Ius Gentium: Comparative Perspectives on Law and Justice 18

Imer B. Flores
Kenneth E. Himma *Editors*

Law, Liberty, and the Rule of Law

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IUS GENTIUM

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Law, Liberty, and the Rule of Law

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I dedicate this volume to my wife, Hazel Blackmore, my sons, Ervin and Kevin, and my dear friend Roberto Salinas León.

–Imer B. Flores

I dedicate this volume to my wife, Maria Elias Sotirhos, my nieces, Angela and Maria, and my dear friend Icarus Tamagotchi Grabowski.

–Kenneth Einar Himma

Acknowledgments

Recognizing the intriguing nature of the changes underway in China, Imer B. Flores – jointly with Profs. Ofer Raban and Gülriz Uygur – proposed to the organizers of the XXIV IVR World Congress *Global Harmony and the Rule of Law* a Special Workshop on "Law, Liberty and the Rule of Law", not only because of the importance and transcendence of the subject matter itself but also due to its (in)appropriateness given the conference's location and the fact that 2009 marked the 150th anniversary of John Stuart Mill's celebrated *On Liberty* and the 100th anniversary of Isaiah Berlin's birthday.

In that sense, this volume grew out of a Special Workshop at the XXIV IVR World Congress *Global Harmony and the Rule of Law* in Beijing, China, in 2009, which drew more attention than originally expected: on the one hand, several scholars were interested and at the end 11 papers presented; and, on the other hand, Mortimer Sellers approached to offer the possibility of publishing them in the collection "Jus Gentium: Comparative Perspectives on Law and Justice". However, since Profs. Raban and Uygur had other previous commitments, Kenneth Einar Himma stepped in as co-editor. Similarly, since some authors were not in a position to submit their original papers for publication, as editors, we – Flores and Himma – decided to invite other scholars to contribute to the volume. We are indebted to the IVR for accepting the proposal and we are extremely grateful to all those who participated in the workshop and contributed papers to this volume.

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Chapter 1
Introduction

Imer B. Flores and Kenneth Einar Himma

Revising the problems of the concept of the "rule of law" and its relationship to both law and liberty are the main aims of this volume. In fact, the concept of rule of law, like the concept of legitimacy, is a morally normative concept that expresses an ideal to which society and its governing institutions should, as a matter of political morality, aspire. For example, the notion of legitimacy applies to those governing institutions that are morally justified in coercively regulating the behaviour of citizens. For a state to be legitimate, as it has sometimes been put, is for the state to have a *moral right* to rule. Otherwise put, a legitimate state is morally justified not only in enacting restrictions or requirements pertaining to the behaviour of citizens (at least within the scope of its legitimacy), but also – and more importantly – utilizing the coercive enforcement mechanisms to increase compliance that might not be a conceptual feature of law but is a feature of every known modern municipal legal system.

Of course, just having a reasonably satisfactory theory of the concept of legitimacy tells us nothing at all about the content of the conditions that a state must satisfy in order to *be legitimate*. Getting clear on the concept of legitimacy is one thing; having a plausible *normative* theory of legitimacy is another. It is fair to say that there are not many disputes regarding the concept of legitimacy: the general idea is that the legal practices of the state, including the use of coercive enforcement mechanisms, are morally justified. But the normative theory of legitimacy remains deeply contentious: that is to say, it is deeply controversial, and there are many alternative theories of state legitimacy, what conditions a state must satisfy in order to have the property of legitimacy (i.e. to be justified in its legal practices).

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In contrast, it is not entirely clear exactly what the concept of the rule of law amounts to, which, of course, complicates efforts to arrive at an appropriate corresponding normative theory of the rule of law. For example, the rule of law is casually described in a number of different ways: rule by law and not people; no one is above the law – even the body that makes the rules; and the rule of law is a state of order created by law. One or all of these could be meant but it is not always clear how the term is being used in conversation or writing.

