

**LECTURE 3:**  
**Reconceiving the Relation between Property and the Rule of Law**

**1. Review of the two earlier lectures**

The first lecture in this series used the facts of an American case – *Lucas v. South Carolina Coastal Council* (1992) – to pose a question about the possibility of a special relation between private property and the ideal we call the Rule of Law.

The case—*Lucas v. South Carolina Coastal Council* (1992)—concerned a property developer, who bought oceanfront real estate on a South Carolina barrier island, intending to develop it as residential property for resale. Unfortunately (or fortunately depending on your point of view), his plans for development were thwarted by new environmental regulations intended to protect the coastline from erosion. Mr. Lucas sued the Council under the Takings clause of the U.S. Constitution, on the ground that the regulations deprived his property of all or almost of its value, amounting therefore to a taking of property by the state. This argument was accepted by a majority in the Supreme Court of the United States.

However, my discussion is not oriented towards American constitutional law. I have been using the facts in *Lucas* in these lectures to pose a question of a different kind. Is there a problem for the Rule of Law in the impact that the environmental statute and the regulations made under it, have on Mr. Lucas's rights of private property? This is a question about a political ideal, not about a constitutional provision. The political ideal of the Rule of Law is something we value in this society (in Great Britain) even though we have nothing like the Takings Clause in our constitution. (I guess the closest we get to it is in Article I of the First Protocol to the European Convention on Human Rights, but as far as I understand it that has not been much used in property cases).

So: we don't have the American Fifth Amendment prohibiting the taking of private property for public use without just compensation, but we can still ask whether it detracts from the Rule of Law to subject property rights to restriction in this way? Does the Rule of Law favor private property? Or is the ideal of the Rule of Law neutral in this matter, given that there is law on both sides of the equation—law inasmuch as Mr. Lucas's property rights are legal rights but law also inasmuch as the restriction on development that he faces represents the application of a properly enacted statute?

The Rule of Law, we know, is mainly a formal and procedural ideal. It protects the independence of the judiciary and the proper functioning of the courts; it insists that people should have access to law; and that they should be able to rely upon fair and respectful procedures in the determination of their rights and claims. It insists that the government should operate within a framework of law in everything it does and that it should be challengeable by law and accountable through law when there is a suggestion of wrongful action by those in power. And it insists that governance should take a certain form—that is, that we should be governed on the basis of general laws laid down publicly in advance, operating as a stable and prospective framework to determine people’s rights.

In Wednesday’s lecture, I considered whether there the Rule of Law should be conceived also to have a substantive dimension besides the formal and procedural aspects that I have mentioned. And if it does, I considered whether we might think of the protection of private property as one of its substantive dimensions, perhaps alongside a broader substantive commitment to the protection of human rights. I indicated a number of reasons for skepticism about that possibility, not least that it seemed to privilege one area of law in particular over others that might be equally important for individual security and individual freedom and dignity. I said I thought it was better to let each political ideal do its own work in its own way: human rights in its way; the principle of private property for the concerns that it aims to address; and the Rule of Law for concerns about the forms, procedures and institutions of legality that cannot be conveyed by any other ideal.

And in the first lecture of the series, I considered whether we should give any credence to a distinction between the Rule of Law, on the one hand, and people using law as instrument of human rule—rule by law—on the other. Applying this to a case like *Lucas v. South Carolina Coastal Council*, it might be said that the beachfront preservation statute is an instrument used by the environmentalists as they exploit their political ascendancy in the state, and that is better than their using non-legal methods, but it is not the same as the law itself being charge—the Rule of Law as opposed to the rule of men. Property rights, it is said, represent the Rule of Law, because property rights are not the result of any human dictate: they emerge (either prepolitically in a Lockean fashion or through the evolution of the Common Law) and they circulate (in free markets) without the interposition of any authoritative act of human rule determining, on the ruler’s own terms, that such-and-such a person is to have such-and-such rights over such-and-such a resource. I expressed doubts about this and about the contrast between public law and private law that it seems to rest on. I argued that in the real world

property rights emerge from the entanglement of state action, on the one hand, and the fragmentary logic of Common Law structures on the other. In every legal system, public policy has mattered and made a difference to the articulation of property rights—either because those rights are deemed to be held from the state, or from the Crown, in the first place, or because much of the land has been collectively owned for long periods of history, or because the incidents of property, particularly modes of tenure, conveyance and exchange have been altered and developed over the years in ways that respond to the state’s interest in distribution and various others aspects of political economy, or because state guarantees have been necessary to wash out the effects of pervasive injustice in the transmission of property from one set of hands to another over the centuries. In other words, legislation like the South Carolina’s Beachfront Management Act is not the first public law intervention so far as the definition and redefinition of property rights is concerned. If the Beachfront Management Act is rule by law rather than the Rule of Law then the same has to be said, and had to be said all along, about the property rights that it purports to modify.

In *Lucas* we have property law versus regulatory law. On Tuesday and Wednesday my lectures focused on the property side of the equation, and the relation between property and the Rule of Law. In this third lecture, however, I want to turn particular attention to the statute which lies in the other tray of the balance. How, in general, should we think about regulative legislation in the light of this very important political ideal we have, namely the ideal of the Rule of Law?

I have written about this elsewhere – but it has been buried in the first issue of the first volume of an obscure journal published out of Belgium, called *Legisprudence*. In that article, I tried to criticize an anti-legislative view that is sometimes associated the deployment of the Rule-of-Law slogan in political economy and in development studies; I wanted to criticize skepticism about legislation that seems to be characteristic, for example, the World Bank’s approach to the Rule of Law. And that’s what I want to talk about today.

## **2. Legislation in the *Lucas* case**

It’s a frustrating topic because I don’t think this general skepticism is shared these days by academic or judicial commentators on the Rule of Law. There is no trace of it in Lord Bingham’s book, *The Rule of Law* for example, and I suspect that this skepticism about legislation is not widely shared in this room.

