BACKGROUND AND PRESUPPOSITIONS OF THE RULE OF LAW

Juha-Pekka Rentto

A 'postmodern' view

The Rule of Law is a widespread punchword of modern jurisprudence as well as of modern political rhetoric. The Rule of Law is one of the supposedly self-evident principles by which the modern Rechtsstaat is created, maintained, and perpetuated. The Rule of Law is even widely considered an important criterion of legitimate government. In the latter days, the Rule of Law has almost come to take the place of the Rule by God's Will, which was formerly considered the main standard of good government. Linked to the modernly deified notion of popular democracy, the Rule of Law has nearly reached the transfigured state of deification as an unquestioned foundation for the political organization and government of a state.

The task of the present undertaking is to criticize the notion of the Rule of Law, and question its sovereign position in the modern discussion. This will be done from the viewpoint of general practical philosophy, through an analysis and criticism of the moral and political presuppositions and foundations on which the central role of Rule of Law supposedly rests. The outcome of the discussion which is to follow will appear a paradox: having first identified and defined the object of our scrutiny to the best of
our ability, we shall proceed to show that, on the one hand, the Rule of Law is indeed a central and even practically necessary component of the human political organization; but that, on the other hand, as an actual political standard it is in an important way impossible to live up to and even logically irrelevant for the particular situations where it is supposed to be applied.

The present text was first prepared some five years ago for a workshop seminar for Finnish and Hungarian scholars of constitutional jurisprudence. Part of the background for it is that the European press was at that time full of news of what was going on in the Eastern parts of Central Europe. One of the strikingly oft-repeated thoughts was that the most important task of the newly emerging Western-style governments was to take all the necessary measures needed in order to introduce the the Rule of Law. For many Hungarians, as well as for Czechs, Slovaks, Poles, etc., the Rule of Law appeared the magic formula which would put their country back on its feet after the breakdown of 'socialist legality'. My motive for preparing this piece for presentation to my Hungarian colleagues was to point out the Rule of Law, while highly important for the functioning of society, is no magic formula but just the necessary beginning for a full flourishing of citizens in the common good of all.

With the benefit of hindsight, another motive, then unconscious but to-day explicit, comes up to the surface: when I first wrote the text at hand I considered myself a proponent of 'Natural Law jurisprudence' or 'jusnaturalism'. The text ought to be read, though, as an exposition of how a philosophical 'jusnaturalism' of the Aristotelian or Thomasian brand in fact entails a strong 'legal positivism' on the practical level of organizing a society in terms of the Rule of Law. It was this insight, too, which made me see things in a different light: I realized that it was not the jusnaturalism which was most essential in the Aristotelian-Thomasian jurisprudence, but it emphasis on the practical nature of things legal and political: its
strength and its appeal lies precisely in its being a jurisprudence of the practical reason, with a point, viz. the common good, in view. Hence also the notion incorporated in the present text of the Rule of Law as a practical necessity if the common good is to be reached. In contrast with it, the positivistic notion of the Rule of Law, if devoid of a comprehensive inbuilt goal, is simply pointless.

In the present article the Rule of Law will be found a curious construction of political thought, a construction of central importance for the viability of human society, but whose importance rather strangely rests on the very impossibility of its being put into actual effect, and on its very irrelevance for its supposed particular applications. It reflects my thoughts to-day as it did five years ago when a shorter Finnish version of it was published in a Finnish yearbook of jurisprudence. But I have learnt something new after that: towards the close of the article there is a section on democratic government and its relationship to the Rule of Law. Later I have acquired a more structured view of democracy via the notion of civil autonomy and the principle of subsidiarity: true democracy is not merely that citizens be allowed to participate in decisions concerning the common good, but that citizens become fully autonomous persons capable of legislating for themselves as well as for each other and of assuming primary responsibility for the common good. Hence a newly written postscript is appended at the end of the text.

1. WHAT IS IT?

The Rule of Law is basically rather a simple notion: it denotes 'accordance with law', and all are agreed on this most general definition. But whose accordance is at stake, when, from whose point of view, and with what law; and what does the accordance
JUHA-PEKKA RENTTO

consist in? All these questions provoke a range of different answers.

The most fundamental sense of the Rule of Law is that it requires a person bound by the law to follow its prescriptions: if the law is followed, the Rule of Law reigns. With a view to different classes of persons, this basic Rule of Law then has different applications. Where the supreme authority of a state is concerned, it is required to govern by law, and not by arbitrary whim. The judge is required to make judgement not by any old standard but precisely by the standard laid down by the law. The civil servant is to act according to the prescriptions of the law. And the legal subject is required to abide by the law and by the lawful judgements and decisions of the servants of law. Usually one has the judge and the civil servant in mind when one speaks of the Rule of Law. Also in this essay, we shall concentrate on their supposed duty, imposed on them by the Rule of Law, to put the law into effect precisely as the law itself exclusively requires itself to be put into effect.

One could speak of the Rule of Law in all these respects with regard to the Natural Law. But usually 'the Rule of Law' refers to the rule of positive law. To be more precise, it refers to a notion according to which it is requires that, once a positive legal order has been insituted in a community, the laws that are positively valid within that order, are to be followed by all in that community. Even if the Rule of Law in this way requires obedience to the positive laws of a society, it need not be a positivistic principle. Indeed it most often has a distinct jusnaturalist flavour: that the Rule of Law is to govern the political community follows from some extralegal consideration.

which makes it an important moral or political requirement of good government. One task of this essay is to show on what grounds and in which respect the Rule of Law is a valid criterion of good government.

There are several alternative points of view from which the Rule of Law can be considered. One can differentiate between a theoretical way of looking at the problem, and a practical one. The former properly regards the Rule of Law as a general abstraction, and considers it at large, abstracted from all and any actual situations. The latter considers the actual aspect of the Rule of Law, viz. its application to given circumstances and to given particular cases.

Related, if not identical, is a differentiation between what might be called the prospective aspect of the Rule of Law, and its retrospective aspect. Here the former reflects the considerations relevant to the situation where no particular occasion to put the requirements of the law into effect has yet come up; while the latter reflects the situation in which a particular judgment or decision by the law is to be made and is under present contemplation. In different words, the prospective Rule of Law is concerned with the general expectations of citizens with regard to the general functioning of the legal order. The retrospective Rule of Law, on the other hand, is concerned with the particular applications of law to individual cases.

In this essay, it will be shown that the Rule of Law is an important political standard from a theoretical point of view. This theoretical significance derives from the vital role the prospective aspect of the Rule of Law has in the maintenance and development of a political community. But despite all this, the retrospective Rule of Law is rather a dubious standard: the claim that one actually ought to act according to the law in a particular context of application is a very problematic one to make.

2. ITS PRACTICAL NECESSITY

The moral foundation

That the Rule of Law ought to prevail in a state, is far from being self-evident. In this section of the essay we intend to show in which respect the Rule of Law is a valid criterion of good government. The notion that acts of government and judicial decisions ought to be in explicit accord with the law rests on a number of moral and political assumptions, chief among them the assumption that law is the appropriate method of organizing a political community. This assumption is correct, but if we wish to understand why and in which way law is the appropriate method, we cannot merely assume it without trying to clarify the argument that backs it up.

Another important assumption behind the principle of accordance with the law is that a duty is involved: it is not merely a matter of being morally preferrable or laudable to abide by the law, but it is considered definitively obligatory to do so. But such an obligation cannot simply materialize out of the thin air. Besides it is not entirely clear what one means by an obligation to abide by the law. Our discussion will not at this point adopt any definition of 'obligation'. Instead, we hope to clarify in the course of the argument, in which precise respect one is entitled to speak of an obligation to the Rule of Law.

A well-known modern argument for why a human society must be governed by a legal order is the one presented by H.L.A. Hart. According to it, a legal ordering of society is necessary because of several human weaknesses, limited human altruism, and limited natural resources. As a result of these fringe conditions, human interaction consists in an unpleasant state of

3. I have previously discussed the same problem from a slightly different angle in my Obligation to Obey? A Modern Myth.
constant competition where insecurity and violence easily prevail. In order to avoid anarchy, one must organize the society by the Rule of Law which regulates the conditions of competition to everyone's advantage and secures a modicum of social peace.