This is problematic for two reasons. First, having an adequate theory of the concept is important for its own sake as part of a comprehensive understanding of the nature of law and its various ideals. It is simply important, as an academic and practical matter, to understand as much as we can about the normative institutions that we create and have. Second, having such a theory would seem to be a prerequisite for developing a plausible account of the normative conditions for satisfying the ideal of the rule of law – and this is obviously necessary, as a practical matter, to improving our institutions to conform to the moral norms that apply to them and ensuring that the state's practices satisfy the norms of political legitimacy. If we are working with a concept of the rule of law that is too narrow, we might be missing normative issues that are of critical importance in assessing our legal practices, from the standpoint of political morality. If too broad, we might be imposing normative requirements that are incorrect from the standpoint of political morality. Being clear on the concepts is a necessary condition for developing the substantive theories that help us assess our legal institutions.

As it turns out, just these two difficulties raise many different issues that must be resolved to produce a plausible comprehensive theory of law. Consider, for example, some of the issues that arise in the theory of legitimacy. There are very general theories that attempt to provide an adequate moral ground for just the institution of law. Social contract theories, for example, ground the legitimacy of coercive legal institutions on citizen consent, whether actual or hypothetical, explicit or implicit. Of course, many of these theories provide some substantive constraints on the functions of the state as well. John Locke, for example, took the position that people voluntarily place themselves under the coercive authority of the state by consenting to obey those laws so long as they respect certain natural moral rights.

But the inquiry does not, and certainly could not, stop there – even if one of these theories were clearly successful. The problem is that the level of abstraction is too high to provide sufficient guidance to courts and legislatures in enacting and adjudicating law. Thus, there are subareas in legal theory that, in essence, deal with more specific questions of legitimacy: the normative theory of criminal law (e.g. what acts may permissibly be criminalized?); of tort law (e.g. for what accidents might a defendant be permissibly be held liable?); of constitutionalism (which includes questions about judicial supremacy and constitutional interpretation); of civil procedure; of criminal procedure; of property; of corrective justice; of retributive justice; of distributive justice; and of many more areas of law.

There are also empirically descriptive theories of what, as a matter of fact, ground the specific rules and principles of these various areas of law. These are usually the subject of most articles that are found in law reviews. In such an article, the author

is concerned with identifying the answer to a difficult legal question based on the history of the relevant legal rules and principles, which, of course, requires an analysis that is partly historical in character (it is also interpretive in character).

Sometimes the empirical and normative theories are conjoined, presupposing that what really *is* law is what *should be* law. For example, Ronald Dworkin famously argues that the law includes the moral principles that show the existing legal history in the best moral light (Dworkin 1986). Moreover, he argues in earlier work that judges typically decide hard cases by attempting to do exactly that – find the moral principles on which the relevant rules are based and decide the case on the basis of which rules express the most important values.

Indeed, it seems reasonable to think that satisfying the ideals associated with the rule of law is at least a *necessary*, if not a *sufficient* condition, for a state to be morally legitimate. Again, the problem of legitimacy is an enormously complicated problem; and it might be that a state might be morally legitimate even though it satisfies some but not all conditions that seem to define the properties of the legitimate state. Surely, there is some room for error in the lawmaking and adjudicative activities of the state. The legislature might, for example, unbeknownst to members, enact some unjust laws (from an objective standpoint) without thereby calling into question the state's legitimacy. But it is hard to imagine, given the importance customarily attributed to rule of law ideals, that a state could be legitimate without largely conforming to those ideals.

The topic of the rule of law, if somewhat more narrow than the more general topic of legitimacy, presents the same problems: (1) getting clear on the concept so that we have a better understanding of what the relevant norms might look like; (2) identifying the relevant norms that govern the rule of law in all the areas in which rule of law issues might arise – and as will be seen in this volume, these issues arise in a number of contexts that are somewhat unexpected; and (3) understanding the history of both the ideal of the rule of law and how it arose and has been applied in past legal systems and theorized by legal theorists from the past.

While it might look as though these three issues are distinct and independent, this is a mistake. The relationship among the three issues are related in a way that any proposed resolution of one issue might require addressing the other two issues. Surely, for example, the history of the ideal as it has evolved over time and expressed itself in legal practice will be relevant with respect to addressing the conceptual and normative issues that arise in connection with theorizing the rule of law.