On the contrary, for good-hearted people with an open mind, if legislation is properly drafted (if it is clear and intelligible and expressed in general terms) and it is properly enacted—prospectively—and properly promulgated, and if the regulations issued under it are properly made, following the procedures laid down

in the statute and in administrative law generally, and if those regulations are then published and applied subsequently in an impartial way to individual cases without fear or favor according to their terms, then that counts as an entirely appropriate exercise under the Rule of Law. Indeed that's what we mean by the Rule of Law: people being governed by measures laid down in advance in general terms, and enforced equally according to the terms in which they have been publicly promulgated.

And that is what seems to have happened in the *Lucas* case. There was a series of statutes. A federal law, the Coastal Zone Management Act of 1972, provided a general framework of law and policy for measures of this kind, for the protection from erosion of coastlines and beaches. In 1977 the South Carolina legislature enacted state law under these auspices—making provision for the regulation of coastal areas in the interest of the environment, setting up administrative agencies, and providing a framework for the specification of areas where land was to be zoned and where permits were to be required for development. In 1988, pursuant to the finding of a Blue-Ribbon Commission that some of the beaches on the barrier islands were in a critical state, South Carolina enacted further legislation called the Beachfront Management Act, authorizing the South Carolina Coastal Council to draw new lines delineating where seaward development would be prohibited or restricted. The council subsequently drew a line in the sand on the landward side of Mr. Lucas's property, in effect prohibiting him from building anything other than a small deck on the land that he owned.

It seems to have been a careful and scrupulous process, both at the various legislative stages and at the administrative stage. True, Mr. Lucas bought his property in 1986, a year or three before the new legislation came into force. But he was not a neophyte in these matters. He was already part of a larger "Wild Dunes" conservation consortium, and like all its members he was almost certainly thoroughly attuned to the legislature's interest and concern about beach erosion. Moreover the property he purchased in his own name was "notoriously unstable," as Justice Blackmun pointed out in his dissent in the *Lucas* case:

In roughly half of the last 40 years, all or part of petitioner's property was flooded twice daily by the ebb and flow of the tide. ... In 1973 the first line of stable vegetation was about halfway through the property. ... Between 1981 and 1983, the Isle of Palms issued 12 emergency orders for sandbagging to protect property in the Wild Dune development. ... Determining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect

condominium developments near petitioner's property from erosion; one of the revetments extends more than halfway onto one of his lots.

In other words, Mr. Lucas was not exactly sand-bagged by the Council's eventual intervention to safeguard the eroding beaches in the immediate vicinity of his property.

To me, it seems that the whole business was conducted lawful and with proper legislative propriety. The legislative purposes were good ones and they are very clearly articulated in the statutes, there were phases of legislative deliberation, there were public commissions, there was the usual notice-and-comment period for agency rule-making, and there is no indicating at all that the Coastal Council's determination as to the line that was to be drawn landward of Mr. Lucas's property was anything other than an impartial and reasonable (and, from a procedural point of view, perfectly regular) application of the state, fully responsive to its articulated concerns.

There is of course a very strong current in Rule-of-Law theory that is on the lookout for administrative irregularities and for statutes that facilitate them by conferring too much untrammelled discretion. That is as it should be, in light of the formal and procedural principles associated with the Rule of Law since Dicey. But that is not the concern here. If the Rule of Law is to take Mr. Lucas's side in the dispute, it has to be on the basis of some objection to legislative intervention as such. It has to be on the basis of a view that there is some affront to the Rule of Law in the very idea of enacting a statute that has this sort of impact on property rights. No matter how scrupulously the statute is drafted, the position we have to contend with is that there is some direct affront to the rule of law in the exercise in this sort of legislative power.

How can that be? As I said, for many of us, the enactment and enforcement of a properly drafted statute is the essence of the Rule of Law. It is exactly the sort of activity to which (for example) Lon Fuller's famous eight principles of the Rule of Law—the inner morality of law—are properly directed. Generality, clarity, constancy, publicity, prospectivity and practicability—these are in fact all best understood as virtues of legislation; indeed for those of you who remember (from your jurisprudence classes) Fuller's articulation of those principles in his 1964 book, *The Morality of Law*, they were articulated precisely as a discipline incumbent on a legislator, Fuller's rather hapless King Rex.

### **3. Stability, prospectivity, and the Rule of Law**

Is there anything in Fuller's conception, or the way it has been developed by people like Raz, Finnis, and Bingham, that might explain the uneasiness over

legislation? Well, if we stick within the framework of formal and procedural principles, two considerations may give us pause.

Number one: legislation is something that can be enacted quickly and easily within most legal systems, and as such it may be at odds with the stability that Fuller's principles command and the predictability that the Rule of Law is supposed to promote. South Carolina enacted one statute in 1977 and amended it in 1988, when a public Commission determined that the Coastal Council needed greater powers in light of the perceived urgency of the problem. Is that an affront to stability? Is that an excessively destabilizing change in the law. I doubt whether many of us, familiar with cycles of public and legislative attention, would judge it so. But I'll talk more about these rhythms and cycles towards the end of my comments today.

Second possibility: Mr. Lucas bought his property in the period intervening between the two pieces of South Carolina legislation. The first statute was enacted in 1977 and its planning ramifications were clear by the time Lucas bought his two residential lots in 1986. But the second piece of legislation, enacted in 1988, applied to all property on the oceanfront including his. Does that mean there was an element of retrospectivity?

It has sometimes been said that the Takings Clause works in tandem with the *ex post facto clause* in Article One of the U.S. Constitution so that between them they cover all forms of retroactivity. It was settled long ago (in a 1798 case called *Calder v. Bull*) that the *ex post facto* clause covers only criminal legislation (though in recent years Justice Thomas has intimated that he, for one, might be willing to revisit the issue).

