

The Rule of Law as a Concept and in Practice

BY MARK NEAL AARONSON

Aziz Z. Huq

THE RULE OF LAW: A VERY SHORT INTRODUCTION
New York: Oxford University Press, 2024

Introduction

At the beginning of this lucid and concisely written book, Aziz Huq characterizes the rule of law as “an important yet nebulous idea” (at xvii). Although explicitly mentioning nothing about the present threats to the rule of law posed by the current Administration, Huq’s philosophical and sociological survey of ideas and historical examples is a helpful reference source for understanding the rule of law generally and as applicable here and now in the United States. The book highlights the origin, aspirations, limitations, and failures of the rule of law as a constraint on arbitrary authority and actions. In doing so, Huq discusses three different concepts of the rule of law. By the end, the author provides us with a much-enriched sense of the idea, well beyond its meme-like use



Professor Aziz Z. Huq,
University of Chicago
Law School. *Photo:*
University of Chicago.

in ordinary reporting, and some useful starting points for figuring out the multiple reasons for and possible resolutions of the constitutional challenges now facing us.

Huq’s main points are grounded in solid research and sharp analysis. Refreshingly, instead of providing footnotes, Huq lists at the end under separate headings his reference sources in the order used in each chapter and then recent academic texts for further reading. Huq does not explicitly choose a favorite among the three highlighted concepts of the rule of law. However, one

proposition he holds across-the-board is that the phrase “rule of law” is to be understood as a standard for evaluating the legitimacy of a legal system in resolving public and private disputes.

Rule of Law as a “Moral Charge”

The ideas and concerns underlying the rule of law originate in classic Greek political thought, but the widespread use of the phrase itself begins in the late 19th century in the writings of the English jurist Albert Venn Dicey. It is Dicey who first used the phrase as an evaluative term “to describe a legal system in good working order.” For Huq, this application of the concept gives it



“a moral charge,” like the word “justice” (at 1–2).

As in thinking about justice, the specifics of that moral charge are contestable. Laws vary place to place and over time reflecting differing values, methods, and purposes. A modern legal system especially is a complex social practice. It involves constitutions, statutes,

judge-made common law, and executive regulations and orders that are distinguishable from but not necessarily uninfluenced by other forms of rules and principles, such as social mores and religious dictates. Consequently, in Huq’s exposition, differences about the rule of law are culturally relativistic and intermeshed with differing views about what is law.

Political and Moral Philosophical Precursors

In understanding the rule of law, the intellectual terrain includes political and moral philosophy along with jurisprudence. Terming the ideas as precursors to the rule of law, Huq draws on canons in Western philosophy, most notably Aristotle, Locke, and Montesquieu (at 14–25). Whereas Huq writes broadly about the rule of law, his most frequent attention is on Anglo-American history and thought. The writings of Aristotle, Locke, and Montesquieu were very familiar to America’s founding generation and highly influential in the development and application of their political aspirations. In the American historical context, the rule of law has served not only as a legal ideal but also as a political ideal.

From Aristotle, Huq calls attention to the relevance of both political regime types and human virtues in discussing the role of law. Aristotle describes three forms of political governance: monarchy — the rule of one; aristocracy — the rule of the few; and polity — the rule of the multitude. There are also degenerate forms of each. They are tyranny, oligarchy, and democracy. In Aristotle’s writings, law comes up as part of his analysis of monarchy. Virtue in leaders is always a concern. Aristotle viewed democracy negatively because it signified for him mob rule and the inevitable rise of a demagogue,

who would come into office appealing to mass passions and then would govern self-interestedly.

Acknowledging the limited context in which Aristotle discusses law, Huq uses the opportunity to drive home a sociological point about legal relativity. For Huq, law is a virtually universal phenomenon, but its features vary and reflect differences in political culture and governance regimes. For example, the aims and operations of law may have some overlapping characteristics everywhere, but they are not the same in an authoritarian regime and in a democratic republic. Later in the text, Huq raises, as counterexamples to the American experience so far, how notions of law and the rule of law function today in places like China, Singapore, Egypt, and Hungary.

