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BOOK REVIEWS

The Rule of Law Under Fire? By RAYMOND WACKS. [Oxford: Hart Publishing, 2021. viii + 167 pp. Hardback £85.00. ISBN 978-1-50995-058-4.]

The rule of law is an elusive concept. It is generally considered to be a fundamental characteristic of liberal democracies. Indeed, in the UK the Lord Chancellor takes an oath to respect the rule of law (Constitutional Reform Act 2005, s. 17). Yet Parliament has (no doubt wisely) refrained from defining what the rule of law is. We can all agree that in some sense at least it means being ruled by laws rather than the potentially arbitrary diktats of an autocrat. And since a key objective of rule by laws is that we are supposed to know what the rules are and be able to arrange our lives accordingly, this presupposes that they must satisfy certain basic criteria, such as being accessible, having at least a certain degree of clarity, being prospective and not retrospective, being enforced efficiently and fairly and so forth. Moreover, those interpreting the law must be seeking in good faith to give effect to the rules according to certain accepted rules of construction. These are the essential features of a fair and functioning legal system.

The uncertainty about its meaning arises principally because of disagreement as to whether the concept has a substantive dimension. Does the rule of law require the legal system to protect specific individual rights or to reflect certain moral values, and if so, which rights and which values? There is also disagreement as to the relationship of the rule of law to other constitutional concepts such as justice, and democracy. Is it wholly independent of them, and if so, should a morally sound Constitution require that it always takes priority?

Professor Raymond Wacks has written a short but stimulating book on the rule of law. He asserts that "the rule of law is imperilled by a number of threats" (p. 57) and identifies 16 of them, although he concludes that some are, on analysis, no real threat at all. However, since he is looking at threats to the rule of law, he perforce has first to set out his stall and propose his own understanding of the concept. In so doing, he gives a short but valuable discussion of some of the existing jurisprudential debates about the meaning of this difficult concept, from the relatively "thin", essentially procedural, concept of Joseph Raz, through the slightly thicker notion of Lon Fuller to the views of Ronald Dworkin who sees morality as central to the idea of law and to the concept of the rule of law itself (chs. 2 and 3).

Wacks adopts what he calls a "thin principle" – although not as thin as Raz's concept. He defines the rule of law by reference to a set of six interrelated principles. First, he says that the rule of law is the antithesis of arbitrary power: a central purpose is to promote the "government of laws, not of men" (p. 52). Second, the legal rules and principles must constitute a formal, rational system; this requires compliance with a number of requirements such as that the rules should be clear, readily available and do not operate retrospectively. These requirements are designed to satisfy an important third principle, that the law should be capable of guiding conduct. Fourth, the laws must be enforced by judges who are impartial and independent of the executive branch. Fifth, the law must be applied equally to all ranks and classes of people, including government officials: Finally – and perhaps most contentiously – the law must be "of benefit

to the individual". Wacks expresses this last principle as follows (p. 53): "Law provides a stable framework in which social, political and economic relationships can operate. It promotes order and personal security, respects human dignity and individual autonomy, and ensures a reliable, predictable form of justice and the protection of individual rights."

The first four principles – and arguably the fifth also – reflect essentially a procedural and institutional concept of the rule of law and would attract widespread acceptance. These are requirements which will be satisfied by any state operating a properly functioning legal system. As Fuller points out, it is unlikely that laws which satisfy these requirements will in fact be morally unjust, or at least not obviously or incontrovertibly so, but that is not guaranteed. It is the final requirement which writes some substance into his concept, but its formulation leaves a number of uncertainties. Wacks rejects the notion (in my view correctly) that the rule of law means that the legal system must satisfy "any specific model of the public good or any particular conception of social justice" (p. 52). But his own definition leaves a significant penumbra of uncertainty. Many laws will restrict individual autonomy in the wider public interest; and which individual rights must be respected if the rule of law is not to be infringed?

The rule of law is no guarantee that laws will not be broken; the question is whether the system ensures that wrongdoers are brought to justice. When the Capitol was stormed following the election defeat of Donald Trump, over one hundred law professors signed a letter describing this as an attack on the rule of law. That is surely a misconception of what the rule of law is about. If the legal process is properly invoked to deal with the lawbreakers, there is no such breach. By contrast, it has been alleged that some democratically controlled cities in the US deliberately chose not to take action against mob violence and looting in the wake of the George Floyd murder; that would be incompatible with the rule of law. It is not for the enforcement authorities to dispense with the law.

Perhaps the greatest threat to the rule of law is poverty. A precondition to a working legal system is that a state has the resources to create and operate it, and the political will to give it at least a degree of priority. Without effective law enforcement there is a rule of anarchy. Another precondition is absence of corruption, which Wacks does discuss as a threat to the rule of law. He identifies many forms of corruption in the public and private sphere. It is present in virtually all societies and is endemic in many. The existence of corruption itself is not necessarily incompatible the rule of law, however. But it is surely the most serious interference with the rule of law where it involves forms of bribery undermining the integrity of law enforcement and judicial determination. As Wacks properly says, corruption of judicial officers destroys trust in the legal process and makes a mockery of the rule of law.

The core of the book is taken up with issues which are said, potentially at least, to place the rule of law under threat. They are an eclectic mix with 16 potential threats being identified. A number of chapters deal with the compatibility of the rule of law with different ideological forms of government. There are separate chapters on capitalism, libertarianism, communitarianism, authoritarianism, and Marxism (contained in a section dealing with Critical Theory). I would not describe these as threats to the rule of law even where the legal systems in these states are not compatible with it (and, unsurprisingly perhaps, Wacks concludes that Marxism, communitarianism and authoritarian governments generally are not, at least on his version of the rule of law). The states concerned simply choose not to

embrace the values which are necessary to enable the rule of law to flourish. They do not threaten the rule of law elsewhere unless they have territorial ambitions.