But I don't think it's a case of retroactivity, any more than I think that a statute changing the speeding fines is retrospective with regard to my operation of an automobile I purchased several years ago. Certainly Mr. Lucas had not commenced any development work on his property before the second statute was passed.

I said earlier that Mr. Lucas knew perfectly well that the legislation on beach erosion was in flux, and that it was quite likely that property such as his might be affected. I don't quite want to get into the position that some courts have reached when they have indicated that attention to the trajectory of law reform, or public dissatisfaction with a law, or to notice given by politicians in press conferences, or attention to law reform in adjacent states can substitute for the notice associated with formal promulgation. (You'll know the cases I am talking about: the marital rape case in UK; the Australian ban imposed retroactively on white powder hoaxes

in the wake of 9/11; and the abolition state-by-state in the US of the year-and-a-day rule that was at stake in 2001 in *Rogers v Tennessee*.)<sup>1</sup>

I don't want to go down that road. Retroactivity is not cured by notice of the intention to change the law

But I really think that it is inappropriate to apply the principle prohibiting retroactive legislation to statutes that affect the use of land purchased or inherited before the statute was passed. Though some property circulates quickly, almost as a commodity, other land remains in the stable possession of a single owner or a single family for generations, and it would be quite wrong to say that the legal situation with regard to the use of that land must remain stable and unchanged throughout that period. Much better to say that one who comes into possession of a piece of land necessarily is aware that what he can do with it will be changed and affected by the rhythm, of ordinary law-making from time to time. People know that there are such things as environmental concerns—particularly people in Mr. Lucas's position. They know that those concerns are seen as urgent and compelling; and that they evolve over time, both in their underlying principles and in terms of environmental strategy. This comes as no surprise. It is part of general civic responsibility to be alert to these matters and to adjust one's expectations according so far as those concern what you can do with your property.

#### **4. Concerns about Legislation**

So if it is not the retroactivity of the impact or the frequency of the enactments, then what is the concern about legislation?

No one doubts that a statute can undermine the Rule of Law.

If you want an example, you can look at the statute enacted in New Zealand in the wake of the first Christchurch earthquake in 2010, the Canterbury Earthquake Response and Recovery Act, that provided (among other things) that the Crown could suspend the operation of any statute—apart from a dozen or so that were listed, including the New Zealand Bill of Rights Act—if that statute threatened to “divert resources away from the effort to efficiently respond to the damage caused by the Canterbury earthquake.” And we are all sickeningly familiar with occasional attempts by legislators to remove legal remedies, obstruct the operation of the courts, or preclude judicial review of executive action, etc.<sup>2</sup>

But this is not legislation as such; this is a concern about the content of particular enactments. So let's see if we can get a feel for this broader

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<sup>1</sup> 532 U.S. 451 (2001), get other cites from JW on retroactivity

<sup>2</sup> Consider, for example, the Military Commissions Act 2006, in the US, limiting the application of habeas corpus and hence the opportunity to review the legality of indefinite detention authorized by the executive (10 USC 950a).

discomfort—the sort of discomfort you find in Hayek’s later work, for example<sup>3</sup>—at the level of general jurisprudence.

I wonder if it is a concern about voluntarism, the role of human will and agency in a legal system. Legislation is a matter of *will*, -- so much a matter of will that it seems ill-suited for celebration under the auspices of a political ideal whose purpose many understand to be the taming or subordination of will in politics. The legislative process produces law simply by virtue of a bunch of politicians *deciding* that law is to be produced. As I said in *The Dignity of Legislation*, there does seem to be something brazen about this:<sup>4</sup> “We have decided that this will be the law; so it is the law. And what the law is from now on is exactly the content of our decision.” And this is said by the very men—powerful politicians—to whose rule the Rule of Law was supposed to be an alternative.

Admittedly, this apprehension about sheer voluntarism or decisionism under the cloak of law can be applied to other legal sources as well. There are similar apprehensions about activist judges who understand their own power in purely decisionist terms.<sup>5</sup> Rule by judges, also, is sometimes seen as the very sort of rule by men that the Rule of Law is supposed to supersede.<sup>6</sup> When Justice Stevens of the US Supreme Court wrote, in his dissent in *Bush v. Gore* (2000), that the true loser in that case was the Rule of Law, he meant precisely to contrast that ideal with a decision of a willful and politically motivated (or at best lawlessly and pragmatically motivated) majority of his brethren on the bench.<sup>7</sup> But although this cynicism about the law can be turned in this way against judicial law-making, it is

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<sup>3</sup> Discomfort about legislation as such is most clearly expressed in Hayek’s later work, where he draws a pretty sharp contrast between the concept of law and the concept of legislation, and suggests that the rule of law comes close to meaning the opposite of the rule of legislation. F.A. Hayek in his later work contrasts law with legislation, and suggests that the rule of law comes close to meaning the opposite of the rule of legislation. See Hayek, *Rules and Order*, Volume 1 of *Law, Legislation and Liberty* (University of Chicago Press, 1973), 72-3 and 124-44. In Hayek’s earlier discussions of the rule of law, e.g. in *The Constitution of Liberty* (University of Chicago Press, 1960) 157, this is discernible (just), but it is very muted. Mostly, the conception of the Rule of Law presented in the earlier book could be applied quite naturally to legislation, whereas the later work evinces great hostility towards legislation and legislatures.

<sup>4</sup> See Waldron, *The Dignity of Legislation*, at 12 and 24.

<sup>5</sup> See, e.g., Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 *Harvard Law Review* 1, 11-12.

<sup>6</sup> See the discussion in Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?” (2002) 21 *Law and Philosophy* 137, 142-3 and 147-8.

<sup>7</sup> “It is confidence in the men and women who administer the judicial system that is the true backbone of the Rule of Law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the Rule of Law.”— *Bush v Gore*, 531 U.S. 98, at 128–129 (Stevens J., dissenting).

more common (and more easily available to lazy minds) as turned against legislation.

