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THE RULE OF LAW AND THE SITUATED SELF

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As a starting research assistant (AIO) at the Philosophy department of the University of Amsterdam, the first course I ever taught was one I conducted together with Pieter Pekelharing on the communitarian theory of Alasdair MacIntyre. In this essay I want to revisit the texts of that course and will explore what they have to say concerning the current focus of my research: the Rule of Law.

The essence of the Rule of Law can be stated in Tom Bingham's words as requiring that 'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts' (Bingham 2010: 8). Although the Rule of Law is widely held to be of great importance, there is equally wide disagreement about what the Rule of Law implies. As Waldron summarizes: 'There is contestation about the content and requirements of the Rule of Law ideal, and there is contestation about its point' (Waldron 2002: 159).

One of the many contentious issues concerns the question of whether the Rule of Law is a specifically Western value, based on the ideals of individualism, liberalism and capitalism, or whether it is of value more generally.¹ This question has gained importance in particular in relation to large-scale projects promoting the Rule of Law worldwide that are carried out by the UN and other international organizations and donors at the national and international levels with the intention of imposing specific standards under the heading of the Rule of Law on non-Western states. For this field, the World Justice Project (WJP) has formulated a highly influential standard, the Rule of Law Index.² The WJP has formulated the basic requirements of the Rule of Law as follows:

I. The government and its officials and agents are accountable under the law.

II. The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.

III. The process by which the laws are exacted, administered, and enforced is accessible, fair, and efficient.

IV. Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.' (WJP: 3)

According to the WJP, 'These principles are derived from international sources that enjoy broad acceptance across countries with differing social, cultural, economic, and political systems' (WJP: 3). The question is whether, despite the claim of the WJP to the contrary, the basic requirements of the Rule of Law can be said to be ideologically biased towards Western liberal individualism.

The ideological bias of the Rule of Law can concern either the procedural or the substantive requirements. Given the limited space we are offered to honor Pieter, I will concentrate on the procedural requirements. Concerning these procedural requirements, the individualistic tendency of the Rule of Law could be seen to lie in the fact that the Rule of Law aims

to ensure that every person is bound by and entitled to the benefit of the law and that this implies that a person has individual rights which he must be able to uphold against the government and society at large. This seems to entail a concept of the person as being somehow detached or detachable from society.

The idea of a person having individual rights that he must be able to uphold against society and its government before an independent and neutral judiciary seems to run counter to the communitarian concept of the person adhered to by MacIntyre. According to MacIntyre, ‘the story of my life is always embedded in the story of those communities from which I derive my identity. I am born with a past; and to try to cut myself off from that past, in the individualist mode, is to deform my present relationships. The possession of an historical identity and the possession of a social identity coincide’ (MacIntyre 2007: 221). This conception of personal identity as being embedded in social practices is also constitutive of MacIntyre’s conception of personal responsibility and accountability: ‘Identity is socially ascribed. To be one and the same person is to satisfy the criteria by which others impute identity, and their criteria of identity govern and are embodied in their ascriptions of responsibility and accountability’ (MacIntyre 1988: 290-291).

By itself the idea that a person should be held accountable and should be able to hold others accountable in accordance with the criteria that are constitutive of the society that define his identity does not run counter to the principles underlying the Rule of Law. Rather the contrary. As I have described elsewhere, the value (or aim) of the Rule of Law lies precisely in treating people as responsible persons (Rijpkema 2013a: par. IV.A). If people are to be held responsible and accountable for their actions, they must be able to adjust their actions to the norms by which they will be judged. This requires that it must be clear to people sufficiently in advance what these norms entail. This explains why the Rule of Law requires *inter alia* that the norms that a person is held accountable to must be clear, publicized and stable. As Jeremy Waldron explains, ‘Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. It is also quite different from eliciting a reflex recoil with a scream of command. The publicity and generality of law look to what

Henry Hart and Albert Sacks called “self-application”, that is, to people’s capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand’ (Waldron 2008: 26-27).