The second point Huq draws from Aristotle's discussion of monarchy is ethical and has to do with the distinction between reliance on law and reliance on people in governance. Here Huq turns to the mid-to-late 20th century American political theorist Judith Shklar for an elaboration.¹ In his paraphrasing of Shklar (at 17), the Aristotelean lesson is "that what matters is not so much the choice between fixed law and fickle men, but the choice between men. . . . Virtue, not institutional design, is key." The implication is that for the rule of law to be sustainable presumes that those in political office have some inkling of moral character. Having low expectations about the consistent likelihood of virtuous behavior, the American constitutional drafters to the contrary counted on institutional design and law to constrain the passions of leaders, especially whoever held the highest office. It is reasonable to conjecture, however, that in doing so, they did not expect the total absence of even a scintilla of virtue in the presidency.

Huq's reading of John Locke emphasizes differences with Thomas Hobbes, both 17th century English social contract theorists. For Hobbes, law was the command of the sovereign and bound only the citizenry, not the sovereign. It was one of the methods used by a dominant leader to establish and maintain civil order. Locke's position regarding the reasons for having laws was more complicated and developed.



Aristotle. Photo: Jastrow.



John Locke. Photo: State Hermitage Museum, St. Petersburg, Russia.



Thomas Hobbes. Photo: National Portrait Gallery, London.

Unlike Hobbes, he viewed the purposes of law as including restraints on both the people and the sovereign; otherwise, there was no rational incentive for individuals to consent to be governed. As cited by Huq (at 20), Locke's metaphoric use of a social contract entailed people agreeing to leave a pre-political state of nature but only if "personal and property rights are protected effectively." Effective protection meant not being subject to "extemporary, arbitrary decrees" but to "promulgated, standing laws, and known, authorized judges," where there is "one rule for rich and poor." Legally binding a ruler was important because it promised protection against arbitrary actions and property deprivations by those in authority and thereby provided compelling reasons for people to agree to the imposition of constraints on their conduct, including the use of force against them. The American founders referenced Locke repeatedly and Hobbes not much.

Huq next turns to the political and legal writings of Montesquieu, the 18th century French baron whose birth name was Charles-Louis de Secondat. Huq first underscores (at 24) two themes already raised in discussing Aristotle and Locke: Aristotle's "intuition that law can play varying roles in different regimes," and "Locke's contrast between arbitrariness and legality." He then highlights Montesquieu's revelatory emphasis on the necessity for the separation of governmental functions in institutional design as a check on power and to protect and advance liberty. For Montesquieu, counting on the personal virtue of public officials was an insufficient political safeguard, particularly in a republic.

For Montesquieu, counting on the personal virtue of public officials was an insufficient political safeguard.

In drafting our federal Constitution, James Madison and his colleagues considered Montesquieu's views as pivotal in their setting forth the scope and extent of the powers to be exercised by the legislature, the executive, and the judiciary. The division of authority among three independent branches of government remains a central principle for our constitutional democracy. With his brief discussion of Montesquieu, Huq lays the foundation for

1. See Judith N. Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Alan Hutchinson and Patrick J. Monahan (Toronto: Carswell, 1987).

intertwining ideas about the rule of law and American constitutional values.

Rule of Law as a Restraint on Public Officials

After addressing Montesquieu, Huq examines Dicey's ideas (at 28–39), which involved “a new account of the English constitution as law,” though there was not and is not now a compact written English constitution.² According to Huq, Dicey's constitutional perspectives were a response to changes in the role and nature of the state during the decades between 1850 and 1890 and reflected a specific focus on the English legal system. Culturally, they were very much rooted in English political and legal history.

