The one defining rule lacks clear definition

*By Rebecca Prior**

As Brian Tamanaha observes, the rule of law 'stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means.'[1]

Some legal theorists argue that the rule of law is purely formal in nature; requiring only that laws be promulgated in advance, in general, clear terms applied equally to all. Others argue that democracy is part of the rule of law. Others still argue in favour of a more substantive formulation of the rule of law, which includes protection of individual rights.[2]

Given the lack of a definitive conception of the rule of law, one is led to question what the rule of law *ought* to be. In considering this normative question, it is useful to outline the elements and requirements of both the formal, and substantive, formulations. After comparing the benefits and limitations of these competing conceptions, it will be concluded that, on balance, the formal version is more representative of what the rule of law ought to be.

Formal conceptions of the rule of law address procedural considerations: 'the manner in which the law was promulgated… the clarity of the ensuing norm… and the temporal dimension of the enacted norm.'[3] Formal conceptions do not, however, encompass any requirements as to the content of law.[4] 'Formal legality' is the dominant formal version of the rule of law, favoured by legal theorists including Joseph Raz, Freidrich Hayek, Roberto Unger and Lon Fuller.[5] Formal legality identifies that 'the law must be capable of guiding the behaviour of its subjects', and sets forth a number of requirements to achieve this end. According to Fuller, these requirements include: 'generality, clarity, public promulgation, stability over time, consistency between the rule and the actual conduct of legal actors, and prohibitions against retroactivity, against contradictions, and against requiring the impossible.'[6]

Proponents of formal legality argue that this version of the rule of law 'furthers individual autonomy and dignity,'[7] as it allows subjects to plan their activities with advance knowledge of the potential legal implications. In doing so, formal legality adheres to

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[1] B. Tamanaha, *On The Rule of Law* (Cambridge University Press, 2004) 4.
[2] Ibid 3.
[3] Ibid 91.
[4] Ibid.
[5] Above n 1, 108; Lon L. Fuller *The Morality of Law* (Yale University Press, 1969) 155.
[6] Above n 1, 107.
[7] Above n 1, 94.

Montesquieu's conception of legal liberty, that is, freedom to do what the law permits. A further benefit of formal legality lies in its political neutrality. The fact that this formulation bears no content requirements means it is more likely to command support from the right, left and centre of politics. As the World Bank has identified, because formal legality is amenable to a broad range of systems and societies, it has the potential for universal application.

Nevertheless, critics of formal legality identify the neutrality of this version as one of its major limitations. Because formal legality is 'indifferent toward the substantive aims of the law and is ready to serve a variety of such aims with equal efficiency', it may potentially serve an oppressive and tyrannical legal system. In this instance, formal legality would not only be compatible with gross violations of human rights, but would actually promulgate oppressive laws with greater efficiency. As Tamanaha observes, even 'democratic legality', a variation of formal legality requiring the determination of laws through democratic process, does not preclude the formulation of oppressive laws. In this sense, the substantive emptiness of formal legality seems to run contrary to the historical inspiration of the rule of law: 'the restraint of tyranny by the sovereign.'[8]

In answer to this criticism, substantive formulations of the rule of law incorporate the procedural requirements of the formal version in addition to certain content specifications.[9] The most common substantive formulation, advocated by Ronald Dworkin, includes individual rights within the rule of law. It assumes that people posses certain moral rights and duties with respect to one another, as well as political rights against the state in general. This conception does not distinguish, as formal theories do, between the rule of law and substantive justice; 'on the contrary it requires, as part of the ideal of law, that the rules… capture and enforce moral rights.'[10] From this perspective, rights are not granted by the positive law, but instead exist in an 'extra-legal' sense, underlying the legal system itself.

The contemporary German application of the rule of law manifests a number of the ideals encompassed in Dworkin's rights formulation. The Basic Law, Germany's post-World War II constitution, declares 'the protection of individual dignity… as the supreme value of the constitutional order'.[11] It identifies 'the universal and extralegal character' of the 'fundamental rights' it sets forth, which exist 'prior to and irrespective of official recognition by the state'.

More specifically, art. 79 states that amendments to the Basic Law which affect the basic principles it embodies, including the inviolability of human dignity, are inadmissible in any circumstances.[12] Herein lies the main benefit of substantive formulations: unlike formal

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[8] Above n 1, 96.

[9] Above n 1, 102.

[10] Ibid.

[11] Above n 1, 109.

[12] Ibid.

legality, substantive versions of the rule of law incorporate individual rights and notions of dignity, therefore precluding the promulgation of oppressive laws.

However, the application of the substantive rule of law in the German legal system also illustrates a number of criticisms associated with this approach. First and foremost, this version raises the issue of indeterminacy.[13] While Dworkin proclaimed that the rule of law must embody moral rights, he did concede that 'it is [often] controversial within the community what moral rights they have.'[14] Even in Germany, where a number of rights are embedded in the Basic Law, there is 'no uncontroversial way to determine what these rights entail.'[15] All general ideals, including the right to 'dignity', are essentially contestable in meaning and application.[16]

A further issue is that the task of deciding these complex questions falls to the judiciary, resulting in the 'judicialisation' of politics.[17] In Germany, the Basic Law situates individual rights within the constitution and beyond the reach of the legislature. Consequently, political disputes over the implications of these rights necessarily transform into constitutional questions, which may only be decided by the Constitutional Court. In this way, the judiciary assumes a greater role in deciding controversial social questions, thereby reducing the legislative discretion of the Parliament.[18]

This issue is further compounded when the judiciary is capable of invalidating legislation on the grounds that it 'oversteps individual rights'.[19] Encroaching upon the autonomy of the legislature in this way undermines the democratic order.[20] And when the legal implications of constitutional values are dependent upon judicial interpretation on a case-by-case basis, the predictability of law is also challenged.[21]

Acknowledging the extent of these limitations, the formal version of the rule of law appears the more favourable. On the face of it, substantive formulations appear to guarantee individual rights. However, a more detailed analysis reveals that in practice, such guarantees may compromise the more procedural requirements of the substantive version, such as predictability and democratic process.

Comparatively, the formal version affords basic individual freedoms, such an individual autonomy and political liberty, without the practical difficulties inherent in substantive formulations. On balance, therefore, the formal version of the rule of law arguably represents what the rule of law *ought* to be.

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[13] Ibid.
[14] Ibid 103.
[15] Ibid.
[16] Ibid 103.
[17] Ibid 108.
[18] Ibid 109.
[19] Ibid 110.
[20] Ibid 104.
[21] Ibid 105.

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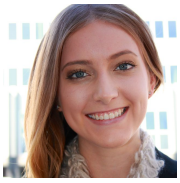

* Rebecca Prior is a CLA lead media spokespeople. She is a law student at ANU, and has represented Australia at youth congresses in London and Rio de Janeiro.

NOTE: Louise Arbour, the former UN High Commissioner for Human Rights, who is president of the International Crisis Group, has recently written on the rule of law in the *New York Times*:

http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html?

CLA Civil Liberties Australia Inc. A04043
Box 7438 Fisher ACT Australia
Email: secretary [at] cla.asn.au
Web: www.cla.asn.au