rights and Laws

The distinction between freedom, liberty and rights are noteworthy. Freedom is an ontological or existential matter in that the facticity of freedom (Sartre 1977, p. 625) the inescapability of making choices provides the basis for the freedom of choice. Liberty is a political or social matter, in that the rights of each are based on the strength of many (Mazzini 1898, pp. 57-63), and there can be limits to liberties only as prescribed by law¹. Rights are a moral or legal matter. Rights are understood as self-evident truths². Rights as self-evident truths can be understood either as liberties or as laws. Rights as liberties can be understood as *de facto* rights or *de*

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¹The Declaration of The Rights of Man and the Citizen, 1789: <https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>.

²The Declaration of Independence 4 July 1776: <https://www.archives.gov/milestone-documents/declaration-of-independence>.

jure rights. It is the recognition of *de jure* rights that is the basis for laws. Rights as laws as Austin would argue are imperatives backed by sanctions (Murphy and Coleman 1990, p. 19). Understanding rights as being either legal or moral permits us to define what counts as legal or illegal behavior, and what counts as moral or immoral behavior. Understanding *de jure* rights as laws constricts punishment only for illegal behavior and not for immoral behavior. The freedom to act, the liberty to act and the right to act are different aspects of recognizing rights. The recognition of rights is the recognition of law or better the recognition of law is the recognition of rights. When rights are recognized as *de jure* rights, we have the basis for the rule of law. Once rights become *de jure* rights, rights entail obligations, regulations and sanctions. That is why, while we have the freedom to lie, we do not have the right to lie because *de jure* rights entail responsibilities and involves sanctions. It is the rule of law that defines what is permissible, hence not punishable, and what is not permissible hence punishable.

What is important in a republic is the assurance of rights to its citizens. However, what is noteworthy in an ideal republic are equal rights, equal justice and equal protection. As such, two philosophical principles of the rule of law — namely the recognition of rights (Plant 2006, p. 30) and the recognition of laws are what ensure equal rights, equal justice and equal protection. H.L.A. Hart argued that the recognition of law (Murphy and Coleman 1990, p. 30) is the basis for the rule of law. In this paper it is argued that since recognition of rights precedes the recognition of laws, it is the recognition of rights that is the basis for the rule of law. Since rights as liberties are self-evident truths, laws do not define rights they only ensure *de jure* rights. The rule of law warrants the enforcement of laws (Bart n.d.) and checks impunity (Harrison and Pukallus 2018). The single objective of the rule of law is to enforce equal rights and equal justice. The Declaration of Rights of Man and the Citizen (1789, French revolution), implicitly purports for equal rights and liberties that can be limited only by law³, as the basis for the rule of law. Contemporary constitutions explicitly purport for the recognition of both inalienable and alienable rights to ascertain the basis for the rule of law. What is legal is what is recognised by law — be it rights (Meyers 2013, p. 407), obligations, regulations or sanctions. Laws ensure rights and justice because the rule of law recognizes rights. Hobbes argued that laws (*lex*) refer to obligations and rights (*jus*) refer to the absence of obligations (Hobbes 2008, pp. 66-67), but in contemporary thinking, it seems to suggest that only *de facto* rights can be held without any obligations and that *de jure* rights cannot be held without obligation, regulations or sanctions. When *de facto* rights become *de jure* rights, rights as laws become imperatives backed by sanctions. By understanding the relationship between rights and laws, we understand the relationship between the law and the state; we understand the relationship between law and justice; we understand the relationship between law and peace and we understand the relationship between the recognition of rights and recognition of law to the rule of law. It is the rule of law that provides equal rights, equal justice and equal protection to all its citizens,

³The Declaration of The Rights of Man and the Citizen. 1789: <https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>.

thus establishing a republic based on democracy and secularism. Majority rule and protection of self-evident individual rights is fundamental to an ideal republic.