For Dicey, the two bedrock English constitutional principles were the sovereignty of Parliament and the rule of law. The sovereignty of Parliament meant that it had the authority to enact law on any topic but had to do so through legislation, and that the Crown can act only through such legislation. Although the phrase “rule of law” had been occasionally used by

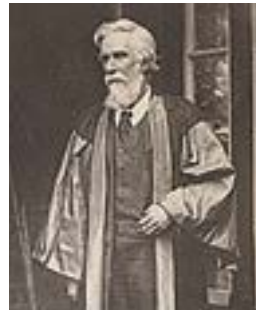
other English jurists previously, it was Dicey who first offered a distinct meaning directed at restraints on public officials and the role and status of courts.

Dicey understood the rule of law as having three related elements (at 30–32): (1) Individuals could not be punished or made to suffer a personal loss unless a legal breach is established by persons in authority “in the ordinary legal manner before the ordinary Courts of the land;” (2) no one stands above the law, which meant

no special tribunals as all legal matters were to be heard in “ordinary” courts under the “ordinary law;” and (3) the origins of English constitutional principles are primarily “judge made.” The first two together hold that ordinary substantive and procedural law is binding on everyone, no exception. The third requires qualification as English law includes both statutes of Parliament and common law judicial opinions. For Dicey, constitutional principles, which are more fundamental than other aspects



Montesquieu. Photo: Collection Chateau Versailles.



Albert Venn Dicey. Photo: Harvard Law School Library.

of law, are generalizations rooted foremost in the opinions of judges in reported cases but also in statutes that “resemble” judicial decisions. An example of the latter is a statute modifying or codifying a common-law remedy constraining executive action, such as a writ of habeas corpus. The main distinction to keep in mind is that some case opinions and statutes are more controlling than others.

Huq additionally gleans from Dicey's writings that the sustaining of a legal system in good working order requires good courts, good legislators, and a supportive political culture. These are three exceedingly significant suppositions. All require attentiveness to abusive and arbitrary exercises of power and when and how to resist them. Furthermore, they underscore the importance of individual and collective behavior. The functioning of a legal system always involves human decision making. In a constitutional democracy, whether it is in good working order tests the character and intellectual virtues of those who govern or judge and ultimately rests on the choices made by masses and elites. Looking ahead, Huq then describes Dicey's analysis (at 39)

as “the opening chord of a symphony that was to ebb and then crescendo across the long and bloody twentieth century.”

Three Frames for Understanding the “Rule of Law”

In surveying the 20th and early 21st centuries, Huq addresses law as practiced in authoritarian as well as democratic regimes, including highlighting different purposes and various misuses of law and counterarguments to reliance on law as a societal tool. Most of his discussion, however, centers on the law in democratic or aspiring democratic regimes. Rather than cover the entirety of his argument, I will focus on his presentation of three concepts of the rule of law, broadly framed but most relevant to thinking about law in constitutional democracies like our own. I will not discuss abuses of law mid-century in Germany, Italy, and the Soviet Union, but I will reference, as Huq has done, academicians whose writings on law and the rule of law were very much affected by the horrors of totalitarian nations.

Huq classifies (at 41) his three concepts of the rule of law as the lawyer's, the political philosopher's, and the economist's branches, because of their respective associations with the legal concerns, priorities, and ambitions of different academic disciplines. This terminology does not mean that each branch includes only the thought of lawyers, political philosophers, or economists. It captures

The sustaining of a legal system in good working order requires good courts, good legislators, and a supportive political culture.

2. Huq specifically cites A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1982) and Albert Venn Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Routledge, 2017).

instead differing perspectives concerning what matters most when examining the nature and purposes of law. An important initial conceptual distinction for Huq is that the lawyer's branch emphasizes how the rule of law works, whereas the political philosopher's and the economist's branches emphasize why the rule of law is desirable. For the first, "the cornerstone is efficacy." For the second, the evaluation is "in terms of a broader vision of a just society." For the third, the concern is with "the contribution that legal institutions make to the operation of the free market."

The lawyer's concept prioritizes the qualities of law needed

to guide effectively those who are its targets. In Huq's words (at 43), an "efficacy-based understanding of the rule of law turns on the capacity of legal rules to offer guidance." He then lists various important legal rule characteristics. They must be clear, publicly promulgated and written in understandable language, consistent and stable, broadly applicable and general in scope, and neither impossible to comply with nor retroactive. Although Huq cites several scholars sharing this perspective, he most draws on Lon Fuller's *The Morality of Law*³ — a now classic work in American jurisprudence in which Fuller uses the term "legality" rather than "rule of law."