Yet another way of capturing the same uneasiness, underlying this hostility towards legislation, is to think about the relation between legislation and the state. The Rule of Law is commonly seen as a way of limiting the power of the state, keeping the power of the state under control. But legislation is normally understood as one of the most important aspects of the power of the modern state. It is not the sole mode of state action, but with regard to the more important policies of the state, it is often an indispensable step in policy implementation. What legislation does is mobilize governmental and administrative resources for the achievement of governmental aims: when the state needs something done, legislation is usually step in the doing of it.<sup>8</sup> It is something the state controls and manipulates as a tool for its own purposes. But, it is said—and this again is a common theme in connection with the issues we are considering—the value we place in the Rule of Law is not in the rule of state law. Instead what we want is a rule-of-law state, and that is something quite different.<sup>9</sup>

So: if legislation is viewed just as a governmental directive, then – these people will say – then maybe it *is* a mistake to regard enforcement of and compliance with such directives as signifying anything very important in relation to the Rule of Law. Enforcement of and compliance with legislation would be a measure of how powerful and effective the state is, and how well organized its apparatus is. But it would not tell us much about controls on that apparatus, and that is mostly what we want to know under the heading of “the Rule of Law.”

I mentioned a little while ago F.A. Hayek’s antipathy to legislation, and suggestion that rule by legislation represents almost the opposite of the Rule of Law.<sup>10</sup> According to Hayek, the legislative mentality is inherently managerial; it is oriented in the first instance to the organization of the state’s administrative apparatus; and its extension into the realm of public policy generally means an outward projection of that sort of managerial mentality with frightful consequences for liberty and markets. And that, says Hayek, is the very thing the rule of law is supposed to oppose. The rule of law, he says, refers to an order of impersonal norms that emerge and evolve, more like common law,<sup>11</sup> rather than norms that

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<sup>8</sup> Ed Rubin, “Law and Legislation in the Administrative State” (1989) 89 *Columbia L R* 369, 372-3.

<sup>9</sup> Robert Cooter, “The Rule of State Law versus the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development,” in E Buscaglia, W Ratliff, and R Cooter, *The Law and Economics of Development* (JAI Press, 1997), 101.

<sup>10</sup> F. A. Hayek, *Rules and Order*, Volume 1 of *Law, Legislation and Liberty* (Chicago, University of Chicago Press, 1973), 72-3 and 124-44.

<sup>11</sup> The view under consideration is associated affirmatively, with a celebration of something like the Common Law.

are posited and manufactured and come bearing legislators' names like, I don't know, the McCain-Feingold Act. Legislation may occasionally be necessary if law's implicit development has led us into a some sort of *cul-de-sac*, but this acknowledgement by Hayek is grudging;<sup>12</sup> it's a reluctant recognition that it may sometimes be necessary to compromise the rule-of-law ideal rather than a recognition of legislation's place in that ideal.

## 5. The World Bank Approach

I mentioned in Lecture One the use of Rule-of-Law indexes to rate countries for the benefit of investors and others seeking to do business in a particular legal or commercial environment. On these indexes, the extent of a society's adherence to the rule of law is not determined (or determined only in very small part) by the effectiveness of its enforcement of existing legislation (or its capacity to enforce future legislation); many of the measures it uses for the Rule of Law could have been used in the time of Adam Smith, without regard to the rise of the modern legislative and regulatory state and the concerns that underlie it.<sup>13</sup>

Indeed, it is often implied or sometimes even explicitly stated that a society's score on a Rule-of-Law index may be diminished by the effective enforcement of legislation if the tendency of such legislation is to interfere with market processes or to limit property rights or to make investment in the society

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Needless to say, in this celebration, the rule-of-law difficulties of the Common Law—its opacity, the ad hoc character of its development, its unpredictability, its inherent retroactivity—are conveniently forgotten. For good accounts, see Bentham, *Of Laws in General*, ed. H. L. A. Hart (Athlone Press, 1970) 184-95 and Gerald Postema, *Bentham and the Common Law Tradition* (Oxford UP, 1986), 267-301.

<sup>12</sup> Hayek, *Rules and Order*, 88-89.

<sup>13</sup> The view I am considering comes in various shapes and sizes, and, as I said, it is not always explicit. Sometimes the antipathy to legislation is apparent only by what is emphasized and what is omitted in a stated conception of the rule of law. According to James Wolfensohn, when he was President of the World Bank, the Rule of Law means that

A government must ensure that it has an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system. James Wolfensohn, quoted by Upham, at 10.

What is missing here? Well, compliance by business, industry, and commerce with legal regulation of the marketplace and with limitations placed on the use of property (e.g. for ecological reasons). Compliance with legislation, the enforcement of regulations—these aspects of the rule of law are deafening in their silence here. Indeed, by its terms, Wolfensohn's conception is a measure of the rule of law that could have been used in the time of Adam Smith, without regard to the rise of the modern legislative and regulatory state and the concerns that underlie it. In a well-known series of studies under the heading, "Governance Matters," Kaufman, Kraay, and Lobatón use as the basis of a rule of law index "several indicators which measure the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts." -- D Kaufman, A Kraay, and P Z Lobatón "Governance Matters," (2005) *World Bank Policy Research Working Paper* 3630, 130-131, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=718081](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=718081) (visited January 18, 2007).

more precarious or in other ways less remunerative to outsiders. The rule of law, on this view, requires a government to offer assurances that it will not legislate in this way or that it will keep such legislation to a minimum; it may call for legal and constitutional guarantees for property rights (and perhaps also for other rights) against legislative encroachment; and it may require provision for judicial review, that is, for offending legislation to be struck down by courts.