Hart's argument is one part of the explanation, but it is not all. Inasmuch as it merely assumes that legal order is better than anarchy, it presupposes that order is something good for a human community. But why so? Why is not rampant anarchy or random despotism best for a human society? – Besides, being based on an individualistic and self-interested view of man prone to conflict and strife, it fails to take notice of the fact that even a community of angels would need to be organized according to law. Law is not needed merely in order to mediate between conflicting individual interests but also in order to promote the common interests of the entire community.

Our forthcoming argument will proceed in three steps. We shall first present an argument that shows why an authoritative ordering is practically necessary for a political community. Then we shall present a different argument for why it is practically necessary that the political community be ordered with law and not with some other means. Finally, we shall present an argument that shows why the principle of accordance with the law is a central element of every and any enterprise of ordering a community by law.

**The common good**

Man naturally seeks that which is good. Good is that which men naturally seek. This double insight is the first starting point

5. Expressed in the very opening lines of Nicomachean Ethics, as well as in the opening lines of Politics.
of practical philosophy in the Aristotelian tradition. It is an expression for an underlying teleological ontology: what is, consists in not only what is in act, but also in what is in potentiality, and in a movement in which potentiality turns into actuality. Beings are on their way to their potential ends, and these ends are the good natural to each kind of being. Man, in this way, has a certain present actuality, a given natural potentiality, and a way of moving towards the fulfilment of that potentiality. This way of moving is seeking good, i.e. engaging in what we call action.

What the good natural to human beings is need not concern us here. But there is an aspect to human good, whatever it is, which is crucial for us: it is shared. Man is not only an individual seeking this private individual goods, but fundamentally an other-directed being seeking common goods together with his fellows. In other words, no man is an entirely independent being but a part of various communities, be they communities of play, communities of utility, or communities of friendship. Now the good of these communities, the common good, is the end of the individual members, because it consists in nothing but everyone's reasonable and rightful sharing in good. A common good is not the sum total of individual goods, nor is it something different or higher than individual good: it is individual good shared between the members of a community.

Human beings have a nature that is not entirely determined to the good that is natural to them. In other words, man has free will to choose between alternative courses of action leading to alternative goods. Man is also in many ways imperfect and, most importantly, fallible. He is susceptible of mistakes concerning what is really good and what merely seems so. Moreover, he is

6. I hope to give a detailed argument of this ontology and many of the questions to be taken up in this essay in a forthcoming book entitled Reflections on Law and Reality.
capable of being habituated to making wrong choices, i.e. to choosing merely apparent goods. If he in this manner develops a vice and becomes evil, he will tend to use his reason and will to unnatural ends and purposes. So as to avoid lapsing into vice, he must exercise virtue, which consists in nothing but an acquired personal habit of doing the right thing, i.e. of seeking the good that is natural to man and no other thing. In this way, individual men are responsible for the formation of their own moral character, and can by their own choice become good or evil persons.

On this view, morality fundamentally demands that individual men not only seek good but that they seek nothing but good. In this way moral virtue consists in a consistent habit of seeking the whole good instead of merely partial goods, and moral evil is nothing but choosing a partial good instead of good in its totality. In this very manner the good of one individual in isolation from others is merely a partial good, whereas the common good of a community represents the whole good. Therefore, morality requires that one chooses a common good not over but as one’s individual good. As a consequence, a common good is nothing but individual good shared between the members of the community in common virtue.

Each kind of community has its own kind of common good and consequently its own kind of virtue. The common good and characteristic end of a community of play is mutual enjoyment. The common good and characteristic end of a community of utility is mutual profit. The common good and characteristic end of a friendship is mutual sharing of one another. These communities are only of a limited scope: they either cover only minor spheres of the human life, like communities of play and

7. Cfr. e.g. Johann MOKRE, *Positivität und Ethik*, where evil is defined as selecting one good from the totality of good and treating it as if it were the totality of good. *Vide etiam* Germain GRIZEZ – Joseph BOYLE – John FINNIS, *Practical Principles, Moral Truth, and Ultimate Ends*, esp. p. 125 p.
utility; or they are not feasible in a large scale community, like personal friendship. But there is a more comprehensive good to be sought than any of these partial goods, viz. the good of the perfect community that encompasses all these partial communities under its aegis. This perfect community is in the Aristotelian tradition called the political community, and its good is referred to as the common good.

The common good that is the natural end of the political community as well as of its members is the good of all, or the virtuous sharing of all in their individual goods. Who the 'all' are, need not detain us here: Aristotle thought of the city as a perfect community, whereas Aquinas in the secular context thought of the state, and in the eternal context of the community of all creation in God. For us, the secular perfect community can as well be the state as the global society, depending on the point of view. But where law is concerned, the crucial community is of course the one represented by the state.

The common good of the political community ought morally to be sought, simply because it is the good of the whole community rather than just a part of it. It is indeed the moral responsibility of each member of the community to seek his own good under the aspect of the common good. But in a large community it is difficult for an individual member to be aware of and appreciate all the necessary aspects of the common good of all. It is not only the proneness of men to sin and vice, or the tendency of society to develop a state of potentially fraudulent competition between its members, that difficultates the attainment of the common good, but also the simple fact that the sheer complexity of society makes it virtually impossible for individual citizens to assess the relationship of their personal actions to the common good. As a consequence, if the common good is to be sought effectively, the multifarious actions of the individual citizens need to be organized, i.e. ordered to the common good, on the level of the whole community. Or, in the words of St.
Thomas Aquinas\textsuperscript{8}, as the end of the common good properly belongs to the community as a whole, it is also appropriate that the community as a whole seeks to realize it.

An organization of society into a political community can in principle be effected in one of two ways: either by unanimous decision by the citizenry, or then by the authority of a public personage that represents the reasonable will of the citizenry\textsuperscript{9}. For most purposes, the first method tends to be impracticable. It follows that a political community, if it is to effect the common good it seeks, is normally to be ordered to the common good by the rule of an authority that bears the responsibility for the common good of all.

\textit{Politics}

Only individual human beings can engage in morally significant action. Indeed it is the case that actions are by their very definition both individual in that they are engaged in by individual agents, and particular in that they have a particular end as their object\textsuperscript{10}. No collective measure or authoritative ruling is of any practical relevance except by virtue of its relationship to individual actions. It unavoidably follows that the common good cannot be reached simply by making authoritative decisions for the political community. The common good can only be reached by a policy that moves the individual citizens to act for the common good. This can best be done by creating an artificial order and organization, a stable pattern of social action that gives

\textsuperscript{8} \textit{Summa theologiae} I\textsuperscript{1} II\textsuperscript{ae}90, 3.

\textsuperscript{9} Cf. FINNIS, \textit{Natural Law and Natural Rights}, p. 231 pp.

\textsuperscript{10} This is part of the very definition of practical reason in the perennial philosophy: according to it, practical reason is that aspect of reason that deals with operables instead of intelligibles, i. e. with what one is to do instead of what one understands.
individual citizens the direction and guidance that is necessary for ordering their actions to the common good.

Where it is important but unlikely that nearly all individual citizens can order their actions to the common good, the public policy is to provide the citizens with a substitute measure, measured by the common good, to which they can easily order their actions to the proximate satisfaction of the requirements of the common good. In other words, where citizens run a risk of having no general grasp of what the common good in every single situation may require, the public policy gives them authoritative direction by which they are hoped to abide, so that despite their ignorance of the requirements of the common good they would by implementing the policy meet those requirements.