Governance by law purports that the people are sovereign and that the ruler is the custodian of power, not the creator of power (Fuller 1969, p. 106). Thus, the rule of law ensures human rights by (1) separating the legislative, executive and judicial powers to curtail the concentration of power and check the culture of impunity; (2) defining the term-limit for the ruler to ensure that the people are sovereign; (3) distinguishing religious laws from state laws to ensure the rule of law, not the rule of God, as the basis for a secular government; (4) distinguishing legal laws from moral laws to ensure that the government only regulates behavior and not legislate morality. As such, punish people only for illegal behaviour not for immoral behavior; (5) requiring trial by jury for charges against citizens and presume the innocence of the individual until proven guilty; (6) advocating that we are equal before the law and demands blind justice for all. (7) accepting economic inequalities provided equal liberty and equal opportunity are a given.

Methodology and Scope

If by methodology we mean the method used and the thinking involved in research, then the approach of this study is phenomenological and analytical. If the basis for freedom is related to the nature of consciousness then the phenomenological understanding of the content of intentionality would establish the reality of freedom and provide the basis of understanding existential rights as self-evident truths. Phenomenological understanding of the content of intentionality related to the recognition of *de facto* and *de jure* rights establishes the relationship between rights and laws. Literature review include the British Bill of rights (1689), the French Declaration of the rights of man (1789) and the American Declaration of independence (1776) along with the review of the theories that define what law is. Literature review related to Hobbes, Hart, Holmes and Austin is restricted to understanding rights as laws and how the recognition of rights provides the basis for the rule of law. The reason for utilizing analytical jurisprudence as opposed to normative or historical jurisprudence in this study is to understand the relationship between laws and rights in the context of the relationship between the law and the state⁴. Natural law theory (Aquinas) defines laws as self-evident truths, such that “an irrational law is not law at all” (Murphy and Coleman 1990, p. 11). Positive law theory (Hart) defines laws as man-made rules, such that laws are social constructs (Murphy and Coleman 1990, p. 19). Legal realism (Holmes) defines laws as what judges say they are, as such laws are best understood in the context of the application of law (Murphy and Coleman 1990, p. 33). Hobbes understanding

⁴The sources for law can be traced to: (1) divine commands based on revelation from God; (2) political and social demands from society for having and maintaining proper intersubjective relationship; or (3) personal choices based on the dictates of one’s conscience. So, we can delineate laws as a social contract (an agreement), a sacred covenant (a pledge) or a social construct (man-made rules). We cannot escape laws, for laws represent the commands by the state, the demands of society and the dictates of one’s conscience.

of the relationship between rights and laws are understood in the context of rights as defined in the English Bill of Rights and the French Declaration of the Rights of Citizen. Hart's understanding of the recognition of laws is juxtaposed with the understanding that the recognition of law is the recognition of rights.

The Indeterminacy of Intentionality: Basis for Freedom of Choice

Rousseau argued that we cannot renounce freedom, for to renounce freedom is to renounce being human (Rousseau 1762, p. 4). It is impossible to surrender one's freedom because of the nature of human condition. We are free, and we are cognizant that we are free. The nature of consciousness or intentionality provides the basis for freedom (Brentano 2002, p. 481). The nature of consciousness is such that, to be conscious is to choose, to choose is to be conscious (Sartre 1977, p 595). The facticity of freedom is such that, there is no escape from making choices. The freedom we have is the freedom to choose what to be conscious of, "for all consciousness is consciousness about something" (Brentano 2002, p. 482). The indeterminacy of intentionality is the basis for freedom. The content of consciousness is the content of intentionality. To be human is to be cognizant of the content of intentionality. Portions of the content of intentionality is our cognizance of the facticity of freedom, our rights, and the relationship between rights and laws. When we define liberties as *de facto* or *de jure* rights, we are aware that only *de jure* rights have obligations or sanctions. Rights can be understood as liberties or laws. Once rights, along with its obligations, are recognised by law, we understand the relationship between rights and laws. The recognition of rights is the basis for the rule of law. It is the rule of law that provides all citizens equal rights and equal justice under the law. Because rights are self-evident truths that are recognised and enshrined in the constitution, they are self-imposed. When responsible citizens obey the law, they become the authors of the laws they obey (Plant 2006, p. 30). Recognition of rights is a self-evident matter, recognition of laws is a constitutional matter and obedience to the law is a self-imposed civic obligation.