Those who take this approach acknowledge that some deliberately crafted law is necessary. It is important for example that there be a clearly articulated criminal code. (Even Rule-of-Law theorists who model their ideal on unlegislated private law are not comfortable with the idea of common law offences.) And often, in a developing society, legislation is necessary in order to establish the institutions and procedural frameworks through which law operates, and by which legal rights are protected, and maybe also to establish clear procedures and expectations in the area of corporate law, bankruptcy and so on.<sup>14</sup> Still, the idea is that we can distinguish between legislation as a framing and facilitating device for the autonomous operation of a well-functioning legal system, and legislation as a medium through which regulatory or public policy goals are pursued. Legislation of the latter sort *is* inherently subject to suspicion from the point of view of the World Bank approach to the Rule of Law, for it threatens radically to limit or undermine the property rights, market arrangements, and investment opportunities which law is supposed to frame and guarantee.<sup>15</sup> What people have in mind here is environmental legislation, legislation favorable to labor, restrictions on freedom of contract, restrictions on investment or on profit-taking, legislation nationalizing assets or industries, price restrictions, and so on.

The view we are considering is one element in a more general approach to economy and development, associated with what is sometimes called the Washington Consensus.<sup>16</sup> On the this account the whole point of the Rule of Law is the promotion of market institutions and the establishment of an atmosphere

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<sup>14</sup> See e.g. Katharina Pistor “Company Law and Corporate Governance in Russia,” in Sachs and Pistor (eds) *The Rule of Law and Economic Reform in Russia* (Boulder, Westview Press, 1997), 165.

<sup>15</sup> For example, see Shihata, “Relevant Issues,” 205: “An over-regulated economy undermines new investment, increases the costs of existing ones and leads to the spread of corruption. Multiplication of laws and regulations often reduces their quality and the chances of their enforcement. The absence of judicial review, or its high cost ... add to the negative impact.”

<sup>16</sup> See, for example: J. Williamson, “Democracy and the ‘Washington Consensus’” (1993) 21 *World Development* 1329. (I am obliged to J. M. Ngugi, “Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse” (2005) 26 *University of Pennsylvania Journal of International Economic Law* 513, 599 for this reference.)

conducive to profitable investment.<sup>17</sup> Concomitantly, the thought is that we need to keep legislation and the propensity to legislate under very firm control. And it would be good (these people go onto say) if that control could be exercised under the auspices of the Rule of Law—an ideal that is so popular, conveys so many good vibrations, and commands such support across the political spectrum.

## **6. Democracy and development: giving priority to the Rule of Law?**

You don't find a lot of this in academic writing about the Rule of Law, but, as I have said, you will see it in journals of political economy, or in World Bank literature, or in development studies

It is often expressed in this literature as a view about democratization. Those who espouse the view I am considering may concede grudgingly that societies have a legitimate aspiration to govern themselves. They may accept that a modern society does need eventually to set up and operate a representative legislature. They will recognize this as part of the normal aspiration to democracy. But it would be good, some of them say, especially in the early stages of nation-building, if such institutions could be confined to playing a marginal role in the governance of the society, for fear that they will undermine the development or marketization of the country's economy. On Tuesday I mentioned the work of Robert Barro, a political economist at Harvard, who believes that the main value of Rule-of-Law indexes is to provide information on country risk to foreign investors. Barro also believes that the empirical evidence supports the assertion that “democracy is a moderate deterrent to the maintenance of the rule of law.”<sup>18</sup>

So that in his view, this suggests at the very least an order of developmental priorities: democratization should take second place to legalization in nation-building.<sup>19</sup> And if legalization—the building of Rule of Law has priority over

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<sup>17</sup> The literature is very extensive. For examples, see: Thomas Carothers, “The Rule of Law Revival,” (1998) 77 *Foreign Affairs* 95; Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, Carnegie Endowment, 1999); Robert Barro, “Determinants of Democracy,” (1999) 107 *Journal of Political Economy* S158; I Shihata, The World Bank and ‘Governance’ Issues in Its Borrowing Members,” in F Tschoben, and A Parra (eds) *The World Bank in a Changing World: Selected Essays* (Boston, Martinus Nijhoff, 1991) 53; Shihata, “Legal Framework for Development,” in *The World Bank in a Changing World*, Vol II (Boston, Martinus Nijhoff, 1995) 127; and I Shihata, “Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy,” in Shihata, *The World Bank in a Changing World*, Vol III (Boston, Martinus Nijhoff, 2000) 187.

<sup>18</sup> Robert Barro, *Getting It Right: Markets & Choices in a Free Society* (Cambridge, MIT Press, 1996), 7. He continues: “This result is not surprising because more democracy means that the political process allows the majority to extract resources legally from minorities (or powerful interest groups to extract resources legally from the disorganized majority.”

<sup>19</sup> Barro, at 11: “[T]he advanced Western countries would contribute more to the welfare of poor nations by exporting their economic systems, notably property rights and free markets, rather than their political systems, which typically developed after reasonable standards of living had been attained.”

democracy, why then it must also have priority over legislation which is the work-product of democracy. That's why, on Barro's view, we are compelled to signal this priority with a conception of the Rule of Law that distinguishes it from the enactment and enforcement of statutes.

### **7. Legislation as a transparent and legitimate mode of law-making**

Well what should we say about all this? As you would expect from someone who authored a book called *The Dignity of Legislation*, I have very little patience with it. Indeed, to my mind, it is very odd that the effective operation of a legislature should be separated in this way from the rule of law. And now I am going to go over onto the offensive..., (but in a way that requires us to step back for a moment and to consider the general topic of legal change.)

We know that, in any legal system, legislation is not the only source of law, not the only source of legal change. Law also comes into existence and changes in a society through the decisions of courts, through executive rule-making, and through the signing and ratification of treaties. But the legislature occupies a pre-eminent role in most legal systems, largely due to the fact that it is an institution set up explicitly—dedicated explicitly—to the making and changing of the law.<sup>20</sup> Though the law-making role of the courts is well known to legal professionals, judicial decision-making does not present itself in public as a process for changing or creating law. Judges constantly assure the public—disingenuously, we (insiders) know, but constantly—that their role is to find the law, not make it. Law-making by courts is not a transparent process; law-making in a legislature by contrast is law-making through a procedure dedicated publicly and transparently to that task. This ought to matter. One of the most important things about the Rule-of-Law ideal is its emphasis on transparency in governance, and one would think that that would be important in the present context as well.