The general strategy of creating a public policy consists in relieving the individual citizens from the recurrent responsibility for making a correct assessment of each particular situation where they are to make a choice, by making that choice for them in some important respect. It follows that, if the policy is to be effective, it must be generally knowable, easy to be recognized, and readily applicable by most relevant citizens to most relevant situations. The best way – as far as we know – to create such a policy is by way of issuing general authoritative standards, i. e. rules. Authoritative rules categorize, generalize, and simplify the complexities of reality that threaten to cause problems in social interaction. Instead of having to make a difficult if not impossible judgment of the circumstances relevant for his action, the citizen can rely on the judgment previously made by the political authority, and act according to the rule laid down by it.

A policy can, in sum, be effective only if it can affect the actions of individual citizens. So as to be capable of this, it must be knowable, clear, permanent, practicable, flexible but at the same time precise enough, consistent – in short, it must be expressed in general rulelike standards that are offered to the citizenry for guidance, in a hope for universal adherence.
Habitual adherence to these rules will, it is intended, habituate the individual citizens to the virtue they might not be able to exercise without authoritative counsel and direction. The external habit of acting by the rule will thereby grow into an internal habit of doing the right thing\textsuperscript{11}. Historically, such rules have usually been issued by way of legislation.

\textit{Law}

Even if we have seen that it is practically necessary for the political authority to express its policies in general rulelike standards, if they are to be effective for the common good, it is not thereby demonstrated that it is practically necessary to do it by public legislation of positive laws as they are understood today. Why law and not some other kind of general organization is \textit{the} appropriate method of generating civic virtue in a political community?

The answer suggested by Aquinas\textsuperscript{12} is rather instructive, with all its apparent faults. He offers three reasons for preferring a rule by general laws to a rule by individual judicial decisions. For one thing, 'it is easier to find the few wise men who suffice to frame rightful laws than the many required to judge aright about every single case'. Secondly, 'framing the laws allows for a long time during which to ponder', while 'judgements on particular cases suddenly blow up', and 'it is easier to see what is right by taking many cases into consideration than by relying on one solitary case'. And thirdly, 'lawgivers judge on the general lie of the land and with an eye to the future, whereas magistrates have to decide on the case before them, about which they can be affected by some partiality, and this can impair their judgment'.

\textsuperscript{11} Cf. \textit{Summa theologiae} \textit{I\textsuperscript{a} II\textsuperscript{ae} 92, 1; 95, 1; 95, 3: ad 2.}

\textsuperscript{12} \textit{Summa theologiae} \textit{I\textsuperscript{a} II\textsuperscript{ae} 95, 2: ad 2.}
In theory, the first reason offered may be true. But in reality I doubt that anyone can confidently maintain the claim that those who actually are engaged in the legislative functions of a society are in fact wiser than those engaged in the judicial functions. Depending entirely on the actual mechanism for the allocation of wisdom, the argument is far from univocal.

The second reason is at first sight curiously at odds with the general practical philosophy of Aquinas. After all, doing the right thing is for him, as it is for us, something particular that can only be done by an individual actor with a particular object in view. But here he seems to be suggesting that where an individual judge may not be able to make a good judgment, the lawgiver can - even without knowing the actual circumstances of any particular situation where the legislative intention might come to be implemented. This is of course sheer nonsense: it is the individual judge, presented with the relevant circumstances of a particular case, that is in a much better situation for making a right judgment.

The lawgiver indeed cannot even make a genuine practical judgment, because he must operate on sheer generalities: he engages in theoretical reasoning with the abstract rightness of a type of decisions in view, whereas only the judge can actually make a real judgment concluding in real action, based on the real facts of the case. Besides, it is patently false that lawgivers would have more time at their disposal than judges. Anyway, it may be true that better judgments result from taking many cases into consideration, but this is, I think, precisely what judges do: they cannot judge upon a case as if it were isolated from all other cases. But on the other hand, it is only as that individual case that it can be rightly judged. The judgment of lawmakers is of a

13. The object of justice is the right thing, as argued in Summa theologiae IIa Iae 57.
different kind altogether, and therefore there is really no pertinent comparison between the two judgments.

The third reason is a variation of the second: it claims that general judgments abstracted from all and any particular cases are easier to make with a detached mind than particular judgments where the judge may feel personally involved. This may be true, but again there is no relevant comparison between the abstract pseudopRACTICAL reasoning of the lawmaker and the genuinely practical reasoning of the judge. The practical activity of making a particular judgment is altogether different from the theoretical activity of considering the general rightness of types of actions in abstract terms. All Aquinas is able to bring home with his argument is that it is indeed easier to make disinterested rules of law than disinterested legal rulings. But as it is the latter that count where actual justice is concerned, it is no reason for maintaining that a rule by general laws is better than a rule by individual judgments.

In sum, it is not true, as Aquinas would seem to argue, that lawmakers are better equipped to making right judgments than individual judges are, or that the circumstances for making right judgments are more favourable in lawmaking than in making particular judgments. Two considerations are central: for one thing, lawmakers are not necessarily more virtuous than the judges; and for another thing, it is in the very nature of political decision-making that the policy laid down in a rule is not a practical judgment in act but only in potentiality. In every case it is the individual judge that turns that potentiality into actuality. Hence the authoritative government of a political community rests anyhow ultimately on the individual judgment of the servants of the law (judges and officials charged with making particular decisions). So why bother with general laws at all?

The answer is that while the servants of law are no less virtuous than the lawmakers and while the lawmakers are no more capable of giving moral guidance to the citizens than the
servants of law, the servants of law are no more perfect for that than they are. That is, they suffer from the same kind of imperfection as all men do: they cannot grasp the whole relevant reality at once, but must reason from one thing to another\footnote{Summa theologiae I* 79, 8.}, making mistakes and losing a lot in the process. Therefore, if their effort is to be for the overall common good of the community, their individual operations must be coordinated. This, again can most properly be done by issuing general rules for them to follow. These rules give direction to the servants of the law concerning the way in which they are to assess the actions of the private citizens in terms of the rules appropriate to the latter. The lawgiving authority is not morally superior, but it is politically more comprehensive than an individual judge: it seeks a more comprehensive end, and is therefore in an appropriate position to give authoritative direction to the judge with general rules.

But judges are indispensable as well. Due to the logical disparity between the general and abstract terms in which rules are issued and the particular and tangible nature of right action, the rules can attain their end only by being effectively followed. Now all citizens will not, or can not by their own effort, abide by the rules, but seek private goods at odds with the common good sought by the rules. These deviants and recalcitrants, if the policy underlying the rules is to be effective, must when necessary be watched, controlled, reminded, instructed, restrained, yes, even coerced and punished for their own edification and for public example. For all this, judges and administrators of the rules are required. And these servants of the rules become thereby part and parcel of the organization created and maintained by those same rules.

The strength of law as a method of organizing a political community derives precisely from the strong institutional
structure of the legal system. No other method of coordination—be it based on recommendations, persuasion, moral propaganda, voluntary cooperation in private organizations, or what not—has such a comprehensive array of means at its disposal where its actual implementation is at stake. John Finnis has argued that the law has a uniquely effective potential in that it can offer general fairness, security, protection, and universal enforcement, and all this with fair strength and certainty due to the comprehensiveness, pervasiveness, permanence, and coercive potential of the legal system as a whole. No other arrangement or organization can promise an effectivity like that of the law. If this is true, and if the law is indeed the only potentially successful way of ordering the whole political community to the common good, then it is practically necessary—if the common good is to be attained—that the community be ruled by law.

Our conclusion, it must be underlined, is conditional: the necessity of law depends on the inferior effectivity of all alternative means of political organization. Therefore, the conclusion that law is necessary for the common good can without qualification only be valid in the general sense that if a comprehensive organization of a whole political community in all its aspects is to be undertaken, law is on the whole the appropriate method. But where any particular task of political organization for any particular end in any particular part of any particular political community is concerned, it does not follow that law is the best, let alone the only, appropriate method, or even an acceptable method at all. Some other method of organization can always be more appropriate for a particular purpose, even if law should be the only acceptable method for the overall purpose of society.