Political Consciousness

In today's world, political consciousness is a given, for most citizens are cognizant of their rights. All the political upheaval, all civil unrest, all waging wars can be traced to the violations of human rights. How do we ensure human rights? The separation of the executive, legislative and judiciary powers while being equal and independent is the best way to ensure human rights. Social and political consciousness around the world challenge governments that act with impunity, question the necessity for qualified immunity given to police officers, and see no basis for morality police. What makes us equals is equal freedom, equal rights and equal justice. As George Washington was ascribed to have said, "government is

like fire, if we can control it, it is good, if the government controls it, it is bad.”⁵ The single purpose of the government is to safeguard self-evident rights. As such governments cannot in any form or shape be instrumental in negating rights, be involved in police brutality, be tangled in extra-judicial killing or in the weaponization of the government. Political consciousness around the world understands the importance and respect for the rule of law.

We are cognizant of the relationship between the ruled, rules and the ruler. The ruled write the rules and chooses a ruler to rule the ruled. The rule of law is not simply about the reign of the ruler but also about the *de jure* laws of the people. What is essential to an ideal republic is “an empire of laws” (Adams 1851, p. 204). The concept of the rule of law is generated from the idea of rule by law (Loughlin 2009, p. 14), without which, arbitrary governmental actions can become the main threat to human liberties (Loughlin 2009, p. 14). The rule of law is a political concept that legitimizes political rule (Loughlin 2009, p. 15). The ruler is the first citizen of the rule of law. In an ideal republic or democratic state, the importance is not about anyone becoming the ruler but about everyone living as free as the ruler and not in fear of the ruler. Jefferson was correct when he argued that “when governments fear the people there is liberty” and “when the people fear the government there is tyranny.”⁶ Any government that does not respect the freedom or wellbeing of its citizens is no government at all. Hence, we cannot agree with Machiavelli who argued that the ruler should be feared (Machiavelli 1532, pp. 120-121), or with Metternich who believed in absolutism where oppression is a given (Machiavelli n.d.), nor can we agree with Moa who said that political power comes from the barrel of the gun (Tse-Tung n.d.). Mazzini was correct when he argued that the rights of each is based on the strength of many (Mazzini 1898, pp. 57-63). Mandela understood the rule of law well when he argued that “when freedom is gained it does not mean that the oppressed get to oppress the oppressor, but together, both the oppressor and the oppressed live in freedom” (Mandela n.d.). Both the oppressor and the oppressed need to be liberated (Mandela n.d.). The freedom we have is the freedom to do anything that is not prohibited or anything that does not obstruct the freedom of the other (Alpa 1994, p. 7). The essence of the rule of law is the iteration of practical and political reason (Meyers 2013, p. 441), which can be defined as political morality (Stack 2016, p. 4). The single characteristic of the rule of law is the law-bound character of the executive (Meyers 2013, p. 431). Rule of law is identified as the decision-making basis for both the citizens and the ruler who are both cognizant of the legal consequence of actions (Stack 2016, p. 4). As such, Fuller defined law as the “enterprise of subjecting human conduct to the governance of rules” (Fuller 1969, p. 106).

⁵Ascribed to George Washington. 1732-1799. https://www.barrypopik.com/index.php/new_york_city/entry/government_is_like_fire_when_controlled_it_warms_you.

⁶A quotation attributed to former President Thomas Jefferson—third president of the United States.

Recognition of Law is the Recognition of Rights

Because recognition of self-evident rights precedes the recognition of law, recognition of law is the recognition of rights. Natural law theorists argue that rights can be held as self-evident truths (Murphy 1990, p. 15). However, it is the phenomenological understanding of the content of intentionality that provides us the basis for recognizing human rights. Understanding human rights best defines the human condition. In recognizing rights, we discover the relationship of rights and laws and the relationship between the law and the state. The history of human beings is the history of how self-evident *de facto* rights become *de jure* rights and laws. The study of law defines which rights require *de jure* recognition, and why some *de facto* rights do not require *de jure* recognition. Do all rights have to have *de jure* recognition? Some countries prefer to have *de jure* recognition for all rights — such as the right to abortion. Still others, like Canada, do not see the need for *de jure* recognition for such rights. The recognition of human rights requires knowing the basis for how *de facto* rights become *de jure* rights (Armaline et al. 2016, p. 220). If the individual is the most important person in the republic then the rights of the individual must be defined in the constitution — Bill of Rights of England (1689), Declaration of Rights of Man and the Citizen after the French Revolution (1791) are good examples of this ideal. The United States bill of rights (1791) purports that rights are self-evident truths. Men are born free (Rousseau 1923, p. 1), remain free and are equal in rights⁷.