Not only that, but one would think that if the Rule of Law requires that law be taken seriously and held in high regard in a society, then particular emphasis should be given to the legitimacy of the processes by which legislatures enact statutes. Again, think of the contrast with courts. Not only do judges pretend diffidently that they are just finding not making the law, but we know also that any widespread impression among members of the public that judges were acting as law-makers would seriously detract from the legitimacy of their decisions.

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<sup>20</sup> See also Jeremy Waldron, "Principles of Legislation," in Bauman and Kahana (eds) *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, Cambridge University Press, 2006), 15, 22-3.

And this popular perception is not groundless. Courts are not set up in a way that is calculated to make law-making legitimate. Legislatures, by contrast, are organized—and occasionally reformed and rehabilitated—explicitly to make their law-making activity legitimate. If we think that the operation of the electoral system has led to some section of the community being wrongly disenfranchised so far as legislative representation is concerned, that will be widely regarded as a reason for reforming a legislature. We want our laws to be made in an institution that properly represents us all. In this and other ways we pay constant attention to the issue of the legitimacy of the legislature as a law-maker; and by doing this, we ensure that there is something to be said to a citizen who opposes a new law why it is fair nevertheless to require him to submit to it. We pay attention to the legitimacy of courts, too, but not to their legitimacy *as law-makers*; instead we look at issues like fairness *inter partes*, and to issues about procedure and delay, and perhaps also to the substantive rationality of decisions. But since we know that the law-making of courts can bind the whole community on the basis of a decision responsive only to the arguments of two parties, this is a very curious way to go about securing legitimacy for legal change.

In general, legislation has the characteristic that it gives ordinary people a sort of stake in the rule of law, by involving them directly or indirectly in its enactment, and by doing so on terms of fair political equality. De Tocqueville remarked on this in his early observation of America: if you want to instill respect for law, he said, making law through elective processes is one of the best ways to do it.<sup>21</sup> Of course every law will have its opponents, those whose representatives were outvoted in the relevant session of the legislature. Still, as de Tocqueville said, “in the United States everyone is personally interested in enforcing the obedience of the whole community to the law; for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own.”<sup>22</sup> But if legislation is denigrated as a source of law for the purposes of the Rule of Law ideal, then it is not at all clear where the respect for the law, which the Rule of Law requires, is supposed to come from.

## 8. The Rule of Law, legal change, and human agency<sup>23</sup>

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<sup>21</sup> Alexis de Tocqueville, *Democracy in America* (New York, Knopf, 1994), 244-8 (Volume I, Chapter 14).

<sup>22</sup> *Ibid.*, 247.

<sup>23</sup> Ronald Cass: “The ways in which systems manage changes in property rights and in legal rules that affect property rights ... are the keys to the effectiveness of the rule of law. But the rule of law does not bar change nor does it forbid discretion. Change is a natural part of any legal system, and efforts to limit change must be seen not as ends in themselves but as part of a larger framework for assuring predictable, valid, law-based governance.” (p. 2)

Objections to legislation that go beyond retail concerns about rent-seeking and so on—objections to legislation that rest on the perception of some sort of wholesale incompatibility between legislation and the Rule of Law tend to make the element of human *agency* pivotal. Legislation is the political construction of law—intentionally and explicitly. Those who feel this discomfort want the Rule of Law to find and accredit modes of legality that manage somehow to eschew political agency, because they think that any concession to human agency undermines the celebrated distinction between the rule of law and the rule of man. And so they look to the Common Law as an emergent evolving body of law and they look to markets in which property rights circulate autonomously without political intervention

Of course there is agency in a property market. But, it is not the agency of politicians inventing and imposing a particular vision of how things should be distributed. There is only the agency hundreds of thousands of individuals working through a given legal framework – as buyers and sellers, landlords and tenants, mortgagors and mortgagees. And this agency of individuals is not supposed to pose a problem, because it is exactly the kind of thing that the elimination of political agency is supposed to make room for. It’s slightly harder to make the case that the common law operates apolitically. After all judges are political officials—in a sense—and the law at any time is the resultant of hundreds of judge-made decisions. But again, it is thought the case-by-case incremental nature of this decision-making avoids at the imperious and comprehensive visions that legislators aspire and that seek, by their human rule to impose.

Myself—I am skeptical about the very idea of eschewing human agency in our conception of the Rule of Law. The Rule of Law is about law and governance and it is necessarily oriented to what is done—to what people do in—in the way of governing themselves or each other. We fantasize sometimes about a society being ordered acephalously, without deliberation or deliberate decision, being ruled (as it were) directly by morality or by immemorial traditions and mores that no one has responsibility for. This is the fiftieth anniversary of the publication of *The Concept of Law*, and morality, as Hart reminded us Chapter 8 of that book is immune from deliberate change. This is as true of the embedded positive morality of a society as it is of the real moral reasons, values and principles that constitute what Hart called critical morality or that we might call morality *tout court*.

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“Property rights will not be secure if the law governing them is subject to change. Much of the rule of law focuses on predictability, and so, too, much of the security for property turns on predictability. .... Yet, it is not the mere fact of changes in the law that makes this so. There is no way to bar change in the law or to make property rights absolutely secure against such change. And no legal system has done that.” (Cass, p. 15)

Positive mores may change gradually but not as result of deliberation or deliberate human agency. The introduction of law by contrast is the deliberate introduction of the possibility that changes may be made in the way that a society is ordered. That's part of the what law means, on Hart's account; the union of primary rules of conduct, which may once have been immemorial, with secondary rules that empower a society to take responsibility for the primary order, adapt it flexibly to changing social conditions, and keep track of and monitor the changes that stand in the name of us all through a rule of recognition. That's what law essentially is and the principle we call the Rule of Law can't be in its essence antagonistic to that. It is essential to law that it be susceptible to deliberate change, and though the Rule-of-Law ideal may patrol that and discipline it, it cannot be understood as an ideal designed to preclude such change.