An important question, not directly discussed, is whether Wacks thinks that the rule of law is only compatible with liberal democracies. He refers to it in the Introduction as "a fundamental element of democratic government" (p. 3), but it does not follow that is incompatible with other forms of government. A benevolent dictatorship could certainly satisfy Wacks' definition of the rule of law. The former Yugoslavia under Tito, and Singapore when under Lee Kuan Yew, provide possible examples. Some argue that Hong Kong under Chinese control, with its independent judiciary, complies with the rule of law, but Wacks is very doubtful. It might be said to comply with a purely procedural notion.

Of course, compliance with the rule of law is not an all or nothing test. Different states comply to a greater or lesser extent. Even democratic states ostensibly wedded to it may introduce laws which are obviously at odds with it. Sometimes this is a deliberate choice. Governments faced with serious threats to the public welfare, such as Covid, will knowingly introduce emergency legislation, often without proper parliamentary scrutiny, and adopting measures in breach of the rule of law on the premise that some other value – perhaps life itself – takes precedence over it. Similarly with counter-terrorism legislation which may, for example, allow for detention without trial and withholding potentially relevant information from suspected terrorists. The departure from the rule of law may be justified, but it ought to be proportionate, going no further than is necessary to achieve the desired outcome. Wacks properly identifies the genuine concerns that what may begin as a temporary restriction may become permanent; and that courts and Parliament might become less vigilant in enforcing the rule of law in other contexts where the justification is slender.

Other threats to the rule of law in democratic countries arise from the rise of populism and nationalism. Populism is itself a contentious concept, but Wacks takes it to mean a government which is hostile to the established elites, which will typically include the judges. If this elite is seen to obstruct the true democratic wishes of the majority, there is an obvious danger that steps will be taken to diminish the power of the elites, including the judiciary, by removing their independence and appointing more compliant judges. This has happened in Poland and Hungary. Even a thin form of judicial review is then very much under challenge. As Wacks points out, it is more debatable whether nationalism is a threat; it largely depends upon how that concept is understood. In so far as the focus is on patriotism, there is no problem. But history shows it sometimes has a darker meaning which would seek to place certain groups, such as immigrants, in an inferior legal position simply because of their status. That would not be compatible with the principle of equal treatment and therefore would undermine his concept of the rule of law.

A particularly interesting area of discussion is whether the rule of law is endangered by the judiciary, exercising the power of judicial review, or from the doctrine of parliamentary sovereignty. At first glance it may appear curious that the key actors in upholding the rule of law can undermine it. The very notion of an independent and unbiased judiciary, ready to hold the executive to account, is fundamental to the rule of law. It is difficult to see how judges seeking to discharge their function of judicial review with integrity can be said to be undermining the rule of law. Of course, judges in the exercise of their judicial review powers may go further than some commentators consider appropriate.

There are real concerns that unelected judges may be too ready to interfere with the elected government or to interpret legislation in an unacceptably narrow way. This may indeed suggest that judges are undermining democracy but provided the courts are applying the relevant principles in a consistent and bona fide way, this does not undermine the rule of law itself.

A controversial issue for English lawyers is whether the doctrine of parliamentary sovereignty is compatible with the rule of law. Wacks concludes that it is, but I wonder whether this is too sanguine. The orthodox doctrine requires the courts to give priority to whatever Parliament enacts. The logic of that position is that ultimately the rule of law is entirely in the hands of Parliament (and often, in effect, the executive). It might, for example, seek to remove – either generally or in specific areas – the right of the judiciary to review the decisions of the executive or Parliament. One might assume that in practice Parliament is unlikely to take such a radical step – although the idea has from time to time been mooted – but the conflict is ever-present and so surely is the threat. Many who support the orthodox position would accept that the doctrine could, theoretically, put the rule of law at risk. They would argue where there is a clash between the elected representatives and the unelected judges, the views of the former must take precedence even though the rule of law is infringed. Wacks has expressed the view that an autocracy – in essence a dictatorship – is incompatible with the rule of law; it is not obvious why what has been described as an "elective dictatorship" (a phrase popularised by a former Lord Chancellor, Lord Hailsham, in a lecture in 1976) does not at least pose a potential threat to it.

Other important challenges to the rule of law result from the development of the global economy and the rise of very powerful high-tech companies with great influence on state governments who can manipulate their activities between different jurisdictions so as to evade effective regulatory control. These raise very different kinds of problems which go to the scope and efficacy of the rule of law as nation states lose their power.

This is a valuable addition to the burgeoning literature on the rule of law. Wacks explores the subject from a fresh perspective. The book provokes as many questions as answers, but in so doing it stimulates further discussion of this fascinating and elusive concept.

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Contractual Relations: A Contribution to the Critique of the Classical Law of Contract. By David Campbell. [Oxford University Press, 2022. xxiv + 438 pp. Hardback £95.00. ISBN 978-0-19885-515-6.]

One might be forgiven for thinking, given Professor Campbell's extensive engagement with the topic in the past (and indeed the title of the book), that *Contractual Relations* would be a restatement of the relational theory of contract. This is to far underestimate the scale, ambition and practical insight of the project undertaken in this new volume. Contained within it is a wholesale critique of classical contract theory, welfarism, laissez-faire, ultra-minimalist and amoral conceptions of contract, and even the communist critique of contract from which