The Rule of Law

When Finnis argues that the prospective effectiveness of law is uniquely greater than that of any other means of social coordination, he makes it explicit that this is because an enterprise of law properly includes what is often called the Rule of Law\(^\text{16}\). The law is by far the most appropriate method of political coordination because it combines a set of features like universality, certainty, flexible continuity, fairness, reliability of procedure, constant predictability of enforcement, effective and fair repression of deviants and recalcitrants, etc. All these things in combination, says Finnis, make up the principle of the Rule of Law. And it is precisely because of this unique combination of good features that the method of law, by default of any other method capable of serious competition, is necessarily to be used, if the political community is to be effectively ordered to the common good of all.

The traditional Aristotelian theory takes the conclusion we have reached through arduous argumentation as something rather evident: it is simply in the nature of the political community that it be governed by law, just as it is in the nature of the family community that it be governed by the directions of the \textit{paterfamilias}\(^\text{17}\). But why is it in the nature of the political community to be ruled by law? The answer to this question will provide us with the key to the whole notion of government by and according to law.

Of the different kinds of communities it is the community of friendship where the good is most genuinely common: everything is mutually shared between friends. Therefore it might well be argued that friendship, being in a way the most perfect

\(^{16}\)Finnis, \textit{The authority of law}, p. 136.

\(^{17}\) Different kinds of communities are on this view distinguished from each other by their respective ends and by the ordering principles appropriate for direction the actions of their members to those ends.
community, provides the model, or ultimate standard, for all human communities. But, as we already noted, it is in the nature of personal friendship that it can obtain only between a few persons. A large and complex political community – and it is in the nature of the political community to be large and complex, as it is defined as an autarkic and perfect community – cannot be ordered to the common good through personal friendship. A different ordering principle is required.

The different principle is that of a certain impersonal friendship. A simulacrum of personal friendship is created in the community so that the citizens would treat one another as if they were friends even if they are not. The principle of this civic friendship is what has come down to us as the standard of justice: that which is the right thing to do, instead of that which is befitting for friends.

An important moral aspect of government by law is that the political community is a community of morally autarkic and perfect persons, i.e., persons that have full moral responsibility for their lives. Therefore it is a requirement of justice itself that the morally responsible citizens be treated as capable of ordering their actions to rules for the common good: it must be left to their full personal discretion whether they are to act as required by the political authority or not. This can only be done by issuing lawlike rules of general application for them to follow, and only on the condition that their actions are also assessed by law enforcement officials according to the laws and by no other standard. Where the government rightly may expect the citizens to follow its prescriptions, the citizens equally rightly may expect that the government abide by its own prescriptions. A mutual trust like the one proper to friendship must obtain between authority and citizen, and as there is no personal friendship to guarantee it, it must be reinforced by the Rule of Law.

And indeed here is the key to everything we have said so far: the political community, like any community, depends for its
functioning on a minimum of mutual trust between its members. Such a trust can, in the absence of true personal friendship, only be created, maintained and augmented if the reasonable expectation of every citizen to be reasonably treated by fellow citizens as well as by the public authorities is effectively reinforced among the bulk of the citizenry. For this purpose the Rule of Law is tremendously important, for constant and certain rulelikeness in social action, combined with authoritative guarantees for enforcement against deviants, is the best catalyst for a healthy flourishing of mutual expectancies that keep the fabric of society together.

The law, in sum, seeks to motivate the citizens to act for the common good of the whole political community. This it characteristically does by laying down general rules for all to follow. If people can know the content and import of the rules, if they can trust that their fellow citizens also follow them, if they can rest assured that the public administrators and other servants of law enforce the rules as the rules themselves prescribe, a network of mutual expectancies regarding the behaviour of other members of the community is effectively created and maintained. If citizens can cherish a justified belief that they will on the average be treated as they can expect to be treated according to generally reasonable rules of universal application, they are freer to plan for their own actions in a relative security, and consequently more likely to act reasonably themselves.

If the law is to be efficacious in bringing about the common good, there must be a general trust in its being largely followed and effectively enforced. Such a trust can only come about if there is a general congruence between the rules embodied in the law, and the action of citizens as well as of public authorities. The principle of the Rule of Law provides the guarantee for the growth of such a trust: a notion of strict accordance with the prescriptions of the law gives society that stable pattern of predictability that it requires for fostering the individual effort for
civic virtue. Hence it is practically necessary, if the common good is to be attained by law, that the principle of the Rule of Law be heeded in that enterprise.

This is the prospective aspect of the Rule of Law: a sure expectancy, created and reinforced by it, that my fellows expect that I expect them to expect me to expect them to expect etc. that everyone in the political community abides by the law, enables the citizens to view their future prospects with confidence. In short, it creates a prospect of continuity and stability which relieves citizens from taking into present account many dangers, difficulties and adversities that they would have to consider in the absence of a constant pattern of interaction. Only if the citizenry at large shares a genuine and constant belief in that the law is administered according to the law, can the law be good for its purpose.

3. **ITS PRACTICAL INAPPLICABILITY**

*The problem*

The argument presented in the first part of this essay depends entirely on the philosophical presupposition that it is possible for individual human beings to act according to a law. Now it may be that all men naturally act according to the law of nature. But our case is different in that we have a real choice between acting according to the positive prescriptions of a law or not. In other words, when deliberating upon a possible action, we are asked to do what the law requires us to do in a situation like the one we are in, and that quite consciously. The crucial problem with this is that the rule extolled by the law is an abstract *theory* of what is appropriate to do in a given *kind* of situation, whereas the consequent action is a thoroughly *practical* and *particular* thing to do by precisely the *individual* person an no other for precisely
the present purpose and no other, and precisely in the *unique*
circumstances that are at hand at the precise time of deliberation
and no other. In theoretical terms, the problem is that of bridging
the logical gap between theoretical abstraction and particular
action.

Modern practical philosophy has often lost this fundamental
problem from sight, due to its own theoreticization, as it were.
Thanks to the breakthrough of modern natural science, and to the
consequent deification of the "scientific" method, it has become
fashionable to treat problems of practical philosophy as if
they were objects of a methodically "scientific" enquiry. This
has led the moderns to construe moral and political philosophy
in terms of theories concerning what is universally good or just
or otherwise appropriate, and to conceive of the principle
of universalizability – in any of its various guises – as the
centrepiece of ethical reasoning. The typical modern ethicist
claims that the appropriate thing for one to do is what would be
appropriate for others as well, should they be in one's place. Such
a way of thinking can recognize no difficulty in linking general
rules with particular actions, as the very method of assessing an
action consists in construing a rule, as it were, about its propriety.

But the perennial tradition, quite rightly I think, makes an
important distinction between theory and practice, which – if duly
appreciated – will have a considerable sobering effect on the
modern philosophical discourse about morals and politics in
general, and about the Rules of Law in particular. Our problem is,
then, how it is possible to bring the law – an act of the past by
which a general standard is fixed for universal application
in future contingencies – actually to bear on future practical
situations as they come up on particular occasions for individual
citizens.
Theory and practice

Before we begin to tackle our main problem, we must make clear how practical reasoning and knowledge differ from their theoretical counterparts. For this difference, as accounted for by the perennial tradition of philosophy, is the root of our problem.

The basic perennial conception of human knowledge is that we know things by their intelligible essence\(^{18}\). In other words, our understanding and knowledge of reality is conceptual: when we know a thing, its essential concept enters our mind, which receives it. The intelligibility of a thing lies in its essence, whereas its material substance in itself, i. e. without being informed by a concept, is unintelligible. All this is really rather obvious, wherefore we need not be detained over disputes with regard to the plausibility of the psychological theories of Aristotle and Aquinas, which have indeed been very much disputed. It suffices for us to appreciate the rather basic point that human understanding is, by its very nature, conceptual: we cannot think or speak of anything, unless we have a conception of – and consequently – a concept for it.

But our understanding is not like that of demons and angels who see the intelligibilities of things immediately and simultaneously just as they are there to be seen\(^{19}\). Human beings are corporeal creatures that must operate through flesh. Consequently human understanding also proceeds by way of the human body, more precisely through its sensitive faculties. In order for the mind to receive the abstract intelligibility of a thing, the body must first receive a sensitive impression of particular thing that is an individual actualization of its conceptual potential. And here is the difference between sensitive and intellective

\(^{18}\) Even if the theory presented here is explicitly Thomasion, one need not be a Thomist to appreciate the gist of the argument, viz, the logical disparity between the universal and the particular.