Law, Liberty, and the Rule of Law is a collection of ten original essays on various issues involving the ideals that fall under the rubric of the "rule of law", including its relationship to both law and liberty. The contributors to the volume are internationally recognized scholars that hail mainly from the Anglo-Saxon, Continental Europe and Latin America academic circles, representing not only a distinct number of countries, including Brazil, Canada, Mexico, Poland, Turkey, United Kingdom, and United States of America, but also a diverse number of perspectives and methodologies.

As one might expect from the above, the essays in the book include articles covering each of the three issues above, and in most cases touch on more than one issue – approaching the issue in what the editors believe is the correct way to theorize

the rule of law. Hence most essays concerned themselves to some extent with conceptual issues that attempt to identify the conceptually essential properties of the rule of law (even when that is not the principal concern of the essay). Just as there are conceptually essential properties for being a bachelor (one of them being that a person is unmarried), one would expect there to be conceptually essential properties of the rule of law. These properties might not be essential "come what may", as our linguistic practices and ordinary intuitions that constitute *our* concept may change; but we are looking for those that are essential given our existing linguistic practices and ordinary intuitions.

Recognizing the hotly contested nature of the concepts, most of the authors of the essays in this volume devote ample space to carefully explaining what they intend by the various relevant concepts. While the various authors agree on a number of issues involving them, they disagree on others, taking care to make explicit their assumptions. This is important because the assumptions they make condition the direction in which they go on the other issues with which their essays are primarily concerned. Accordingly, it is not necessary to attempt to arrive at a definitive analysis of the concept of the rule of law in this introduction, as the authors do an exceptional job of situating their views among the wide diversity of conceptual views expressed in the essays in the volume. In fact, given the diversity of the conceptual views in the essays, it would detract from the project of the volume to try to impose any set of particular conceptual commitments on the essays because any set might fit some but not all essays in this volume.

Even so, it is worth briefly discussing some of the differences in accounts of the concept of the rule of law. Some theorists maintain that the concept of the rule of law is principally *formal* in character and correspond to ideals that define formal constraints on the rule of law. Examples of such explications of the concept include the view that the rule of law is governance by rules properly enacted by an authorized body and applied consistently to everyone, including those who enact them. The idea here is that people are governed by rules and not ruled by people. On this view of the rule of law, the ideals expressed may include certain procedural norms for regulating subject behaviour.

Others believe that the concept of the rule of law has to do with *substantive* matters of legal content. On this view, the ideals expressing the rule of law involve certain moral restrictions on the content of law – restrictions of a particular kind that conform to the specific conceptual characteristics of the rule of law. For example, the Equal Protection Clause of the Fifth and Fourteenth Amendments might, on such an analysis, satisfy the ideals associated with a substantive account of the concept of the rule of law.

Finally, and further complicating the issues, is that some theorists maintain that the concept of the rule of law has both formal and substantive elements. Because there is so much disagreement on the content of this somewhat underdeveloped concept, discussion and dialogue can be difficult to understand when the conceptual presuppositions are not made clear, as is all too frequently the case in published essays on the topic. Indeed, one recurring theme on the conceptual issue in the volume is whether the concept is best characterized as formal or substantive.

For this reason, it is best to allow the authors to define their own conceptual views in the process of arguing for a particular thesis. Conceptual issues are not generally best assessed by the substantive results they produce. For example, just knowing that it is a conceptual truth that a bachelor is an unmarried adult male tells us little, if anything, what sorts of substantive norms govern how they behave and how they should be treated. Likewise, though somewhat more contentious, questions about the nature of law – i.e., the content of the concept of law – do not, as a general matter, seem to have much by way of practical results. Indeed, critics of conceptual jurisprudence frequently point out that nothing of substantive or practical value seems to turn on such matters. According, for example, to Richard Posner (1997, 3):

> I grant that even if the *word* 'law' cannot be defined the *concept* of law can be discussed; and that is after all Hart's title, though he uses the word 'definition' a lot. Philosophical reflection on the concept of justice has been a fruitful enterprise since Plato; for that matter, there is a philosophical literature on time. I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question' What is law?' if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it. I go further: the central task of analytic jurisprudence is, or at least ought to be, not to answer the question 'What is law?' but to show that it should not be asked, because it only confuses matters.