Recognition of rights warrants which rights are considered as inalienable (uncreated, hence inviolable); which rights are considered as alienable (created, hence violable); which rights are considered as absolute (having no conditions); which rights are considered as *prima facie* (having conditions); which rights are considered as fundamental (not dependent on other rights); which rights are considered as derivative (dependent on other rights); which rights are considered as positive rights (the right to receive services); which rights are considered as negative rights (right to non-interference); which rights are considered as perfect rights (having legal recognition and are enforceable); which rights are considered as imperfect rights (having legal recognition but are not enforceable); which rights are liberty rights (freedom to do something) and which rights are claim rights (obligations of others to allow you to do something) (Hohfeld 1917, p.719) which rights are claimable (when there is an agent to complain to) (James 2003, pp. 133-147); and which rights are not claimable. In short rights can be understood as claims (rights proper) or as liberties (privileges) (Hohfeld 1917, p.716).

Further, while rights, as claims, are enforceable, all rights or claims are not enforceable. For instance, the right to vote in most countries is a right, but it cannot be enforced because one can choose to vote or choose not to vote. The right to socioeconomic equity cannot be enforced — for instance the US does to recognize socioeconomic rights as human rights (Wiles 2006, p. 46). For free market capitalism opposes government interferences in economics. *Laissez faire* purports that economic inequality is acceptable where equal liberty and equal opportunity is a given (Rawls 2002, p. 461). The right to have an abortion simply means that one

⁷The Declaration of The Rights of Man and the Citizen 1789.

has a choice to do so: it does not mean one has to choose to do so. What must be noted is that all rights include the option for or against such options, as such, they cannot be enforced.

When we understand the recognition of laws as the recognition of rights we establish the relationship between the law and the state. When the relationship between the law and the state is established, Austin would argue that there are two types of laws—laws (commands) backed with sanctions and laws not backed with sanctions (Murphy 1990, pp. 19-23). Positive law (laws properly so-called) are considered as commands backed with sanctions. Laws improperly so-called such as international laws are laws that can be held without sanctions. Laws are enforceable proposition that can be met with punishment if not followed (Bart n.d.). Laws related to inalienable rights define obligations as responsibilities. For example, free speech does not include slander or label — though we have the freedom to say anything we want, we do not have the right to say anything we want without consequences. Laws related to alienable rights define regulations as conditions or limitations — for example, driving without intoxication. The intersection of law and politics is at the core of the rule of law (Meyers 2013, p. 446). As such, if the recognition of law is the recognition of rights then the recognition of rights involves recognition of what is permissible. If recognition of rights involves defining what is permissible, then it must also define what is prohibited. If recognition of rights defines privileges then it must also define obligations. If recognition of rights involves understanding rights as claims, then it must also define which rights as claims are enforceable and which rights as claims are not enforceable. If the recognition of rights involves enforceability then laws that recognize rights must be backed by sanctions.

Hart distinguished primary rules from secondary rules. Primary rules deal with how we ought to act, and secondary rules encompass rules that deal with recognition, change and adjudications of laws (Murphy 1990, p. 30). Rule of law is a legal system in a system of governance⁸ where it has both legal principles and procedural processes to follow, namely political morality (Stack 2016, p. 4). What is the importance of the rule of law in a secular state? The source of law can be religion, but if the rule of God becomes the focal point in a secular state, then the question would be which religious laws should the state accept or reject. If a republic or a secular state gives its citizen the freedom of religion and purports that the state cannot endorse any religion over another, we are left by default only with one option: the rule of law. The rule of God is operable only in a country like the Vatican state where there is only one religion. In a secular state, the logical option is to accept the rule of law.