\(^{19}\) *Summa theologiae* I\(^{a}\) 58, 3.
faculties: where the intellect only can receive abstract essences, the senses can only be aware of particular, singular things. For understanding to take place, both must cooperate.

The sensations received by the outer senses are in the nervous system transformed into a sensitive image, sometimes called phantasm, of what is being sensed 20.

This image then presents itself to the mind, which abstracts from the image the intelligibility of the thing in question, which it then understands. The crucial thing to realize here is that the mind is not only dependent on the senses for information, but it also has an active role in the process or understanding: it does not simply receive an essence like the senses receive impressions, but it does a bit of its own work on the information presented to it by the senses, so as to participate in the making up of the concept which it is to understand. It follows that human concepts, while they are reflections of real essences, are partly the product of man's own making. An important consequence of this is that human concepts, being abstractions from reality, do not entirely reflect reality, but rather deflect it through the abstracting mind. Concept is not therefore identical with reality. Rather it is reality generalized, universalized, simplified, subjected to a rule. Indeed, concept is a rule of a kind.

Human concepts, then, capture things as they are as a rule, whereas the unique singular particulars, the instantia of the rule, are only understood by the human mind indirectly, not as they are in themselves but only as instantiations of the general concepts. Theoretical human reasoning considers the conceptual intelligibilities of things for the sake of truth itself, defined as correspondence with the given reality. A theoretical view is true if it correctly reflects how things are. But practical reasoning is different in that it is not exercised just for the sake of contemplating the truth, but it is put to a use. Practical reason is

that aspect of human reason that seeks an outlet in action. Where theory is contemplation of intelligibilities for its own sake, practice is doing things for a purpose. Practical reason is, then, about doing things for a purpose.

From the fact that practical reasoning consists in deliberation leading to an action, follows a radical difference with theoretical reason. Practical reason cannot proceed merely by considering the abstract intelligibilities of things. The object of practical reason is not the natural object of the mind, the conceptual abstraction of a thing, but the natural object of the senses, the particular thing that is to be done. This is because action can only be performed with the bodily faculties, and these, being bound to time and place and immediate contact unlike the mind, can only do one particular thing at a time. Doing does not take place by abstraction, and one cannot do things in general. When one does, one necessarily does singular, particular things, with particular purposes in view, and with particular and tangible consequences. In short, practical reason has a task that in a way goes beyond the very capacity of reason, i.e. to reach a genuinely particular conclusion consisting in a singular action.

Our fundamental problem is now clear: how can we choose to do a particular thing on the basis of general abstractions? This problem is at the core of all moral thinking, for the uniquely correct solution for each unique situation of practical choice is therefore practically impossible to reach. The very difficulty if not impossibility of making a correct particular judgment is precisely one of the most crucial reasons for the necessity of issuing laws for the common good of all. By way of issuing laws the political authority can try to alleviate the task of individual citizens, officials and judges included, so that these can decide according to the law, instead of being lost in the innumerable and detailed considerations that make each problem different from all other problems.
But the problem carries further. It is namely the case that the law consists in nothing but authoritative generalizations, abstractions, simplifications, categorizations, classifications, yes, conceptualizations of reality. Or to be even more precise, re-conceptualizations, as the very point of a law is to define a thing differently from how it is previously conceptualized so as to make it more amenable to social interaction. It is in the essence of law that it be a general abstraction, wherefore it naturally belongs to the realm of theoretical reason. Law is an authoritative theory of what is the right kind of thing to do in a generally defined kind of situation. It follows that the abstractions of law diverge from reality even more than ordinary human conceptualizations, being authoritative re-conceptualizations of the world. Laws do not merely reflect reality, but they seek to subject reality to the human will. This makes them incongruent with reality, with the explicit purpose of effecting a change in it for the better.

But what can be the appropriate bearing of general authoritative rules on particular actions? This problem has two related aspects: the first aspect concerns the relationship between the particular rightness and the general lawfulness of a judgment; whereas the second aspect has to come to grips how it is possible at all to determine what the law requires to be done in a given situation so that one can act 'in accordance with the law'. The former aspect is the well-known problem of equity, while the latter is the not less well-known, but for some reason less appreciated, problem of contextual determination in the interpretation of law.

Equality

Is the right thing to do always to act in accordance with the law? How do the general precepts of laws relate to justice? How

can the Rule of Law be morally or politically desirable if acting strictly by the book will often, if not always, be a wrong or unjust thing to do in the particular circumstances at hand? These questions come up if we fully appreciate the consequences of the fact that it is in the nature of laws to be general rules.

Being a general rule precludes the possibility of being an appropriate standard for every and any particular contingency. This fundamental insight has been commonplace in practical philosophy ever since Aristotle introduced his metaphor of the leaden rule of Lesbos. Laws generalize, universalize, and simplify reality by reducing the unique particular things all different from one another into categories as artificial as they are authoritative. According to laws, things and actions are forced into categories where, in the absence of every possibility of identity, a greater or smaller degree of similarity in one respect or another is the dividing line imposed by the lawgiver. Laws operate by making some of the differences between persons, things, actions, and situations, authoritatively irrelevant, and by defining some of their similarities not only authoritatively relevant but also conclusive. In other words, laws impose exclusionary reasons for action, reasons that exclude some reasons while they impose others.

The function of laws is to relieve decision-makers from taking into account all imaginable details of every problem they face. But success in this basic function entails at the same time the natural defect of laws: being intended to be applied to particular cases, they are inherently incapable of foreseeing all possible future cases, and consequently incapable of providing a suitable

22. For an illuminating discussion, vide. Noël DERMOT O'DONOGHUE, The Law beyond the law.

23. The term "exclusionary reason" has been made widely known by Joseph RAZ, 'The sense given to the term here is similar to Raz' but not necessarily identical. For a discussion of how I understand it, vide Prudentia Iuris, p. 345 pp. and p. 400 pp.
solution to every and any situation that meets the abstract description of the law. The general abstractions in which laws are written simply fail to address some of the situations that come up. It follows that applying the laws rigidly as they are sometimes leads to unjustified judgments and morally unacceptable consequences. A law may be generally just, as a theory of what is the right kind of thing to do in a given kind of case; but the same time some of its particular applications may be unjust, i.e. wrong things to do on some particular occasions.

In practical reasoning the right thing to do is what ought to be done, never mind any rules that may demand otherwise. From the viewpoint of morality this goes for rules of law as well as any other theories of what is the right kind of thing to do. Therefore even judges and other law-enforcement officials ought to follow Aristotle's suggestion and discard the rigid rule of law for the flexible leaden measure of Lesbos: equity. The particular justice of a judgment is fundamentally more important than the general justice of the law that is relevant for the judgment in question.

Now the Rule of Law would seem to demand that judgments and legal decisions be made according to the law and not according to some different standard of equity or what not. Indeed we have seen that the common good requires that laws be followed once issued, otherwise they will not be of good use. But a judgment that is wrong or unjust is also against the common good, being against the good of some citizen. Hence it is clear that the Rule of Law, if it is to be an acceptable political principle at all, must have an inbuilt facility for exceptions on account of equity: when the particular circumstances do not make an appropriate fit with the abstract circumstances described by the law, it ought to be possible, even according to the Rule of Law, to suspend the law on that particular occasion. The question only remains whether the Rule of Law can retain its credibility, and whether the legal system with such an inbuilt mechanism for
exceptions from the law can maintain its reliability in fostering stable mutual expectancies between citizens.

