

PERSPECTIVES ON THE RULE OF LAW IN A MODERN DEMOCRACY

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Abstract

The nurturing presence of law within a state is, in a modern society, not open for debate. In fact, the absence of law or the lack of its enforcement has been considered as the main symptom of failed states. But the concept of “rule of law” has evolved along with society, along with the principles that drive it. Thus, this concept hasn’t always been the same and will not be the same in the future. Whilst in the time before the French Revolution, the “rule of law” meant the rule of an absolute head of state anointed by the divine, the people simply abiding by his will, after the French Revolution the concept changed, the state remained powerful, but under a collective rule. The road had been opened for the modern democracies. As the 19th century grew to a close, the modern state had been born in the Western democracies, a modern state which still held a tight grip on the individual. After the devastating effects of the First and the Second World Wars, the state was once again reformed, in a more subtle manner: its strength was reduced in favor of the individual who considered the collective interests of society to be inferior to his personal interests and needs: post-modernism was born, a thought-current which has had influence on all fields of human life, including the concept of “rule of law”.

Keywords: *rule of law, democracy, separation of powers, French Revolution, post-modernism. I. The dawn of “law”*

1. Introduction

First of all, we need to define “law” as being mandatory guidelines within society set forth by a ruling body.

Secondly, the ruling body that mandates these laws can take many forms in accordance with the development of each society. Thus, looking in our distant or not too distant past, we can identify many ways in which a society and the leaders of that society impose their will on the majority of the population.

Most of history, the ruling classes, governments, leaders have not been elected

by the majority, but have either been hereditary (absolute monarchy etc.), theocratic (any form of rule in which the domineering classes are considered to be instated by divinity), dictatorial etc.

In any case, most of human history has seen a manner of leadership or rule that has been absolute, totalitarian. We must not come to the conclusion that single rulers have imposed their will with iron fists and the rest of society was more or less composed of slaves, but we must acknowledge that be it one ruler, a council of rulers or a body of leaders, the ruling minority imposed its will upon the subservient minority.

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This subservient minority along with its unopposed ruling elites (be it the supreme leader, or some form of intermediate aristocrats, nobles, businessmen etc.) generally formed society, formed proto-states or, later, states.

The gradual evolution of human thought, human desires, and human needs brought forth, through the ages, gradual changes in the perception of people of their own society and brought into question the legitimacy of those in power.

The power of these people was called into question and, through violent revolutions, these systems came crumbling down along with the political edifices which brought them to power.

This paper does not and cannot make a summary of human political and social history, but it does want to shine a light on certain events that have permitted the rise of democracy, the rise of the rule of law and the possibility of the current layout of society.

Thus we consider essential to mention the 18th century simply because it is the century in which a great event unfolded which even today has repercussions and will have for centuries to come: the French Revolution.

2. The birth of the modern state and of modern democracy: The French Revolution

Through the Middle Ages humanity has seen a slow evolution, both in terms of technology, as well as in terms of social and political thought.

Of course, the reader will have realized by now, that we are referring, in general, to European society, and in a lesser degree to

African or Asian cultures. In that respect, we can assert that in 16-18th centuries Europe has dominated the entire world with its empires, mainly, through the use of its weapons and political intrigue.

In European society political discussion was frozen as whole nations were being controlled by authoritarian hereditary rulers who imposed their will, along with the church, upon the vast majority of the population.

Law, in this effect, was imposed by the ruling elite, which had little incentive to change anything of the *status-quo* which greatly favored their own interests. And the people, in general, having only basic knowledge of life, was not inclined to bring forth any type of meaningful changes, preferring stability.

Through the centuries, however, through western philosophy and thought, the certain aberrations and major disadvantages of such a system became more and more evident¹.

The harsh and unequal enforcement of law, undemocratically elected kings or parliaments meant that all social reform or all new ideas were stifled by a rigid and unwavering class system.

For this reason western thinkers became all too aware of these factors which held back the huge potential of mankind, the creativity of most members of society being channeled only towards the benefit of a few individuals.

Thus philosophers like Voltaire² proposed through their writings that this system must be destroyed and a new form of human governance must come into effect.

His writings along with the writing of many others created the premise which was

¹ See also for more references : S. Bullen, *A Critical Examination of the Role of Political Thought in the French Revolution*, <http://www.e-ir.info/2011/10/12/a-critical-examination-of-the-role-of-political-thought-in-the-french-revolution/>.

