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FURTHER THOUGHTS ON THE RULE OF LAW AND A NEW WORLD ORDER

PAUL B. STEPHAN III*

A common theme linked the Braun Lecture Series given on April 16, 1992: The meaning and content of the concept of rule of law. Judge Webster has stressed the differences between the "rule of law" and "rule by law." The German term *rechtsstaat*, and the Russian *pravovoy gosudarstvo*, capture the latter notion. Rule by law means something quite different than the former concept as it has evolved in Anglo-American jurisprudence. Professor Grazin observed that an exclusive focus on the pronouncements found in laws, without concern for their moral content, leads to the mindless positivism and evil finality of Nazism. He also, I am sure, would include the Stalinist system and its attendant evils as another example of what can come about under a relentlessly amoral regime of legal positivism. Finally, Professor Ngongi asked us to consider the incomplete relationship between law and justice.

All of these approaches test the meaning of "rule of law." Does the concept express the fulfillment of certain fundamental moral norms, or rather, it is an instrument used to achieve a desirable social end state? And what are the criteria, the moral content, by which we judge whether a society successfully employs the rule of law as either a means or an end?

My own contribution will not be to offer a clear answer to any of these questions, but rather to note a paradox that lurks within this inquiry. The paradox is this: without an underlying sense of justice, decency and morality, human existence is meaningless, ugly and degrading. Yet, a monolithic, rigid, uncompromising moral conception, one that admits to no challenge or compromise, has both inspired and justified some of the grossest barbarisms inflicted on human beings throughout history. Morality is essential, but undiluted it is fatal. How does one get out of this box?

I have no clear answers to this question, but rather a few intuitions. One of the defining features of the rule of law, at least as it has developed in the United States, remains a dispersion of power under commonly recognized rules.¹ This formula, of course, ex-

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1. I would note in passing that Judge Webster's career, and in particular his tenure as Director of the Federal Bureau of Investigation, and then of the

tends rather than resolves the paradox. What are the commonly recognized rules? In a world where power and political participation is far from equal, how can one separate the appearance of consensus from the reality of coercion and deception? How does one enforce the rules, when power is dispersed? What prevents the rule-enforcer from becoming a moral dictator, undermining the dispersion of power? Yet, one has a sense that however problematic its logical foundations, such a system can exist and, given the human condition as we find it, even offers the best hope for a decent society at both the national and international levels.

I am not interested in labels, such as "liberal democratic" or "pluralist," but rather in broad trends unfolding both intellectually and politically. Whatever else comes out of the disgrace of the Communist worldview and the collapse of the Soviet empire,² making the case for concentrated political and economic power has become harder. The naturalness of the impulse to abuse such power or, to put it in the negative, the difficulty of eradicating the inclination toward aggrandizement in human beings, manifests itself with such frequency that almost all arguments must start from the premise that political and economic dictatorship is evil. I do not believe that this point leads ineluctably to a celebration of life in the United States; it does, however, pinpoint one of the fundamental problems underlying Soviet-type societies, defined by the concentration of such power.

Working from the premise of concentrated power as evil, what can we say about the likely near future of those societies that seek to attain something that we call the "rule of law"? What we presently find in the former Soviet-type states is an understandable sense of anxiety and dismay, the aftertaste of the heady moments of liberation (that is to say, of December 1989 and August 1991). These countries have experienced the breakdown of the social and

Central Intelligence Agency, exemplifies the fulfillment of this idea of the dispersion of power under commonly accepted rules. Judge Webster understood that these necessary instruments of government could exist in a civilized society only if there existed shared control over their activities. In the case of the FBI, he worked hard to make that agency more responsive to the commands of the courts, especially with respect to the requirements of constitutional criminal procedure. His investment in and support of the FBI Academy, for example, helped to reinforce the idea that the Bureau, and police officials generally, had to abide by the law as a necessary part of enforcing it. And at the FBI, and even more at the CIA, he strengthened the role of legislative oversight, both as a check on reckless ambition within the Executive and as a means of having Congress take responsibility for the actions of those agencies. He came to the CIA at a time when a deep crisis over a failure to honor the dictates of Congress had plunged that agency into turmoil; his administration did much to restore the balance of shared control.

2. I count myself a pessimist here. It seems most unlikely that societies where command economies and *nomenklatura* political systems flourished will soon become bastions of freedom as the West understands that concept.

intellectual structures that previously made sense of everyday life, even as their obvious contradictions and failures subverted their claims to legitimacy. Many people now fear that anarchy is the natural successor of totalitarianism, and believe that their countries are slipping into a state of chaos. Are they right? In countries that treated self-command and individual initiative as dangerous deviations from social norms, does the dispersion of power mean anarchy?

One rejoinder is to preach the virtues of constitutional norms that draw on the principles of checks and balances and separation of powers. These institutions, of course, are bulwarks of a free and democratic society. Much of the advice and technical assistance that Western lawyers have given the citizens and governments of the formerly socialist countries focuses on them. I endorse this counsel, but not without reservations. Political institutions, especially at the national level, tend to be abstract. After decades of cynical and mean public life, the people of the post-Soviet world have trouble drawing inspiration from any politicians, no matter how elegant or fair the new structures in which they operate may be. Politics also play out through layers of mediation, for example, as presented by the media, which until the onset of *glasnost*' inspired mostly distrust and contempt. If the concept of dispersion of power under commonly accepted rules is to have any bite, it must be tangible and commonplace. People must see it in operation constantly if they are to allow it to shape the new culture that will emerge in the post-Soviet world.