But if Posner is correct about the substantive payoff of conceptual theorizing about the nature of law, a similar view is simply not true about conceptual theorizing about the rule of law. One reason that conceptual theorizing about the nature of law does not help much in our legal practices is that our pre-theoretical understanding of the nature law is good enough for us to find authoritative statements of law: authoritative reports of statutes and cases are trivially easy to find. This, however, does not seem to be true of the rule of law. Although there are pithy pre-theoretic formulations about what it is, these formulations are sufficiently vague that it is hard to get a handle on how they apply except in perhaps the most obvious of cases. Couple that with the fact that these casual formulations differ, and it becomes all the more difficult to ascertain what normative standards are associated with the concept of the rule of law.

This helps to explain why most of the essays in this volume are at least partly concerned with the conceptual issues. The conceptual questions addressed here are vital to addressing the normative questions; if we do not understand the conceptual assumptions being made or do not share them, we cannot understand the positions they take on the other issues or their reasons.

To understand each essay primarily concerned with a normative issue, we must understand the underlying assumptions about the concept, something the authors in this volume realize and address for the reader. Likewise, the historical questions addressed in some of the essays are vital to addressing the conceptual and normative questions – even if, as the editors believe, the contributions are valuable simply in virtue of what they contribute to the body of the literature pertaining to the history of political, moral, and legal theorizing about the rule of law.

The volume opens with an essay by Courtney Taylor Hamara precisely on "The Concept of the Rule of Law", which among other things introduces the debate

by pointing out to the paradoxical and problematic nature of the concept of the rule of law. On the one hand, there is apparently an agreement in the sense that this so frequently used and politically weighty ideal is among the most important ones; but, on the other hand, it actually stimulates so much disagreement to the extent of being considered as an essentially contested concept. Moreover, Hamara advances the claim that more not less conceptual analysis of the external and internal coherence is required to facilitate meaningful and fruitful discussions on the rule of law.

Brian Burge-Hendrix, in "Plato and the Rule of Law", makes an important contribution both to scholarship on Plato and conceptual rule of law theory. He adroitly reassesses the legal philosophy of Plato, arguing that his work has been underappreciated and has much to contribute to contemporary debates in legal philosophy. Burge-Hendrix has a couple of specific concerns in this essay. The first is to show that Plato's philosophical methodology is one that has been adopted by many theorists in general jurisprudence; indeed, he argues that Plato has, albeit indirectly articulated, the foundation of a general jurisprudence. The second is to identify four different conceptions of the concept of the rule of law and shows that Plato's work in legal philosophy addresses all of them. As he states these conceptions in their broadest form, the rule of law can be construed as stating (1) an *existence condition* for an actual legal system; (2) a *practical constraint* on a legal system; (3) a *procedural principle* (or set of procedural principles); and (4) an *object-level practice* (i.e. a practice carried out by the officials of a particular legal system) whereby laws are *enforced* and enforcement is *justified* by reference to an implicit or explicit legal principle avowing the rule of law. Burge-Hendrix's discussion of each of these elements shows expertly how Plato's view engages those of contemporary theorists in general jurisprudence and on the rule of law and makes an intriguing case for Plato's relevance in general jurisprudence and rule-of-law theory.

Andrzej Maciej Kaniowski, in "Kantian Re-construction of Intersubjectivity Forms: the Logic of the Transition from Natural State to the Threshold of the Civic State", attempts to revitalize Immanuel Kant's theory of the republican polity. Kaniowski notes that Kant, like all mainstream theorists, supports the formation of an ethical commonwealth, and sharply opposes imposition of such a commonwealth by force: "Woe betide the legislator – says Kant – if he wishes to bring about through coercion a polity directed to ethical ends!" But he argues that the objection, however, is not only an opposition to the *method* of implementing a system based on norms of virtue; it is an objection to the attempt to mix the political polity with a polity based on principles of virtue or ethical ends. For Kant, the republic is necessary in order to conduct commonwealth in accordance with the absolute indications of practical reason and, according to him, has its foundation in the idea of "original contract". Accordingly, Kaniowski concludes the Kantian political theory of the polity remains vital to political theorizing in our times and, in addition, to the rule of law.