Operating Principles Related to Jurisprudence in a Republic

Understanding the nature of law, we discover the importance of the principle namely the rule of law in a republic. What is fundamental to the rule of law is that

⁸Stanford Encyclopedia.

the state is accountable to a single legal system. John Locke wrote that freedom in society means being subject to the same law made by a legislation that applies to everyone, including the lawmakers and leaders (Locke 1823, p. 114). It is the rule of law, not the ruler, that matters in this study. While the ruler governs, in reality we are governed by the rule of law. As such, what law *is*, is best understood in the context of what law *does*. If the recognition of rights precedes the recognition of laws, then, it defines not only the relationship between laws and rights, it also defines the relationship between law and the state, the relationship between law and justice, and the relationship between law and morals/religion. The rule of law defines what is permissible, what is punishable and what is enforceable. We shall now discuss the operating principles related to the rule of law or jurisprudence in a republic.

Governance by Law Principle

The first operating principle of the rule of law is the governance by law principle. There are rules that govern social, political and economic life (Weingast 2018, p. 3) of a citizen. A good government is a government of laws (Adams 1851, p. 204). These laws are defined by the constitution, such that everyone is under the law, for no one is above the law, and everyone is equal before the law. The laws are written by the people, is for the people and can only be changed by the will of the people. However, the single purpose of the rule of law is to ensure constitutional rights. Everything the governance by law principle represents ensures the rights of the individual citizen. Individual rights are self-evident truths, as such the rule of law recognizes and ensures such rights to each citizen. No government can tamper with individual rights because human rights are constitutional rights (Murphy 2005, p. 241). Majority rule cannot negate individual rights nor can they suppress or silence the opposition.⁹ Democratic process is simply a political process for the selection and election of the executive, not the basis for human rights. As such, laws do not define rights, they only ensure rights. Constitutional rights deal with both criminal and civil laws. Criminal laws define what a crime is and the judge decides who is a criminal after establishing the relationship between guilty mind (*mens rea*) and guilty act (*actus reus*). Civil laws define what is permissible and what is not permissible, what is finable or liable. Law can be understood as a covenant (Hebrews) in that it is an agreement between people¹⁰; laws can be understood as a contract (Hobbes) in that we tell each other “punish me if I break the law” (Hobbes 2008, p. 25); laws can be understood as a social construct (Murphy 1990, p. 28) (Hart) in that it is alienable or what is created by us and for us. But more importantly laws are commands backed by sanctions (Austin) in that they are imperatives to be obeyed (Murphy 1990, p. 20). Whether the law is a contract, a construct or a covenant, what is common is that it is based on consensus, in that there is a collective will for its

⁹Simple majority is a means to choose the ruler, majority rule is not the means to suppress or dispose of the opposition or descent.

¹⁰II Chronicles 6:11; II Chronicles 5:10; Galatians 3:17.

content and reflects the spirit of the people. That is why it is an imperative or a command backed by sanctions.

The Sovereignty of the People and Government by Consent

The second operating principle of the rule of law is the sovereignty of the people principle, in that the ruler is the custodian of power, not the creator of power. It is the rule of law, not the rule of the ruler, that matters. While the ruler governs, in reality we are governed by the rule of law. The rule of law defines the relationship between the ruled, rules and the ruler. The ruled writes the rules and chooses the ruler to rule the ruled. “We the people” have the responsibilities in an ideal republic to write the constitution and elect the ruler to rule. “We the people” write the constitution that governs the republic. It is this idea that prevents power from becoming autocratic and prolonged. This in turn prevents the rise of rulers like Hitler, Moa or Stalin who disposed basic human rights and killed as many as they wanted or needed — all in the name of the government. All the atrocities that humans commit against fellow human beings occur when rulers use their authority to negate basic human rights. Yes, there has always been the ruler and ruled distinction. Yes, history has taught us that we cannot live without this distinction. However, we live in times when the ruler acknowledges that the source of power is the people, and that ruler holds office only as long as it is the will of the people. As such, no one can govern in a democratic republic if one assumes that the ruler is the source of power. A sovereign government is a government by consent.