To make the dispersion of power under commonly accepted rules vivid and real, these countries must develop the institution of private property. In theory, of course, the legal systems of the Soviet Union and its dependencies recognized a concept of property, but the practical reality encompassed a complex dualism that excluded free and open disposition of personally held assets for the purpose of creating wealth. The state claimed a monopoly over productive activity, and the underground or "shadow" economy that developed to correct some of the lapses of that system operated entirely outside the law, whatever other kinds of legitimacy it might have had. Somehow the new societies must find a way for their citizens to identify productive ownership—the linkage of property with investment, and investment with effort, risk-taking and return—with law, both in its formal sense and as a deep cultural norm. By making property effective, they can make law concrete.

Why private property as a prerequisite of the rule of law? First, the alternative to private ownership of the means of production is a state monopoly over economic activity. Such a monopoly violates the principle of eschewing concentrations of political and

economic power. A functioning private sector offers edifying comparisons with the performance of the state, both as a deliverer of services and a creator of wealth. Like any abstract principle, this concept can be abused: a concentration of economic power in the hands of a close-knit group of private persons is no less fraught with the potential for evil than is a state monopoly. The point is not that private property, as such, guarantees a dispersion of power, but rather that without private property no dispersion can exist.

Second, private property can operate as a vital social institution only if a broad consensus exists concerning the rules of property. If property means anything more than naked possession, it must depend on mutual recognition of the possessor's and owner's rights. It is not enough for the state to proclaim that these rights exist, if the general population will subvert them in the absence of constant and direct coercion. For separation of ownership and control to take place, both those who control the disposition of assets and those who have a claim to a return for their use must understand their relationship.

Judge Webster placed particular stress on the need for an independent judiciary in a system based on the rule of law. Part of the genius of the institution of property is that it encourages disputants to turn to disinterested arbitrators, in other words judges, to determine their claims to ownership. If the judiciary of the former Soviet-type countries are to gain the respect of the citizenry, that they do not have yet, they must be seen as fairly dispensing disinterested justice. Intervention in high-profile political disputes might help to build this perception³ but such cases may not occur often, and, like the politics that underlie them, will seem distant and abstract to many observers. More mundane, but ultimately more useful in terms of nurturing a culture of legality, will be the expeditious resolution of disputes over ownership in a manner that earns the confidence of all parties.

Consider the history of constitutional development in the United States. Of the landmark cases of the Marshall Court, the constitutional moments that largely determined what kind of governmental structure we would have, three of the most important had at their root a dispute about property. *Marbury v. Madison*⁴ was a contest over a government position, a rent-collecting entitlement, as well as a clash over the power of judicial review. *Martin v. Hunter's Lessee*⁵ involved a dispute over title to land, although the

3. Arguably, the Russian Constitutional Court's resolution of the dispute over abolishing the Communist Party bolstered the public's impression of that court's legitimacy.

4. 5 U.S. 137 (1803).

5. 14 U.S. 304 (1816).

Supreme Court to resolve it had to establish its primacy over the state courts. And *Gibbons v. Ogden*⁶, which along with *McCulloch v. Maryland*,⁷ located the authority to regulate interstate commerce squarely in the federal government, turned on a determination of the validity of a steamship franchise. In other words, the Marshall Court established its authority, both over and as part of the national government, by making that authority indispensable to the resolution of property disputes, and by resolving those disputes in a fashion that inspired confidence rather than cynicism.

Does a society that recognizes private property by that choice alone achieve the rule of law? Is a legal system that expends a considerable portion of its energies defining and protecting the institution of private property for that reason imbued with a moral sense? If a system supports property, is it therefore just? The answer to all these questions is the same—obviously no. My point is rather that property, in subtle ways that we may not fully appreciate, can both inculcate a culture of legality in those societies that have lost their respect for law, and deter the development of one kind of injustice, namely the concentration of power in the hands of a few.

Where does this leave us as far as the content and limits of the rule of law are concerned? First, it would be the height of folly to suggest that developing a culture based on the rule of law would solve all the problems faced by those states that are now groping away from political and economic dictatorship. No one has suggested that it would. Second, it is reasonable to believe, although perhaps not uncontroversial, that promotion of a system of governance and social order based on dispersion of power under commonly accepted rules is a necessary, although not a sufficient, requirement for building a decent civil society on the ashes of Soviet-type socialism. We cannot make the claim that such a development will end injustice or achieve a full realization of moral norms in those societies, but we can contend that without the establishment of a law-based culture the goals of freedom and prosperity will remain elusive.

As lawyers, as well as in our role as morally driven individuals, we should take heart from these conclusions. We do not have any panaceas—none of us is Jonas Salk, developing a vaccine that will eradicate a terrible malady—but we do possess particular skills and habits of mind that can help to make the world a better place. Surely we can be satisfied with that.

6. 22 U.S. (1824).

7. 17 U.S. 316 (1819).