Two essays that are historical bear closer relationships to other issues. Brian H. Bix, in "Radbruch's Formula, Conceptual Analysis, and the Rule of Law", considers the work of a more recent theorist: Gustav Radbruch. Bix examines the relevance of Radbruch's view that unjust laws should not be enforced even though valid. He argues that the traditional understanding of this claim as a claim about the

nature of law and legal validity does not neatly connect to discussions about the rule of law. Like Burge-Hendrix, he approaches the historical question by distinguishing different conceptions of the rule of law. He considers whether Radbruch might be more productively understood as a claim about the nature of law, rather than more narrowly as a prescription about how judges should decide cases. He notes the complex role of judges, observing that courts frequently apply (and see themselves as bound to apply) norms that *are not* valid within their legal system, and the courts also on occasion do not apply (and see themselves as bound not to apply) otherwise applicable norms that *are* valid norms within their legal system. Bix concludes that the better reading of the Radbruch *formula* is to construe it as a prescription for judicial decision-making rather than as a descriptive, conceptual or analytical claim about the nature of law. Accordingly, Bix's analysis touches not only on historical and conceptual claims, but also on normative standards regarding judicial decision-making, which he believes are conceptually distinct from normative standards governing the rule of law.

Two of the essays are primarily concerned with conceptual issues. First, Imer B. Flores, in "Law, Liberty and the Rule of Law (in a Constitutional Democracy)", considers, among other things, the relationship between the concepts and conceptions of law and the rule of law. Flores begins by arguing that the ideal embedded in the concept of the *rule of law* cannot be logically derived from merely combining the content of the concept *rule* with the content of the concept *law*. The *rule of law* has content that transcends both the atomic concepts of *rule* and *law* of which the more complex concept is constructed, as well as the formal assertion that *law rules*, regardless of its relationship to certain principles, including both *negative* and *positive* liberties. In that sense, he goes on to consider the relationship not only between the rule of law and concept of freedom by recalling the distinction between two concepts of liberty but also between the rule of law and *constitutional democracy*. Finally, Flores concludes that the tendency to reduce the *democratic principle* to the *majority rule* (or *majority principle*), i.e. to whatever pleases the majority, as part of the *positive liberty*, is contrary both to the *negative liberty* and to the *rule of law* itself.

Second, Gülriz Uygur, in "The Rule of Law: Is the Line between the Formal and the Moral Blurred", considers the issue of whether the standards defining the rule of law are moral standards or purely formal ones that derive from the necessary and sufficient conditions for the existence of a legal system. Uygur, similarly to Flores, identifies various conceptions of the rule of law, from Lon L. Fuller's idea of the rule of law embodying eight procedural requirement to more substantive conceptions relating to protecting human dignity, and attempts to determine whether these conceptions are moral or not. She identifies the features of these conceptions that seem to suggest the claim that the rule of law is on a blurred line between the formal and the moral. Having done this, Uygur argues that the rule of law cannot be separated from political ideals that give the concept of the rule of law its distinctive content. Of course, it is worth noting that there are both historical and normative considerations being discussed, but the issue of primary concern is conceptual: how to conceptually characterize the standards expressing the rule of law.

The remaining issues are largely concerned with normative issues pertaining to whether particular legal practices are consistent with rule of law ideals. Conrado Hübner Mendes, in "Political Deliberation and Constitutional Review", explores the idea that judicial review might be justified by the special *deliberative* nature of the function constitutional courts play in reviewing statutory enactments or common law rules. Mendes attempts to flesh out the content of the relevant concept of deliberative in order to identify standards that would guide courts in the exercise of this function such as to justify the practice of judicial review as consistent with the ideals governing rule of law. He considers, for example, the ideas of a deliberator as *public reasoners* and *interlocutors* through a broad survey of the literature on the role of courts in judicial review. Mendes concludes that judicial review cannot be justified solely on the strength of the court's role as deliberative and points the way to additional factors that are relevant with respect to the issue of the legitimacy of judicial review.