Hayek says that this emphasis on change is already infected by a positivist mentality—no wonder that it was sponsored as an essential element of law by the arch-positivist or the arch modern positivist H.L.A. Hart. But, Hayek reminds us, positivism is just one option in jurisprudence, and he thinks for various reasons (some of them good, some of them bad, that it is a discredited option.

But do things really look any different if jurisprudence swings to a more natural law, anti-positivist point of view? It may seem so. The Rule of natural law seems a wonderful paradigm of legal stability—a timeless and objective law, built into nature or the real moral structure of the world, or the enduring commands of an eternally faithful God. It doesn't change, and certainly we cannot change it. As John Finnis puts it in *Natural Law and Natural Rights*, “of natural law there could be strictly speaking no history.”<sup>24</sup>

But appearances are deceptive, and this inference of stability from a hypothesis of natural law is a mistake, for two connected reasons.

First: if circumstances are changing, then the ultimate deliverances of natural law (so far as concerns, for example, who has what natural property rights) will change too: a constant set of principles applied to changing circumstances (where the principle is formulated in a way that is sensitive to the relevant circumstances) will lead to changing results. When population changes drastically, expanding (say) from the thousands to the millions; or when climate changes with inundation or desertification, bringing new and unprecedented dilemmas of resources use, then the application of constant principles will not yield constant results.

And anyway, secondly, even if natural law has no history, our understanding of natural law has a history – we may have got it wrong (in principle or in application) in the past, and now we have to change what we say it implies, our

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<sup>24</sup> Finnis, NLNR, cite.

sense of what it implies, to reflect the repudiation of our errors. Natural law was thought by some people to sanction slavery or the subordination of women; now we know better. Our sense of natural law has a history, even if the abstract principles laid up in heaven (which have sometimes managed to elude our understanding) are themselves timeless in character.

So any human legal system that purports to be based on natural law cannot eschew the agency involved in deliberation or deliberate change, for fear of embedding its own errors or for fear of being unresponsive to the varied ways in which constant moral reasons interact with changing circumstances.

The point here is not to convince you to take a natural law approach. But to show that nothing in particular turns on one's jurisprudential choice in this debate between positivism and natural law – on either account, we have to set ourselves up to accept and consecrate flexible law, changeable law, including law changing deliberately through explicit thought and social decision, including in other words legislation.

So, when Justice Kennedy said in his concurrence in *Lucas v. South Carolina Coastal Council* that “[t]he State should not be prevented from enacting new regulatory initiatives in response to changing conditions” and that “the Takings Clause does not require a static body of state property law....,” that is as true on a natural law approach as it is on a positivist approach.

### **9. The importance of social and economic legislation<sup>25</sup>**

Some will say that, even if all this is true of law in general, there is a case to be made for slowing down the pace of change and minimizing the impact of change on rights of private property and the operation of free markets, for it is in these areas that security of expectation is particularly important and the confidence of proprietors and investors must particularly be paid attention to.

In my lecture yesterday, at the University of Warwick, I addressed this theme of the stability of property that is required for market economy. I acknowledged the truth of the point that you can't have a market in any good or commodity, including land, without a clear sense of who is entitled to sell a piece of land—who is, at the moment of any given transaction, its owner. That has to be determinate and we have to have clear rules for the passage of a given item from one person's ownership to another. Otherwise markets are impossible. But I said it doesn't follow law has protect the value of any given item of property, in order to facilitate market transactions. I said that that would more or less make a nonsense of the very idea of a market, where prices are established as a resultant of

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<sup>25</sup> See also Jeremy Waldron, “Legislation and the Rule of Law,” *Legisprudence*, 1 (2007).

hundreds of thousands of transactions in changing circumstances and are not under anyone's control. If uncertainty is the issue, then markets can monetize uncertainty. And the monetization of uncertainty can be as sensitive to probabilities concerning legal change as they are to probabilities concerning cyclical economic decisions.

A case can perhaps be made that the establishment and protection of property rights is one of the paradigmatic functions of law: this function for law responds to some of the most elementary circumstances of the human condition such as our need for resources, our limited altruism, and the need to mitigate what David Hume called "the easy transition from one person to another ... of the enjoyment of such possessions as we have acquir'd by our industry and good fortune."<sup>26</sup> It is part of what H.L.A. Hart called "the minimum content of natural law."<sup>27</sup> All this, we can grant.

But it is inevitable in the world we live in that the nature and legitimacy of property rights will be affected over time by changes in circumstances, both in their character and in their distribution. The exploitation of land and other natural resources in a way that ignores public goods or the prospect of great public evils is not always tolerable. And the pace of our recognition of this is going to have to accelerate in breadth and intensity over the next fifty years if decent conditions of life are to have any chance of surviving man-made changes in climate that are presently afflicting us.

Likewise extreme and growing inequalities are not always tolerable. The basis on which private property rights were initially allocated may turn out to be inequitable in light of changing circumstances or they may always have been inequitable, and market circulation may have done nothing to reduce that inequity.

For example, the transition that many societies in Eastern and Central Europe and the former Soviet Union have undergone from collective property arrangements to a private property economy is one that needs careful and continuing management and scrutiny, for the first steps that were taken have not always proved to be the steps that the society can be expected to live with in perpetuity. The broad social consequences of privatization in various areas are not always easy to foresee. Eventually inequalities become intolerable.