Separation of Powers Principle

The third operating principle of the rule of law defines the need to separate the three branches of government: namely the legislative, the executive and the judicial powers. Judge Scalia of the US supreme court argued that only the separation of powers can afford individual rights (Scalia 1988). What is important in the separation of the legislative, executive and judicial powers is the concept of the independence of each branch of the government. Political, social and economic rights are best guaranteed only by the separation and independence of the three powers. Each play a distinct role. One legislates laws, one interprets the law and the third executes the law. The legislative cannot adjudicate or execute the laws, the judiciary cannot legislate or execute the laws and the executive cannot legislate or interpret the laws. The legislative only legislates, the executive only executes and the judiciary only adjudicates (Scalia 1988). The ruler cannot stay in office beyond what is dictated by law, and the ruler cannot legislate laws as he pleases (Murphy 2005, p. 243). The ruler is like a conductor, the ruler can only play the music composed by the legislative body not create the piece. When there is no separation of powers, human rights can be called into question, and the government can act with impunity. It is the independence of the three branches of the government that best safeguards human rights. This principle of the division of powers checks the

rise of totalitarian governments and ensures the rights of its citizens in the republic. Separation of powers prevents the weaponization of the government.

The Selection and Election Principle

The fourth operating principle of the rule of law relates to the selection or election of the ruler. In modern times, in most western countries the selection of candidates is related to the political parties in the country. Though there are independent candidates, it appears that most western countries have adopted the bi-party system as the process in which the two leading candidates are selected. Once the parties put forward their candidates, the democratic election determines who the next ruler will be. The selection and election process are best rendered when a bi-party system selects its candidates to establish which party comes to power. Why is a bi-party system better than a multi-party system? It is because in any decision there can be only two serious options. Multi-party systems tend to forget that the purpose of the opposition party is to oppose the ruling party, not to oppose each other. Today the transfer and transition of power from one to another is peaceful because of the ballot system. How does this ensure human rights? Each candidate in the primary will have a chance to campaign on ensuring the rights of citizens. It is usually the public perception as to who will best ensure rights and liberties of its citizen that wins the election.

Term-limits and Transition of Power

The fifth operating principle of the rule of law relates to the term-limits and transition of the elected ruler. Since the ruler is the custodian of power, not the creator of power, the people are the basis of power, and as such, term limits are essential if one understands that power resides with the people. This is why democracy is not the rule of the majority but the rule of the people. Once elected, the ruler must always realise that his or her power is term-limited and transitional. This will prevent people who manipulate the three branches of the government to get elected many times. Anyone who believes in the rule of law can rule and become the ruler. It is the rule of law, not the ruler, that ensures human rights. A good ruler is one who governs and is governed by the rule of law, as such, anyone who believes in the rule of law can be a ruler. A citizen is not a subject of the ruler but a subject who can be the ruler. That is why once one's term in office is over, one becomes a regular citizen. Term-limits define political offices as being transitional, prevents dictatorial tendencies and avoids nepotism.

Term-limits are not only good for the people, but also good for the ruler. The ruler runs on a mandate, and it is his job to fulfill those mandates in a given time. The rule of law includes the term-limits and number of terms one can run for election. Why is this important? In a republic, no one is indispensable, for it is the rule of law not the ruler that governs. The ruler is symbol of authority, not the authority. It is the law that is the authority as defined in the constitution. The ruler

acts in accordance with the law. Any ruler who thinks that he or she is above the law ends up disposed. The death of Charles I of England and Hitler are two examples of the fates of rulers who did not understand the rule of law. If the rule of law does not define the selection, election and transition of power, then like in the ancient Roman world, the transfer of power is either done through assassination or by suicide. Elections and term-limits are the safety mechanisms to curb the ruler from effectively becoming president for life.