Tom Campbell, in "The Rule of Law and Human Rights Judicial Review: Controversies and Alternatives", argues that court-based human rights judicial review of legislation is in conflict with the fundamental principle of democracy that lawmakers should be accountable to its people. His analysis focuses on the interface between rule of law ideals and two related and relatively neglected critiques of human rights judicial review. The first part of the essay explains these two critiques: (1) *a (formal) rule of law objection*, that the bills of rights on which human rights judicial review is based are contrary to the principle that rules of law which courts are called upon to apply should be specific and clear as to what they require and permit, thereby reducing the accountability of elected governments, and (2) *a practical objection*: that human rights judicial review is largely ineffective in promoting human rights goals. In the second part of the essay, Campbell argues (1) that weaker versions of court-based human rights judicial review fail to meet either the rule of law or the efficacy objections, and (2) that is better "to institutionalise bills of rights as part of political constitutions involving mechanisms such as legislative review of existing and prospective legislation in order to promote and protect human rights in ways which are politically more effective and more in accordance with the twin democratic doctrines of the rule of law and the separation of legislative and judicial powers."

Kenneth Einar Himma, in "The Rule of Law, Judicial Supremacy, and Legal Positivism", argues that legal systems affording final authority to courts over the content of a constitution fall short of fully meeting the standards defined by procedural rule of law ideals. The problem, according to Himma, is that the rule of recognition in such legal systems affords the court with the legal power to bind other officials with objectively mistaken decisions (if there be such) about the content of the constitution. This means that, in contrast to procedural rule of law ideals, sometimes it is not the objective content of the law that governs citizens or legal officials; in such cases, it is the mistaken *subjective* views of unelected judges. Procedural rule of law means governance by law, and not by persons; but the doctrine of judicial supremacy seems inconsistent with this ideal. Nevertheless, it is crucial to note that, unlike Campbell, Himma does not take a critical stance towards the practice of judicial supremacy; rule of law ideals are only one component of a theory of political legitimacy by which judicial practice should be judged.

Juan Vega Gómez, in “Retroactive Application of Laws and the Rule of Law”, argues that issues of retroactivity should be addressed by a two-stage process, the first dealing with a *formal test* of retroactivity and a second one that *involves issues of justification*. Vega Gómez believes that confusion occurs when problems of retroactivity are addressed only from the perspective of political justification. To avoid and resolve such confusions, he advocates approaching such problems in the two stages described above. The *formal test* is derived from Raz’s idea of a formal conception of the rule of law; on this view, we must not confuse this formal conception with an idea that thinks that complying with the rule of law entails that the law in question is good law or, more specifically, necessarily promotes human rights; nor should it be thought that a formally retroactive rule necessarily is a bad law or fails to promote human rights. Accordingly, in this provocative essay, Vega Gómez argues that the retroactivity question requires both formal and substantive analysis.

As the editors hope is evident from this brief introduction that *Law, Liberty, and the Rule of Law* provides a welcome addition to the literature on the rule of law. Readers interested in the topic, no matter how specific their interests are, should find something of interest here. But the editors expect that readers will find value in all the essays not only on its own but also as a whole. In sum, the legitimate concern for the rule of law has increased substantially in the recent years as the number and variety of articles and books on the essence, nature, scope and limitations on this legal-political ideal demonstrate. However, the rule of law remains a multifaceted and deeply – and highly – contested concept. Hence, the book intends to promote: the discussion of its essence or nature, including its core principles and rules, and the necessity if at all of defining – and even redefining – the concept of rule of law; the revision of the proper scope and limitations of adjudication and legislation, which includes the problems not only of limiting legislative and executive power mainly via judicial review but also of restraining an active judicial law-making at a time of guaranteeing an independent judiciary capable of limiting the government but maintaining a balance of power; and, more generally, the deliberation on the relationship between the rule of law with not only human rights and separation of powers but also constitutionalism and democracy. This book provides valuable insights on the rule of law and themes that continue to occupy the attention of legal philosophers, as well of legal scholars, philosophers, political scientists, among others. Finally, we are extremely grateful to all the participants for their enthusiasm that made possible first the workshop and later this volume.

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