² For more ideas on the influence of Voltaire see also I. Birchall, *1989: Voltaire and the French Revolution*, <http://grimanddim.org/historical-writings/1989-voltaire-and-the-french-revolution/>.

necessary for a sudden and much needed revolution.

This revolution came to be in 1789-1799 A.D., the entire French populations revolting against the aristocratic rule (which was viewed as corrupt, unwilling to listen to the needs of the people and unwilling to change), Church rule (which was also seen to be serving its own interest) and, in general, against the make up the system.

Of course, the majority of the members of this revolution had no idea what to put in place of the current system, had no idea of the concepts of rule of law or of democracy, but, as history sometimes creates, certain elements coalesced to produce the sudden spark of revolution.

We cannot place this spark on the usual perpetrators, as people usually do: the extravagance of the court of Marie Antoinette, the high cost of the royal court, the oppressive general regime of land owners.

The spark came from a certain buildup of tension, of ideas, of needs and from the unwavering evolution of humanity.

The revolution is well known for its violence. Indeed many tens of thousands of people found their death in the first years of the revolution.

The revolution is also known for its initial tyranny, bringing forth the Reign of Terror (later used again with “great” results by Lenin) in which thousands of people were put to death without a trial³.

The revolution is also known to have sparked the ascension of power-hungry individuals such as Napoleon, causing further suffering upon all of Europe.

But, as has been the case often in human history, the revolutions, through 20 years of struggle, produced a new concept of

state: one in which the ruling class is not imposed by the will of few, but by the desires of the many.

The revolution also produced equality not between all members of society, but between all ages and both sexes (the revolutions being the instance in which women fought for equal rights)⁴.

Moreover, and concerning our topic, the French Revolution produced, after years of intense struggle, the modern concept of “separation of powers”, a state in which the rule of law prevailed, law which has been decreed by of the will of the people through a democratically elected legislative body and in which the executive branch is kept in check by a judiciary branch which is also under the control of law.

Like all brilliant ideas, this notion spread throughout Europe and the world, and today most of European society is dominated by the notion of “the rule of law” and “the separation of powers within the state”.

3. Democracy and the rule of law

The concept of “rule of law” is vague and is hard to grasp fully even by the most notable scholars.

This vague ideal, thus has been hard to achieve and the road towards it can be fraught with many perils.

This is exactly what we must extract from the 20th century, a century “*of the self*”, in which the individual awoke, giving birth to modernity, in which the individual said “no” to the rule of elites, in which the individual said no to the overbearing force of the state, he himself becoming the “center of

³ See also M. Carey, *Violence and terror in the Russian Revolution*, <https://www.bl.uk/russian-revolution/articles/violence-and-terror-in-the-russian-revolution>.

⁴ For more on this topic, J. Abrey, *Feminism in the French Revolution* available at https://www.jstor.org/stable/1859051?seq=1#page_scan_tab_contents.

the universe”, and thus creating the premises for post-modernism.

The 20th century represented a century of human suffering as well as human liberation, a century fraught by two world wars in which hundreds of millions of people suffered or died and in which the classical state knew many reforms.

In its stride for democracy, in its stride to achieve equilibrium, humanity more than once slipped into the clutches of dictatorship only to come out reinvigorated, able to restart in a better position and, more or less, with lessons learned.

The rule of law, thus, particularly after the fall of the Soviet Union, became a goal for most countries in the world, realizing that only through the separation of powers within the state, can the individual come to flourish.

But, as we mentioned, there are many perspectives of the concept of “rule of law”, “separation of powers” and “democracy”.

First, we must note that the “rule of law” system entails that the state has legitimacy in the eyes of the majority, thus the state ensures the rule of law and the rule of law ensures its legitimacy – interdependency of the two concepts.

Secondly, the law becomes a vector of state power, the modern state being formed along the following principles: the ruling body is subservient to the law of the land, free and guaranteed access to a court of law against any administrative, legislative or judiciary abuses, the prevalence of the rule of law against the state itself, means for the state to impose the rule of law and the rule of law to impose itself against the state.⁵

Thirdly, we must define democracy as a system of state organization in which the rule of law is ensured by specific means and in which all aspects of political and social life are dictated by the rule of the majority, through legal institutions.