Penal Principles: Lex Talionis — Rules for Punishment

The sixth operating principle of the rule of law is that laws define what a crime is, and define the penalties related to crimes. Law as a social contract is such that we tell each other “punish me if I break the law” (Hobbes 2008, p. 25), as such, punishments, like laws, are self-imposed. However, one can be punished only after due process and be punished only as prescribed by law. The rule of law demands penal penalties for the violation of criminal laws and fines for the violations of civil laws because laws, by definition, are commands backed with sanctions. The rule of law demands the removal of the criminal from society either through incapacitation or incarceration of the criminal. There are three main principles related to penal philosophy: namely (1) the proportionality principle, which purports that punishment must fit the crime. The old testament principle — namely the “eye for an eye”¹¹ principle — purports for the proportionality principle (Fish 2008) to avoid extreme revenge; (2) the appropriateness principle purports there can be no cruel or unusual punishment. Dostoevsky argued that a society is considered civilised not by how it rewards the good but by how it punishes the bad (Dostoevsky 1860); (3) the continuity of punishment principle purports that punishments end only when the crimes end. Further, punishment rendered must be as prescribed by law and there can be no *ex post* laws for punishment. What then does punishment entail in an ideal republic? It entails retribution (punishment must fit the crime), restitution (pay back), repentance (remorse), restoration (pardon) and rehabilitation (bringing criminals back to society after serving jail time).

Punishment can be based on the law or on justice. The courts of law have a difficult time arguing for punishment when someone breaks a traffic law to save a child crossing the road (D’ Amato 1992, p. 22). Should judges decide cases according to justice or according to law? If it is with reference to the law, the driver should be punished, but if it is with reference to justice, the driver should be praised. What is the purpose of punishment: is it a deterrent to prevent further crimes, or is it a penalty for illegal behavior? Without law or sanctions, Hobbes argues that life would be nasty, brutish and short (Hobbes 2008, p. 9). There are many types of punishments apart from capital punishment, but the object of punishment is to prevent further crimes, be it from oneself or others. That is why Hobbes argued that law is the basis for peace (Hobbes 2008, pp. 9-10).

¹¹Deut. 19:21.

Because we are cognizant that laws define what behaviors are permissible and not permissible, laws also define what is punishable. Laws define which rights, as claims, are enforceable (Janes 2003, pp. 133-147) and which rights, as claims are not enforceable. What is considered permissible must always be understood in the context of what is considered prohibited. What we can do must be defined in the context of what we cannot do. These premises are what brings us to the necessity of punishment for prohibited behavior or actions. What must be noted is that what is permissible is not punishable, but what is prohibited is punishable. However, while prohibited actions are punishable, all offensive behavior is not punishable: certain offensive behaviors are only finable. So, while rights are about liberties, there are also prohibited liberties.

Distinction between State Laws and Religious Laws

The seventh operating principle related to the rule of law is the distinction between state laws and religious laws. While there are constitutional rights to preach, practice and propagate one's beliefs, they are not enforceable rights. The right to believe is legally recognized, but what one chooses to believe cannot be enforced by law or by the state. No one can be forced to believe or practice any faith. In a secular state it is the rule of law not the rule of God that is the basis for governance. Countries that do not distinguish state laws from religious laws are considered as fundamental states. This does not mean that the laws in a secular state are not based on religious law. It might well be so. The important aspect to consider is that there is a distinction between religious laws and state laws. A similar distinction can be made between legal laws and moral laws. The relationship between laws and morals has a long history. St. Augustine argued that every law has a moral content, as such, an immoral or unjust law is no law at all (Murphy 1989, p. 11). On the other hand, Hart argued that there is no moral content in law (Murphy 1989) — for example, driving on the left or right side has no moral connotation. Law is a social contract or construct, — nothing more or nothing less. The primary purpose of law is to regulate behavior and to punish those who engage in illegal activities. In fundamental state, where there is no distinction between state laws and moral laws, one can be punished for violating morals laws. The question is “can we have moral policing?” Morality police, as those in Iran, punish those who do not conform to moral codes. In a secular state, we can only punish people for illegal conduct, never for immoral conduct. To be moral is not about what we can't do but what we won't do. To be legal is not about what we won't do but what we can't do.