Huq offers several general criticisms of this conception, including failing to address how legal institutions implementing the law in fact operate and their actual accessibility to all people. He also has several reservations about this concept, such as inadequately accounting for the ambiguity of language and describing some characteristics too absolutely and not as a matter of degree.

Regarding Fuller, Huq questions the assumption that how legal rules are framed and applied alone determines the "internal morality" of a legal system. In most cases, further contextual analysis is necessary. In Huq's view (at 48), Fuller's theory works to distinguish Nazism as being morally outside the rule of law, but it ignores, for example, the "important role [played by law] in maintaining slavery in both Europe and the Americas through the nineteenth century." For a legal system to have moral voids that need to be acknowledged is not unusual. Indeed, the legitimacy of a legal system may well rest on its capacity to redress moral imperfections and lapses over time.

Compared to the lawyer's formalistic or "thin" concept of the rule of law, the philosopher's is a more broadly



The Right Honourable Tom Bingham. Photo: English Wikipedia.

developed or "thick" concept that explicitly focuses on the "why" of law in addition to the "how." The dominant concerns are with creating a just social order that enables human flourishing and protects individual rights. As exemplars of this perspective, Huq mentions John Rawls and Ronald Dworkin, but he attributes the most influential arguments to Tom Bingham, an English judge, who wrote *The Rule of Law*.⁴

In Bingham's work, much pivots on what are considered "fundamental" rights. As Huq underscores (at 51), there are disagreements among and within nations as to the ranges and types of right that count most. There are

also other kinds of values to consider in a just society, such as democratic self-rule and restitution for mass injustices. For Huq, the political philosopher's concept inherently is culturally specific and allows room for disagreements about basic principles and how to reconcile them.

Such relativism is not the case with respect to the formulation of the economist's concept of the rule of law. Though a "thick" concept because it is purpose driven, its immediate aims are narrow, virtually singular. In this version, the reason for the rule of law is tied to support of a free market for goods and services. Efficient accumulation and distribution of material benefits is viewed as the highest priority for the development of a just society. Huq presents this perspective mostly through an explication of the ideas of Friedrich Hayek, whose conceptualization of the rule of law is intended to be universal. Hayek's most famous book is *The Road to Serfdom*.⁵

Hayek was horrified by the Nazi state and posited, according to Huq (at 54), that it was socialism "that dragged the Germans into fascism." The connection was that Germans both on the left and the right insisted that "state planning should oust the 'impersonal and spontaneous' operation of the market." For Hayek, this ouster "led directly and precipitously to a disastrous loss of civil liberties." Although Hayek left some room in his early writings for social welfare legislation, he always was adamantly opposed to central planning. Later, he viewed almost all social welfare legislation as anathematic.

Hayek also favored, like Dicey, the organic emergence of rules and principles of social ordering through the common law. In his view, the legal predictability promised by the rule of law and needed for efficient economic exchanges was best left to judges to determine.

3. New Haven: Yale University Press, 1964.

4. London: Penguin, 2011.

5. Chicago: University of Chicago Press, 1944.

Those most not to be trusted were in legislative and executive positions; judge-made law was the most advantageous and least risky way to legally support free markets.

Huq presents (at 57–59) several powerful responses to Hayek regarding the relationship of the rule of law to free markets and the consequences for civil society. First, the overwhelming historical evidence is not that socialism led to fascism but that fascism in Germany and Italy took hold by forging alliances with conservative elites and rural factions. Furthermore, Hayek’s fear about socialism leading to totalitarianism has yet to happen in western European social democracies. The reasons now for rising support for authoritarianism are mixed, varied, and complicated. Second, Hayek’s aversion to any governmental regulation is unconditioned and overly inclusive. For example, professional licensing by a government may provide information to consumers that furthers trust in obtaining a service and, thus, is market enabling. Lastly, misuse of state authority is for Hayek the main threat to freedom. Whereas governmental power certainly can be horribly abused, what Hayek overlooks is that society and the economy also can be sources of despotic power.