The obvious answer is, I believe, that the law is able to engender much more popular trust if citizens not only can expect that laws are followed, but also that laws are suspended when they would work injustice. The particular rightness of each and every application of the law is part and parcel of the Rule of Law. The political community would not be better off if were absolutely certain that all laws were followed to the letter even if their applications should be unjust. But, on the other hand, it is equally obvious that it makes a great difference how equity is practised within the legal system. It must be practised carefully and with discrimination, and as something that belongs to the system of legal rule itself: one must at least keep up the impression that the Rule of Law reigns even if exceptions from particular laws are made. One way of doing this, as popular as it is dishonest, is never to admit in public that exceptions from the law are made, and that all judgments and legal decisions are in fact based on the laws even when they really are not. Besides being dishonest, such a popular deception also underestimates the capacity of citizens for making moral distinctions. It would be morally much more acceptable to give the citizens a chance to understand that it is in the nature of laws not to be applicable to all unforeseen situations of application. This, if any would contribute to the exercise and growth of civic virtue.

**Interpretation**

The preceding discussion on equity presupposes, as well as the whole notion of the Rule of Law does, that it is possible to know what the law requires to be done in a particular situation, and to

24. Cf. the argument in Aulis AARNIO, *The Rational as Reasonable*, p. 1 pp., according to which legal certainty includes not only the notion of legality but also that of justice.
apply the law on a case at hand on the basis of that knowledge. The assumption goes, in other words, that it is possible to give a precise meaning to the prescription of the law by way of its interpretation in advance, as it were, of its application to a singular problem, and then to apply that interpretation upon a particular occasion. Nevertheless, this assumption is utterly problematic, due to the nature of the interpretation of law 25.

Before the law can be applied to a case, it must necessarily be interpreted, so as to give it a fixed meaning, because uninterpreted it only carries a general meaning that has no direct bearing on any particular circumstance but only consists in an authoritative abstraction from particular circumstances. The general prescriptions of the law must be given a particular meaning through interpretation. In such a way, it is held, the logical gap between the universality of the law and the particularity of the case to be judged can be bridged.

In modern legal theory one has traditionally assumed that the interpretation of the law primarily consists in an interpretation of its language independently from its circumstances. One has assumed that linguistic expressions, words and sentences, have clear fixed, and univocal meanings which can be universally determined, and on which the true meaning of a law can be based. But this kind of thinking is based on a grossly misleading conception of language. According to a it, lexical item in a language corresponds in principle to a given meaning, and the two invariably make a match, so that a given word always has the same invariable meaning. Accordingly, if the invariable meanings are found out by interpretation, then one can fix the correct interpretation of every sentence, too. Interpretation would be an intralingual business.

The lexico-semantic view of language has been shown mistaken by the modern hermeneutical philosophy as well as

25. For a more detailed discussion, vide Prudentia Iuris, p. 357 pp.
by the general linguistics of today. General linguistics has introduced into semantics an element of pragmatics, founded on the notion that language does not merely consist in abstract sentences but in acts of communication which must be interpreted as wholes before the meaning of any utterance can be understood. Hermeneutics, concurrently, brings attention to the fact that language acquires its meaning in a context which must be interpreted as a whole in order to catch the real meaning. Let us now look at how the interpretation of law takes place in a context.

The basic structure of legal interpretation is as follows: the law as issued is nothing but a set of possible meanings for the law; so as to find out what is the real meaning of the law it must be interpreted; the real meaning of the law is the one that makes sense in a context; hence an appropriate interpretation of the law is a result of an appropriate understanding of the relevant context. Crucial for our argument is the identification of the relevant context.

Part of the relevant context of interpretation is of course the text in which the language to be interpreted is embedded. This means that the code of law in question as a whole, and any other relevant pieces of legislation, form the textual background of a problem of interpretation. The interpretation arrived at must be one that makes sense in the text, and which makes the text as a whole make sense. But this is not enough. Other considerations, like relevant theories of value and morality, provide a further context for an act of interpretation. So that an interpretation should make sense, it must meet the relevant evaluative and moral standards. Indeed, on the most comprehensive level, an appropriate interpretation must be such that it is not too sharply at odds with the relevant social and cultural context in which it is made. We can see that interpretation is not an intralingual business at all, but must encompass a wide range of considerations not contained in the explicit language of the law.
The contexts mentioned above are amenable to theoretical reasoning in that one can be aware of them before one is confronted with making a legal judgment. In principle, one can consider general theories of value and morality, as well as one's social and cultural environment, and form an informed opinion on what, at large, the law ought to be taken to mean, with a view to all that general information. But the relevant contextual factors are not exhausted thereby. Indeed the most important part of the relevant context is strictly practical: the particular context in which the judgment is to be made. This context, encompassing the persons involved, their lives and their possibilities, the particular actions and alternative choices that are to be assessed, the particular things that are the objects of the judgment, the possible particular consequences to real persons and things that may come about with the judgment, and so forth, is the most important context, because the very point of law lies in its being applied to particular practical problems. Hence it is only natural that an interpretation of the law must, above all, make sense in each and every practical situation in which the law is to be applied. The general abstractions of law must be translated to something that has particular relevance for the case at hand. This again, can only be done from the particular facts of the case at hand.26

All this reflects the rather basic fact that, in order for a judgment to be a genuine solution for a practical problem, it must be a judgment in practical terms, in other words it must be a particular judgment for individualized reasons. A legal judgment cannot, for all that it is a legal judgment, be a judgment in general, if it is to fulfil the purpose of law itself. But a particular judgment cannot be made on general premises like the law and transcendental concepts.

26. Cf. Klaus GÜNTHER, Der Sinn für Angemessenheit, p. 28 pp., where it is argued that applying a rule on a particular case differs from the justification of that rule not only in degree, like specific differs from general, but also in kind, like singular differs from universal.
the general contextual considerations identified above; a particular judgment can only be made on account of particular reasons for action. The particular facts of the particular case are these reasons, and they provide the judge with the most crucial context in which the interpretation is embedded. It follows that the interpretation chosen by the judge, if it is to be a relevant interpretation at all, is a result of his interpretation of the facts of the case. Hence the applier of law stands in a curious situation: his supposed task is to interpret the law so that he can then apply his interpretation to the facts, but in fact he can only arrive at an interpretation of the law from an understanding of the facts; but these he, again, underestands from his previous understanding of the law. All in all, facts are interpreted from the law, and the law is interpreted from the facts.

We can see now that it is impossible to give the law a practically relevant interpretation independently from the facts on which it is supposed to be applied. There is no way of making a clear difference between interpreting the law and interpreting the facts. As a matter of fact, there is no way of applying the law on the facts, unless the facts are first applied on it. The strange but unavoidable consequence of all this is that it is logically impossible to act in accordance with the law, if by accordance is meant abiding with an interpretation of the law that has been reached in advance of being confronted with the practical situation in which one is supposed to act in accordance with the law.

In short, it is impossible to know, in advance of one's action, by which standard one should abide according to the law. The appropriate standard can only be discovered in and by the deliberation that concludes in a particular choice to act in a given way. In this very choice is included the particular interpretation of law considered appropriate for the case at hand. Contrary to general belief, we cannot first know the law and then act accordingly; more likely we first act, and then know what the law
was for the purposes of that precise action. And for each future judgment or choice the law is potentially different, no practical situation being identical to another.

Our conclusion is, then, that it is impossible to implement the Rule of Law, for the simple reason that it is not possible to act according to the law, but more likely one makes up the law while one acts. Also cases of equity turn out to be ones where the law one makes up while one acts is so different from the law that has been issued by the lawgiver that it cannot even reasonably be claimed to be an application of that law but rather an exception to it. The Rule of Law is practically necessary for the common good of all, we have argued, but at the same time it is practically incapable of being put into effect. Is it nothing, then, but a logical chimaera that keeps up a beneficent social illusion? This is our question for the final section of this essay.

4. THE IMPORTANCE OF BEING EARNEST ABOUT IT

Its democracy

A popular piece of theoretical argument as well as political propaganda has it that the Rule of Law is an important ingredient of democratic government, wherefore it ought to be regarded an important principle of political morality, rather than just a rule governing the application of laws.