Equal Rights and Blind Justice

The eighth operating principle of the rule of law is that everyone has equal rights and rights to equal justice, with no impunity for anyone. The rule of law in a republic demands that both the ruler and its citizens be subject to the law and be

equal before the law — no one is above the law. There are no prerogatives for the ruler — everyone has the same rights and claims to equal justice. What makes us equals are equal rights and rights to equal justice based on the same laws (Locke 1823, p. 114). Two important aspects must be highlighted. (1) The judicial branch of the government must be equal and independent and (2) questions related how judges are appointed. Without independence the judiciary branch cannot adjudicate with fairness. The judicial branch must be an equal branch of the government if it is to act independent of any influence. With reference to the appointment of judges different countries have different ways of related to the selection and election of judges to the judiciary¹² United states allows the elected president to appoint judges, when vacancies arise, who are then approved by the senate. In Israel the judges select their own judges by the judicial selection committee. The ideal scenario would be to have some form of direct or indirect election for the judiciary branch of the government. For if the executive branch is elected and the legislative is elected then it would seem fair to have some form election for the judiciary. What is most important to note is that the protection of human right is not based on majority rule but on the judicial branch of the government. Majority rule only provides for government by consent and it is only the judiciary that can guarantee protection for the self-evident individual rights. Further, the emphasis in the modern world is not only on equality but on equity. Aristotle's claim to treat equals equally is important to note (Westen 1990, p. 185). What makes us equals is the fact that we have equal rights, but equal rights must be defined in the context the honest differences that necessitates us to treat equals equally and unequals unequally (Westen 1990, p. 185). One honest difference is economic inequality provided equal liberty and equal opportunity are a given (Rawls 2002, p. 461). Equal justice under the law is a self-evident truth, and many revolutions have been fought to ensure blind justice. That is why majority rule or a government by consent, cannot use the executives branch of the government to weaponize the law to negate constitutional rights.

Conclusion

Rights can be understood as liberties or as laws. Understanding the importance of freedom, liberties and rights establishes the relationship between rights and laws. Rights as liberties are *de facto* rights that can be held without obligations or sanctions, but rights as laws are imperatives backed with sanctions. The recognition of laws is the recognition of *de jure* rights. Laws and the rule of law are distinct. Laws are legislations that ensure equal rights with obligations, whereas, the rule of law is a concept or principle — the principle being that the recognition of rights is the basis for political, social and economic justice. What guarantees equal rights and justice is the rule of law, and the best way to guarantee human rights is the separation of powers: namely, the legislative, the executive and the judicial powers

¹²Here in this webpage we see the many ways judges are appointed. <https://www.nationmaster.com/country-info/stats/Government/Judicial-branch/Judge-selection-and-term-of-office>.

where the legislative only legislates laws, the executive only executes the laws and the judiciary only interprets the laws. The greatest threat to human rights is when there is no separation of legislative, executive and judiciary powers. The concentration of power leads to governments to act with impunity, leading to the violation of human rights.

To conclude, jurisprudence delineates the relationship between the law and the state to ensure the rule of law. To this end, the rule of law ensures the following: (1) the recognition of rights and the obligations related to rights; (2) the determination of term-limits providing for the peaceful transfer of power; (3) the separation or independence of the legislative, executive and judicial powers to safeguard human rights; (4) the distinction made between religious and state laws to ensure that the rule of law not the rule of God, is the basis for a secular government; (5) the distinction made between legal and moral laws guarantees that governments only can regulate behavior not legislate morality, as such constricts punishment only for illegal behavior and never for immoral behavior; (6) the concurrence between the guilty mind and guilty act to prohibit the arbitrary incapacitation or incarceration of citizens without a trial; (7) the connection of laws backed by sanctions with blind justice to ensure that governments do not act with impunity; (8) the necessity for equal liberty and equal opportunity as the basis for the acceptance of economic inequalities among citizens.

Understanding freedom, liberty and rights define the importance of the recognition of laws to the rule of Law. However, while laws can be understood as a command, a covenant, or a construct, recognition of law is the basis for rule of law. But since the recognition of law is the recognition of rights, it is rights that provide the basis for law and the rule of law. That is why no government can weaponize laws to terminate constitutionally recognized rights. Social and political unrest around the world can be traced back to the violation of human rights when governments act with impunity. In a republic anyone who respects the rule of law can be elected as the ruler and everyone lives as free as the ruler.

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