Rule of Law and American Constitutionalism

The remainder of Huq’s very short introduction to the rule of law has chapters addressing “Why does the rule of law survive?”; “Cultivating the rule of law in new lands”; and “The rule of law condemned: Critics and crises.” Most of his discussion in these chapters addresses ideas and developments not central to my interest in focusing on how to better understand the present rule of law crisis in the United States, with two exceptions to which I now turn: Huq’s examination of Madison’s constitutionalism, and his capsule description of what has happened in Hungary in recent years under Victor Orbán’s rule.

In his delineation of Madison’s constitutionalism (at 63–64), Huq emphasizes Madison’s skepticism about relying on the virtue of leaders and confidence in relying on institutional design. The key constitutional structural features laid out by Madison were three branches of government with Congress being the first among equals, “national elections for both the presidency and Congress,” and “splitting power between the national government and subnational units known as states.” With respect to establishing three branches, Madison assumed that the individuals in office would “identify themselves and their interests with their respective branches,” and that this attachment would be sufficient motivation “to parry any overreach by another branch.” In this way, as



Friedrich Hayek. *Photo: Mises Institute.*



James Madison. *Photo: Association (White House Collection).*

phrased by Huq, “‘ambition’ would ‘counteract ambition’ and would elicit a government under law.” As to the new federalism, Madison’s assumption was that “the state governments would serve as sentinels against the national government’s abuse of centralized power.” Huq identifies (at 64–66) several critical and related weaknesses in Madison’s approach.

First, Madison’s theory did not address why and when officials would identify with their office rather than prioritize other interests. Rather, the presumption was that Congressional representatives, for example, would view as an enduring fundamental commitment maintaining the integrity, authority, and power of independent legislative decision making. Widespread congressional subservience to presidential will was not something envisioned by the founders.

Second, Madison’s theory assumed conflicts between the branches of government and between the national and state governments but did not account for collusions among them. In this regard, though very much directed at factions in politics,

Madison’s constitutionalism ignored the formations of political parties, which happened immediately, and their pervasive effects on the obtaining and wielding of governmental power. In analyzing inter-governmental relationships and conflicts, the constitutional framers recognized the need for compromise and cooperation but not how to constrain partisan collusions.

And third, Madison’s theory did not anticipate future dramatic changes in the operations of the three branches of government, namely the striking accumulation of responsibilities and power in the presidency and executive branch during the 20th century, the formidable role played by the Supreme Court and judicial review generally in restraining or not restraining both the legislature and the executive, and the paralyzing waning of congressional power resulting from partisan polarization.

In discussing Orbán, Huq makes no references to President Donald Trump, whose election to a second term happened after the book’s publication. The only mention occurs in the Preface (at xvii), noting his efforts “to remain in office after losing a democratic election.” Huq also does not make explicit connections between Hungary and the United States. But the parallels are there for the reader to infer, notwithstanding major historical and political cultural distinctions.⁶

6. For a short, thoughtful essay regarding rule of law issues and American civic institutions, published while I was writing

Huq writes (at 105), “Hungary provides the best example . . . of how a thick rule of law can be transformed into a legal regime imposing no meaningful constraint on the arbitrary use of state power.” He then lists several actions taken by Orbán and his Fidesz party since regaining control of Hungary’s parliament in 2011. These actions include (at 106) identifying the party with a mythic ideal of the nation thereby stigmatizing political opposition as disloyal and alien; redrawing electoral districts to the party’s advantage; establishing a new “Media Authority” to supervise and sanction broadcast, print, and online media; dismantling and reconstructing Hungary’s court system; and enacting 319 statutes in the first 18 months of Fidesz’s supermajority parliamentary control, including entirely new civil and penal codes. In summary, Huq states, Orbán’s “party used a host of seemingly proper changes to law as a means of disabling almost every mechanism whereby its power could be checked.”