Finally, fourthly, the concept of “separation of powers” must be defined as the system in which three state powers : the legislative, the executive and the judiciary are in a balance dictated by law and enforced through legal means, in which each branch of the state has the duty and right to oversee the enforcement of the law.

We must emphasize that, as can clearly be seen, the rule of law is as the core of the modern democratic system, in which none of the powers of the state has the upper hand and in which each of the powers balances the “weight” of the other.

Also, it would seem that all the power of the state is under the rule and guidance of society which expresses itself through the direct elective processes, in which the majority of the population dictates the direction of society.

This is the crux of the issue, as some events have shown, the democratic electoral systems having its major inconveniences.

First of all, having the majority of people dictate the direction of society by electing members to establish law has some drawbacks.

Recent events such as *Brexit* and the election of far-right or far-left governments even within well-established democracies proved that, under certain conditions, the general population is inclined to choose paths which are not necessarily the best from a “rule of law” perspective. Sometimes choices appeared to be wholly unreasonable and against the concept of democracy itself. The classical example of this is the coming to power of the Nazi Party in the 1930s in Germany. The Nazis, an extreme right worker’s party came to power through democratic means because of the dire economic situation in Germany between the two World Wars, a situation in which the population’s savings were wiped out by galloping inflation and in which war

⁵ M. Voicu, *Accesul liber la Justiție*, Dreptul Journal no. 4/1997, Bucharest, p. 2.

reparations brought financial despair to most households.

Because of this situation we conclude that the population, willingly voted democracy out of the state, voted for a centralized, authoritarian regime which ended by bringing destruction upon Germany and Europe.

This is not by far the only example of democracy which, through the careful manipulation of politicians in certain periods of despair, has renounced its self, and the people, in a struggle to achieve security and stability, lost not only democracy, but the security and stability which they sought.

Another more recent example would be the *Brexit*: a situation in which, by creating fear and in the context of economic downturn, certain politicians have managed to convince the majority of the British people that parting from the European Union is the only method in which they can regain their economic prowess. After a stormy referendum, the majority of the population now, polls show, regrets this decision.

But, as was the case of Germany in the 1930s, the rule of law dictates that the effects of the popular referendum be respected by all the branches of the state, being the direct will of the people.

Thus we move further in our analyses: can the democratic system outvote itself? Can democracy make choices that are undemocratic? Can any of the branches of the state dismiss certain popular choices of the people?

First of all, the checks and balances inherent in a democratic system, theoretically do not permit the people to vote out democracy, as there are certain core values which cannot be changed even by direct vote of all of the members of society. For example, in our own national Constitution it states that Romania is a

sovereign Republic, in which the rule of law is of constitutional value and in which all people are equal.

These are values which cannot be altered by any popular vote.

The “forefathers of the Constitution” enshrined these values so that future generations cannot alter them in any way.

However, as history has shown, even withholding these values, a society can slip into an authoritarian system.

Second of all, all laws that can have harmful effects on society must be passed through a legislative process in which politicians who have been elected vote the respective laws into effect. The executive branch is held responsible for enforcing the laws. The judicial branch, which in most states is the only branch of the state who is not elected directly, must overview the way in which the laws are passed and in which the executive branch enforces them.

4. Rule of law in the classical view, modernism and post-modernism

Now we arrive at the crux of the issue: can the judicial branch rescind popular laws passed by the legislative branch or enforcements by the executive branch.

As an example of a situation in which this has occurred, we present the following.

During the 1970s a big debate over abortion was held in the United States, the significant majority of the population being against abortion (except for certain medical reasons) and thus was in favor of passing legislation which banned all abortions (with certain limited exceptions)⁶.

The congress of the United States passed the bill and declared abortions illegal.

⁶ For details on the case, see also Pew Research Center; <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>.

Following this, this Supreme Court of the United States was petitioned in regard to the Constitutionality and legality of the respective bill, which had been highly appreciated by the general public.

The Supreme Court of the United States, in a historical decision established that the bill was unconstitutional as it was against the rights of the mother enshrined in the Constitution of the United States. The Supreme Court considered that by limiting abortions in such a major way, the legislative branch breached its Constitutional prerogatives.

In hindsight, we can easily observe that the “rule of law” and “separation of powers” within the American state is the so called “classical” one, in which the rule of law is imposed upon all walks of life, **the judicial branch having the power to enforce even the most unpopular of rulings.**

Also, it must also be noted that the American people accepted willingly this ruling, even though it was unpopular, as a consequence of its democratic system and a consequence of the independence of the judiciary.