The argument goes roughly like this: In democratic government, it is the citizens who govern themselves. As unanimity can rarely be reached, practical democracy must operate with the majority principle. Minorities that disagree with the majority, by the very fact that they participate in the process of decision making even if they lose, accept the outcome of the process, in the hope that in some other time or in some other question they might be in the majority. This kind of decision making procedure
is fair, and consequently it would be unfair to break the rules issued by the majority just because one disagrees with them. A particularly gross unfairness is involved, if those in authoritative positions – like judges and other servants of law – disregard the general will of the citizens and fail to act according to the laws that have been issued by the sovereign people. Therefore one should abide by the principle of the Rule of Law, and failing to do it would be undemocratic.

This chain of reasoning, rarely made explicit but more often implicitly assumed by political actors, has several weak points. Strong doubts can be raised on whether the citizens really govern themselves in any political community, be it called a democracy or something else. It can be questioned with good reason whether losers in a democratic vote in fact have incurred for themselves an obligation to abide by the conquering will of the majority. And it is clear that no sweeping statement like the one that breaking the rules made by the democratic majority is unfair can be successful by and of itself. Questions of fairness are particular problems, just as any other problems of morality, and no abstract answers suffice to solve them on any particular occasion. Indeed the whole belief in the inherent superiority of democracy to other types of government is doubtful: it should be obvious for all that a democratic way of making decisions is quite unsuitable for many kinds of situations in which public decisions must be made27.

It is possible to dispense with all these misgivings if we consider the problem purely in the abstract: democracy may be ideally so defined that the objections listed above will not apply. But then we must be clear on the fact that our argument has nothing to do with any real political community, for none of them have met, nor will meet, the stringent requirements of ideal

27. For a more comprehensive critique of democratic ideology, vide my Sananen laista, legitiimiystä ja demokraatiasta.
democracy. But even if we consider ideal democracy, the chain of reasoning presented above suffers from another problem: It is not specific to democracy. Essentially the same reasoning will be valid about every and any kind of government, ideally defined. Thus we could say equally well that the Rule of Law is essential for a good monarchy, or for a good aristocracy.

Indeed the Rule of Law is indifferent to the form of government, all it is concerned about is the common good, for which it is practically necessary. It follows that the only restriction of applicability for the Rule of Law lies in its task of promoting the common good: if strict accordance with the law would fail to fulfil this task, then the Rule of Law ought not to apply. This is the inbuilt natural exception to the Rule of Law, and it has nothing to do with whether the government is a democracy or a tyranny. For even a tyranny can be for the common good, if the relevant alternative is no political order at all.

To claim that the Rule of Law is part and parcel of democratic government may serve important strategic objectives in the political turmoils where some countries may find themselves, but deep down it is another trick by which the natural desire of the ordinary citizen to be able to trust the public authorities is surreptitiously turned into a goodwill to whatever political objectives different groups wish to promote by labelling them as democratic.

_The Rule of Constancy_

Instead of trying to underline the moral desirability of the Rule of Law with an appeal to democracy, we ought to take a closer

28. Among other things I have in mind here the recent recurring reports of the press from Eastern Europe, where the present political development and its problems are time and again referred to in terms of democratic legality and the Rule of Law.
look at the principle, so as to abstract from it the essential content that is both practically necessary for the common good – and not sheer illusion. I propose that this essential content, as it cannot be accordance with the law *simpliciter*, is accordance with the rulelikeness of the law, i.e. not so much abiding by the positive law as issued but acting in a lawlike manner.

In the course of our argument we have come to the conclusion that the Rule of Law is necessary for the common good because it fosters among citizens a web of mutual expectancies necessary for each and every citizen's reasonable pursuit of good. Now it is not so that only a rule of positive law can foster mutual expectancies: rule by any constant order will do. But the positive law is, nevertheless, an especially salient and uniquely applicable kind of order for this end, because of the effectivity of the arsenal it carries with itself for the purpose of ensuring constant application. Yet exceptionless application is not morally desirable. And what is more, any application in the way the law is supposed to be applied is, strictly speaking, logically impossible. All this lends itself to supporting the double conclusion that, for one thing, rulelikeness in social interaction must be fostered; and, for another thing, it cannot reasonably be demanded that something that cannot be done, i.e. that laws be applied according to the conditions laid down by the laws themselves, ought to be done.

Yet rulelikeness can only be effected if the citizenry can at large trust that the issued rules are followed by other citizens as well as by government officials and courts of law. As a consequence, it would seem that the only way out of the dilemma is as follows: government officials and courts of law must maintain a reasonable rulelikeness in their actions without pretending to themselves that they are following the prescriptions of the law, while outwardly they must keep up the general belief that their actions, decisions and judgments have a reasonable congruence with the prescriptions of the law. Whether it is a good
idea for them dishonestly to give the outward impression that they are in fact making their decisions according to the prefabricated prescriptions of the law, or more honestly just to make a point of underlining the fact that their actions on the whole hold the law in due respect, may depend on the political maturity of the citizenry. But in every case, while we have not reached the blessed state of the deified, it is necessary that the citizens be given the clear clue that in an important way it is the law that makes the actions of public officials meet the reasonable popular expectations of the citizenry.

It is useful, then, to maintain that it is because of the law that the reasonable expectations of the citizens are met, as it is the name of "the law" that traditionally rings "authority" and "obedience". It only remains to be investigated in what the rulelikeness really should consist in that is at play in the name of the law.

The answer, I propose, lies in what the citizens reasonably expect from the officials that are supposed to enforce the law: a reasonable satisfaction of their mutual interest in continuity, coherence, constancy, and fairness in the behaviour of public officials. To put it in simple terms, law officials must make their decisions and judgments as the citizens have reason to expect them to make them. There is no point in trying to find out what people actually expect of the government officials; an ideal standard consisting in what they have reason to expect is morally more appropriate, as well as more practicable. Now what citizens have reason to expect is of course partly based on their own reasonable opinions, but most significantly these opinions are influenced by the information they can get regarding what they can reasonably expect. A large part of this information, again, is provided by the government. Laws as issued are pieces of this information, as well as are the public – and often publicized – individual judgments and decisions made by the servants of law.
In short, the public officials, by making their judgments and decisions, give the citizens reason to expect that their future judgments in similar situations will be similar. That is at least what they are supposed to do. It follows that, if they are to fulfil their task, they ought at large to decide as they have decided earlier, to judge as they have previously judged, to act as they have acted before. In other words, they must go on as they were and are. This is what keeps the fabric of the political community together for the common good of all. Reasonably unforeseeable judgments can create uncertainty among the potentially affected citizens; therefore they ought to be avoided, and judgments made ought to have been reasonably predictable on the basis of the previous behaviour of the relevant officials in the relevant respect.

By the fact that officials act as they used to act it is not guaranteed that they act justly or otherwise morally reasonably. That they act as they used to act is, nevertheless, incrementally for the common good of the political community, unless it is shown otherwise. And the sheer fact that things go on largely as they used to, gives the citizens the sense of certainly they need for the pursuit of a good life. An additional guarantee for the constant continuity of public behaviour is that the law exclusively stipulates who is to make public decisions and how. If the law can clearly define the officials that are entitled to make authoritative decisions of supposed law-enforcement, and if the force of legal authority can in fact make sure that no outsiders can influence the judgment of these officials, and that these officials always make their judgments and decisions according to a certain predefined and familiar procedure, then it is more likely that the

29. From all this it ought to be clear that the crux in "what can reasonably be expected" is not the psychological reaction of individual citizens or the citizenry at large, but the continuity and constancy of the manner in which legal decisions are made by public authorities.
citizens can safely trust that "law-enforcement" will meet their reasonable expectations.

This is the sense, I finally propose, in which we can meaningfully speak of the Rule of Law: the rule of legal authority that effectively monopolizes and organizes the activity of public decision-making in the political community. There are two crucial aspects to the Rule of Law so understood: first there is the continuity and constancy of rulelikeness that gives the citizens the necessary conditions of predictability and certainty; and secondly there is the brute force that at the disposal of political authority ensures a clearly defined monopoly of public officials over that activity which is generally supposed to put the law into effect. But the relationship of law as issued to law as supposedly applied is indeterminate to the point of contingency, and the Rule of Law in the sense of accordance with the law as issued, is a mere figment of wishful imagination.