The book’s last chapter ends with a final section entitled “What remains of law.” In this section, Huq (at 107) poses a pointed and ironic warning:

“A dictator of Brazil in the 1930s, Getulio Vargas, is reputed to have said, ‘For my friends everything, for my enemies the law.’ So, indeed, it has often been. Tycoons, emergencies, and populists can sap the rule of law. Sometimes, legality itself can prove a remarkably effective instrument for unraveling its own best aspirations.”

Conclusion

In this review, I have underscored five analytic and contextual features of the rule of law identified by Huq. These features are (1) the rule of law is an evaluative standard with a “moral charge” for describing whether a legal system is in good working order; (2) although sometimes viewed as though its terms are universal, the values underlying and institutions implementing concepts of the rule of law are to an important degree culturally and

this book review, see Thomas B. Edsall, “Trump Is Insatiable,” *The New York Times*, April 22, 2025 <https://www.nytimes.com/2025/04/22/opinion/trump-harvard.html> [as of October 6, 2025]. See also Emily Bazelon, “Bow to the Emperor: We Asked 50 Legal Experts About the Trump Presidency,” *The New York Times Magazine*, October 6, 2025 <https://www.nytimes.com/2025/10/06/magazine/legal-experts-trump-justice-department.html> [as of October 6, 2025].

Substantial questions have been raised about the Trump administration’s compliance with the rule of law. New issues are brought to the federal courts on a weekly, and sometimes daily, basis: Can the President ignore statutory restrictions on his ability to fire appointees to independent agencies? Can the President disestablish birthright citizenship by Executive Order? Can the President deport non-citizens and even some citizens without due process? Can the President refuse to spend funds lawfully appropriated by Congress? Can the President order National Guard troops or regular Army units into cities where there is no armed invasion or insurrection? These are just some of the most salient issues raised to date, many of which have already landed on the Supreme Court’s docket.

historically specific; (3) in American political culture, there is an inextricable intertwining of ideas about the rule of law and constitutionalism, an important effect of which is that the rule of law functions as both a legal and a political ideal; (4) the greatest institutional threat to the rule of law is an unrestrained and unchecked chief executive; and (5) the survival of the rule of law in practice is dependent on three pillars — good judges, good legislators, and a supportive political culture.

The rule of law is a method for curtailing arbitrary and abusive power. In the United States today, the meaning of the rule of law closely aligns with understandings of American constitutional provisions, rights, values, and ideals. Its sources, however, include not only constitutional language but also court opinions, statutes, regulations, and even executive orders, if they are constitutionally authorized or otherwise legally justifiable. When there are conflicts of interpretation and in application, we have long assumed that judicial decisions are ultimately determinative. But the extent to which such decisions change behavior and are followed reflects their content and the realities of implementation and enforcement.

In February 1931, two years before the Weimar Republic’s President Paul von Hindenburg appointed Adolph Hitler Germany’s Chancellor, Joseph Goebbels declared to the Reichstag: “We want to conquer power legally. But what we do with that power once we possess it is up to us.”⁷

Power is a relationship concept. One has power only to the degree others cede it. Such compliance can occur under duress, as an expression of self-interest, as a sense of legal, civic, moral or religious duty, or from being uninformed or passive. The American constitutional order, including the viability of the rule of law, is under the severest challenge since the Civil War and its immediate aftermath. Whether resistance is sufficient and the challenge is overcome depend upon what happens in American courts, in Congress, and in the society at large. Looking forward, one thing is clear: America’s political exceptionalism, if it ever existed, is no more. ✪

MARK NEAL AARONSON is Professor of Law Emeritus, University of California College of the Law, San Francisco. He dedicates this book review in memory of his friend and faculty colleague, former Associate Justice of the California Supreme Court Joseph Grodin (1930–2025).

7. Cited in Harald Jähner, *Vertigo: The Rise and Fall of Weimar Germany* (New York: Basic Books, 2024), at 364.

The values underlying and institutions implementing concepts of the rule of law are to an important degree culturally and historically specific.