Thus certain observers have stated that this type of “rule of law” that overrules even the majority will is a type of “*dictatorship of the rule of law*” in which the separation of the branches in the state is so absolute, that the judiciary can rescind a popular law passed lawfully by the legislative body.

This dictatorship of the rule of law has been the approach of the classic democracies of the 19th and early 20th century when the state, though democratically elected governments, was dominated by certain fundamental principals who were applied in practice in accordance with the view of the judicial branch (in general, Supreme Courts). Since the judges of the Supreme Courts were few in number and not

democratically elected, **it thus became evident that certain decisions by the majority would be rescinded by a small group of individuals who were not elected.**

This system, however imperfect it may seem, was seen as acceptable as the ruling elites still had significant power and acted paternalistic in their belief that society, as a whole, is incapable of addressing important matters and thus a ruling body, the judiciary, should be able to “press the brake pedal” when democracy is threatened even by democratic actions.

However this classic approach towards democracy could not be long lived as the 20th century rolled on, with its many wars and with its many social and political upheavals.

As the two World Wars concluded and as the Cold War ended, the western world no longer trusted the institutions that were put in place to limit the aspirations of the individual.

The old paradigm which asserted the rational man, which asserted that the elites had to rule in a benevolent, but paternalistic manner over the ruled was put into question and eventually abandoned. A new social and political reality was put in its place, postmodernism, in which the individual was supreme, in which the desires of the majority would be passed into law that could not be rescinded by any branch of the state. Indeed, the will of the people would rule supreme in this new form of “rule of law”.

Francis Fukuyama, a great historian and thinker of the 20th century concluded in discussing the future of the state that “the state that emerges at the end of history is liberal insofar as it recognizes and protects through a system of law man’s universal right to freedom, and democratic insofar as it exists only with the consent of the governed”⁷.

⁷ F. Fukuyama, *The End of History?*, 1989, https://www.embl.de/aboutus/science_society/discussion/discussion_2006/ref1-22june06.pdf.

Thus the future state envisaged by Fukuyama insured that the liberal state of tomorrow would be democratic insofar as the consent of the governed would be offered. In other worlds, no branch of the state would be able to contradict the direct will of the people, thus the modern (or post-modern) concept of the state, the concept of “rule of law” comes into being.

Although this short essay cannot begin to analyze the complex meanings of such concepts as modernism or post-modernism, the critical difference between human (especially western civilization) society of the early 20th century and of the early 21st century is that the latter is more individually-driven and centered. The individual in the 21st century is centered not on fulfilling his role in society but he sees society and indeed the state and the rule of law only as a prerequisite for his own personal fulfillment. The individual now reigns supreme and does not accept other entities to openly defy his will.

Thus the state has become subservient to the individual and not the other way round.

This has, of course, had dire consequences upon the concept of rule of law and upon the separation of the powers of the state.

None of the branches of state, in the post-modernist mentality, can rescind the decision of the majority however in disregard to the wellbeing of the state, of society in general, it really is.

Thus, the situation of *Brexit* can be explained in terms of a majority which has dictated the course of action which is clearly detrimental to the wellbeing of the nation, but cannot be contested through the judicial system, as it was passed through a direct referendum.

This can have serious repercussions, especially concerning decisions whose consequences shall be felt not in the near future, but in the distant one.

For example, the struggle to implement legislation on a global level for the protection of the environment and, of course, the long term protection of the entire world. In recent years, very little has been done in limiting the extensive damage which has befallen the environment because of emissions, deforestations etc., exactly because popular opinion is not for curtailing this phenomenon, and the population of the world, in general, is indifferent to the destruction of the environment as long as its needs are met in the short term.

5. Conclusion

Living in our post-modern world, in which the notion of “rule of law” has been redefined to better suit the needs of the individual and less the needs of the state and the general society, has produced several imbalances which will have to dealt with in the coming future.

The new “rule of law” concept gives new force to the individual which can dictate the policy of the state, in disregard of the general interest of society.

A balance between the needs of the individual and the needs of the many must always be the goal, but if the balance is extremely difficult, if not impossible to achieve, then we would prefer the needs of the many to prevail over the individual. Otherwise, our whole civilization would be in jeopardy in light of the egotistical desires of the individual.

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