And thirdly, what markets can and cannot produce, and how efficient they are (or what social goals they promote or retard in various circumstances) are not always calculable *a priori*. This too varies over time and with circumstances, in

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<sup>26</sup> David Hume, *A Treatise of Human Nature*, ed. Selby-Bigge and Nidditch (Oxford, Clarendon Press, 1978), 487-9. (I have reversed the order of two quotations here, without altering the sense.)

<sup>27</sup> Hart, *The Concept of Law* (Oxford, Clarendon Press, 1994), 193-200.

the face of social, economic, ecological and demographic change. The circumstances vary and—as I said in my natural law—our apprehension of the relevant principles and circumstances can vary too, with the state of our knowledge and the state of our politics. And so we may need to adjust either the framework of markets or the reach of markets in various ways. No sensible person, I think, can doubt this after 2008.

That matters like these may need collective attention from time to time is not a cranky or anomalous position; it is not Bolshevik or socially destructive; *it is the ordinary wisdom of human affairs*. No conception of governance, no conception of law that fails to leave room for changes and adjustments of this sort can possibly be tolerable. And it seems to me that any conception of the rule of law which denigrates the very idea of such changes and which treats their enforcement as an inherent derogation from that ideal has to be wrong.

Any particular proposal for change will no doubt have its opponents, and sometimes or often the opponents will be right. They may be right because a proposed environmental regulation proves unnecessary or hysterical, or because a given piece of social legislation represents nothing more than cynical rent-seeking by one faction exploiting another. These are enduring possibilities in the sordid and shabby circumstances of human politics. But the opponents are not necessarily right all the time or right as often as not because such proposals for legislative change are always out of the question. If someone is prepared to say that once markets and property rights have been established, any change or any regulation is out of the question, it seems to me that their perspective is necessarily that of an outsider, interested only (like the investors that Robert Barro referred to when he talked about the sale and purchase of Rule-of-Law indexes) in what can be extracted from a given society, rather than the perspective of someone who lives in the society and who cares about changes in the quality of life (and changes in the distribution of the quality of life among his or her fellow inhabitants) that markets and property rights are supposed to contribute to. Responsiveness to these changes and willingness to express concern about them is the hallmark of the responsible citizen, and we should be wary of adopting any conception of the rule of law that is designed to sideline or discredit that. We should be especially wary when such conception is advocated from an external or predatory point of view.

So changes in the regulation of property and market structures are not necessarily out of order. Of course everything depends on the mode of such changes. Constant day-to-day managerial meddling or changes imposed by decree are rightly regarded as incompatible with the rule of law. But *legislated* changes are not necessarily incompatible with the rule of law. On the contrary: not only does an adequate conception of the rule of law have to leave room for them; an

adequate conception of the rule of law will discipline these changes, subjecting them to formal and procedural criteria of legality. The rule of law will insist on changes enacted openly through procedures that are transparent and clear, changes that are formulated prospectively in general terms, changes that take the form of established schemes that people can expect to see upheld and enforced in the medium and long term, changes set out publicly in intelligible legal texts and then given to independent judicial tribunals for interpretation, administration and enforcement.

I am not making a case for the sort of flexibility that is characterized by peremptory or ill-considered legislation. I am a great believer in legislative due process. Legislating is not the same as the issuing of a decree; it is a formally defined act consisting of a laborious process. In a well-structured legislature that process involves public consultation and the commissioning of reports and consultative papers; as well as the informal stages of public debate, it includes also successive stages of formal deliberation in the legislature, deliberation and voting in institutional settings where the legislative proposal is subject to scrutiny at the hands of myriad representatives of various social interests.

These procedural virtues—legislative due process, if you like—are of the utmost importance for the rule of law. Bicameralism, checks and balances (such as executive veto), the production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation inside and outside the chamber, and the sheer time for consideration—formal and informal consideration, internal and external to the legislature—that is allowed to pass between the initiation and the final enactment of a bill: these are all features of legislative due process that are salient to an enactment's eventual status as law (for the purposes of our thinking about the Rule of Law).

To wish to be subject to the Rule of Law is to wish to be subject to enactments that have been through processes like these. When we say, for example, that the Rule of Law requires that no one should be punished except pursuant to the violation of some rule that was laid down before he offended—*nulla poene sine lege*—we don't just have in mind an edict or a decree issued in advance. We have in mind that the prohibition which he is accused of violating is one that was enacted in advance through the laborious solemnity of the legislative process, enacted as law not just given out as notice.

True, legislation is sometimes adopted in haste or under urgency; but by and large that is something that should be criticized in the name of the Rule of Law—and in the Rule-of-Law indexes, the score given countries that allow it as a typical mode of law-making (such as New Zealand, which otherwise has a very high score

on the World Bank's Rule-of-Law index) should be marked down sharply for this sort of abuse.

And no doubt these requirements of legislative due process mitigate the pace of legal change, if they are properly observed, and this may go some way to addressing the concerns that property-owners have about the security and stability of their expectations. But I don't think it is possible to go much further than that. The discipline of the Rule of Law, and in particular the discipline of legislative due process, already imposes substantial constraints on the alacrity with which a society can respond collectively and deliberatively to changing circumstances. We must remember too that the rhythm of change that this imposes needs to be matched with the rhythm of politics, because it is not easy to develop a platform and assemble and sustain a coalition for change all the way through this process. (This is perhaps harder in an American-style legislature, than in the Westminster system, though legislating at Westminster is proving (or will prove) more and more difficult as executive dominance gives way to specifically parliamentary institutionalization of the safeguards of legislative due process. I have in mind the growth of select committees, for example, independent of the executive, and the increasingly assertive power of a changing second chamber.)

But what I don't think we should concede is that the rhythm and timetabling of a society's legislative flexibility should be adjusted additionally to pander to the profit horizons of individual investors who crave a certainty in the property market that they cannot secure in other investment environments.

## **10. Eschewing the Rule of Law; arguing directly about property and markets** *add conclusion*