5. A POTSCRIPT FIVE YEARS LATER: THE SUBSIDIARY RULE OF LAW

When I first wrote the text above, the principle of subsidiarity played only a vague minor rôle in my thinking. Soon afterwards it began to take a more prominent shape as I began to ponder on the possible practical applications of the Aristotelian-Thomasian philosophy. It struck me that the common good in itself, as the abstract notion it is and devoid of universally valid particular applications, can hardly provide any concrete practical guidelines to how one is to seek the common good in a real society. Then a deeper analysis of what the common good may consist in yielded the principle of subsidiarity as the major political corollary of the philosophy of the common good. That principle, finally, turned out susceptible of being used as a rule of thumb, a measure—inexact, to be true, but still a measure—of right and wrong for
state policy and legislation. Recently I have used the principle of subsidiarity to evaluate new legislation in civil and criminal procedure, criminal law, basic civil rights, taxation, welfare relief, and other fields of government activity. Here I will only briefly outline the essence of the argument from subsidiarity and point out how the Rule of Law relates to the principle. The argument can be found only in an embryonic form between the preceding lines. Here it is made explicit.

The starting point is the Aristotelian view of morality: moral action is about making oneself, about informing one's personality be one's choices, about becoming the result of one's own actions. Hence the punchword or morality is responsibility: everyone is responsible for one's own becoming. The task of the government is to help the citizens to bear their responsibility with success, "to make citizens good" as the tradition puts it. Now the way to become good is to subject one's actions to reason. With a constant habit of acting according to reason one is virtuous, i. e. good. Such a habit can only be acquired by personal practice: one's own actions and one's own choices build up one's own virtue or vice, and no one can make another person good or evil. This applies to the state, too: no government can make its citizens good or evil by its own actions and its own choices. Hence the way a government can "make the citizens good" must be indirect: it must induce the citizens into making themselves good by their own choice. The common good, I would argue, consists precisely in that the citizens make themselves good citizens. Hence the primary responsibility for the common good lies with each citizen for his own part. and with the government only in a secondary, subsidiary manner.

Now a good citizen, according to the view at hand, is nothing but a citizen who is capable of fully bearing his responsibility for the common good: i. e. a morally free, independent and responsible citizen who is his own lawgiver, in one word an autonomous citizen. Hence the task of the government is to bring
out this freedom, independence and responsibility, not to repress it. The law is for this reason fundamentally a method of teaching the citizens to use their reason and free will in an autonomous manner. This it can do if it respects the subsidiary rôle of the state in a double sense: On the one hand, those citizens who need help for developing their own capacity for autonomy and virtue ought to be given such support, \( (\text{subsidiary}) \) which helps them to assume personal responsibility for their lives. On the other, public support to citizens ought to be a last resort \( (\text{subsidiary}) \) in the sense that the government ought always to give each citizen the chance to make his life on his own, and that every act of public support always ought to aim at making itself unnecessary, i. e. helping the needful citizen to become independent from the government.

The Rule of Law rather obviously serves the principle of subsidiarity in the first sense as it helps to provide the society with a condition of relative security, certainty, safety, foreseeability, clarity, stability and constancy. If such a condition prevails, it is easier for the individual citizen to engage in developing his own personality and morality as he can rest fairly assured that things will at large remain reliable in how they are and predictable in how they will change. This relieves him from some of the more preoccupying basic worries of everyday life a human being has if he must live in constant insecurity. The conclusion of the preceding text presents this desirable effect as the most important funcion of the Rule of Law: if the law is to fulfil its task \( \text{at all} \), it must be able to organize society in a fairly stable manner. But not just any organization will be for the true common good of all: An organization may be too lax, or too strict. In other words, the Rule of Law will not be for the common good if the content of the laws is not for the common good – except in the meagre sense that the Rule of Law with any content will always be better than no Rule of Law at all. But if the Rule of Law is to be for the true common good, the content of
the laws must meet the mean of the virtue of prudent statesmanship: just enough regulation but not too much. The right amount of regulation will match the educational level of the ordinary citizen: it will leave him with just so much responsibility and freedom as necessary in order to encourage him to assume more responsibility over himself and over the community, to learn civic skills, and to exercise civil virtue. The last thing, therefore, that the law is to do is to overtake an individual citizen's responsibility for choices he could reasonably himself bear the responsibility for if allowed to manage his life on his own. This is why I think many of the blessings of the modern "welfare state" need to be reassessed – but that would be another day and another story.

Here we must make note of a second and morally more fundamental way in which the Rule of Law intrinsically relates to the political principle of subsidiarity. The Rule of Law is, namely, also an echo of the Aristotelian notion according to which it is the law, and not persons, that govern a good political community. Often this idea is expressed in context with the polity, or the aristocratic democracy which Aristotle in a way thought the best form of government. But it could equally well be extended to the other forms of government, too: in any kind of political community, laws and principles ought to govern, not the people who make the laws and coin the principles. The thought behind this maxim touches upon the Aristotelian concept of citizen very deeply. It is part and parcel of the definition of citizen that he be free, equal and autarkic, in other words a fully responsible and self-sufficient autonomous person. It is the goal of the political community that its citizens become perfect citizens, citizens simpliciter. But while the community is on its way to that perfection, the way to come closer to it is to treat the prospective full citizens as citizens, nevertheless, imperfect as they may be: citizens secundum quid. Only if they have a sufficient sphere of responsibility as free citizens can they
practice their skills and virtues and become more perfect citizens. The necessary minimum ingredient in that sphere of freedom is that each and every one be allowed to make one's moral choices on one's own, as the only way of developing a personal morality at all is to make such choices. Yet again, imperfect as the civil virtue of the citizens is, the government must sometimes interfere and give them guidance in certain matters. But, as Aristotle was so keenly aware of, there is only one way of interfering with the life of free, equal and autarkic citizens, without encroaching upon their basic sphere of autonomy. The political community cannot be governed paternalistically like a family, where the paterfamilias has all the responsibility and his dependents none, because in the political community, by definition, there are no dependents: all citizens are equally self-sufficient. It follows that political government must not make choices for the individual citizen. Quite the contrary, when the government makes political choices, it must allow the citizens to decide on their own whether they accept those choices of not. When the government interferes with the activities of citizens, the only way of accomplishing this is by passing laws, i.e. universal rules which the citizens can know and which they are morally free to obey or not to obey once they know them.

It is only by laws that the government can appeal to the reason of its citizens. Only government by laws respects their rational human nature in the sense that it proceeds on the assumption that citizens are capable of guiding their own actions rationally, and of understanding the reasons for acting as the law requires and not contrary to it. The alternative to government by law is government by manipulation, proceeding on the assumption that the citizens are incapable of assuming the common good as their own goal and understanding good reasons for making their personal choices concur with the wishes of the government when necessary. Therefore the Macchiavellian task of the government is conceived of as choosing for the citizens and then manipulating
their actions so that they move in the desired direction even without making informed choices to that effect. The common method of manipulative government is by the stick and the carrot: when you want the citizens to refrain from something, show them a stick and watch them recoil; when you want them to go for something, show them a carrot and watch them rush. Such a government by incentive rather than by law is today very common, and is becoming more and more prevalent in the so-called enlightened world. But it is an immoral government as it treats its subjects as irrational cattle rather than free rational citizens. It is a bad government because it underestimates the capacity of citizens secundum quid to grow into citizens simpliciter. If we truly appreciate the depth of this problem, we can easily understand why the Rule of Law — as opposed to the Rule of Incentive — merits a strong advocacy, and how the Rule of Law can transcend its formal nature and acquire the position of a substantial principle of government, as a warranty for respect for the rational citizen and his primary responsibility for the common good. In that substantial sense, the Rule of Law represents that supreme reason in which the political animal is to actualize his specific potential and flourish as a full-fledged human being.
BIBLIOGRAPHY