Similarly, Lon Fuller claims that ‘law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of the system’ (Fuller 1969: 210). According to Fuller, this requires that, in addition to being clear, publicized and stable, norms must be general, prospective, non-contradictory and not requiring the impossible, while further there must be congruence between the norms and the actions of the institutions upholding them (Fuller 1969: 70-79). Meeting these conditions will be necessary for any normative system claiming authority over people in order to be justified in holding them responsible and accountable for their actions. Therefore these basic formal requirements of the Rule of Law are not only consistent with, but even required by the conception of responsibility and accountability advocated by MacIntyre.

One complicating factor for international projects promoting the Rule of Law is that these projects often exclusively or primarily aim at implementing or reforming formal legal institutions, rules and procedures. These formal legal systems are often considered in isolation of informal authoritative normative systems that are or may be constitutive of the social practices of a society and the personal identity of its members. And even if attention is paid to these informal normative systems, they are often regarded as being independent of and secondary to the formal legal system. Thus the WJP, for example, further develops the four basic requirements of the Rule of Law in nine factors by which compliance with the Rule of Law is measured. Only the last of these is concerned with what is called ‘informal justice’ (WJP: 11). This concerns ‘the role played in many countries by traditional, or “informal” systems of law – including traditional, tribal, and religious courts as well as community-based systems – in resolving disputes’ (WJP: 17). Of these systems of informal justice the WJP examines ‘(1) whether traditional, communal and religious dis-

pute resolution systems are impartial and effective; and (2) the extent to which these systems respect and protect fundamental rights' (WJP: 17). In this way formal and informal systems of justice are regarded as fully separate and as independently claiming and exercising authority over a specific society.

This poses a question that is also central to MacIntyre's analysis: 'How ought we to decide among the claims of rival and incompatible accounts of justice competing for our moral, social, and political allegiance?' (MacIntyre 1988: 2). MacIntyre diagnoses the existence of multiple, possibly incompatible, systems of justice that claim authority over a society as a sign of the fragmentation of that society, which also has repercussions for the identity of persons within that society. If identity is socially ascribed and is determined by the criteria of identity that are embodied in the ascription of responsibility and accountability by the applicable systems of justice, then the applicability of multiple incompatible systems of justice within a society implies a fragmentation of that society and this, in turn, implies the fragmentation of the personal identity of its members and leads to, what MacIntyre calls, a 'protective compartmentalization of the self' (MacIntyre 1988: 397). Thus, even if the formal requirements of the Rule of Law would not as such be specifically biased towards liberalism, the operationalization of these requirements in the way advocated by the WJP would at least potentially be incompatible with and detrimental to societies with systems of informal justice, including traditional, tribal, and religious societies, and the personal identity of its members.

However, as we saw, the Rule of Law requires that it must be sufficiently clear in advance which norms are supposed to guide people's behavior, and this requires among other things that the norms of an authoritative system should not contradict each other. The existence of multiple authoritative systems claiming authority over the same society poses an additional problem in that it should not only be clear which norm of an authoritative system is applicable and what it implies in a particular case, but also which authoritative system is applicable. As I have argued elsewhere, what the Rule of Law requires in this type of situation is a system of secondary rules that makes it sufficiently clear how the various systems are related (Rijpkema 2013b).

This can be accomplished in a number of ways. First, there can be an accepted set of conflict rules. It can be established, for example, that in a case of conflict one of the systems takes precedence over the other. This is the normal case at the national level in Western democratic states where the formal national legal system is the overarching authoritative system that decides on the limits of the various spheres of authority.³ A set of conflict rules can also formulate priority rules relative to the subject-matter at hand, like for instance in the system of Private International Law (PIL).⁴ Or it can take the form of 'personal laws' (Glenn 2011). According to this model, the applicable authoritative system is determined by personal characteristics rather than situational characteristics. For example, in many countries certain religious laws are applicable to a person if and only if he is a follower of that religion. Another possibility for preventing different authoritative systems from imposing incompatible demands is by requiring that their respective norms are harmonized when needed. Whether these secondary rules succeed in ensuring that the totality of authoritative systems meets the requirements of the Rule of Law depends on the extent to which they succeed in offering sufficient clarity, consistency and concordance between the various authoritative systems, so that fragmentation is avoided.

The Rule of Law requires that for all members of a society it must be sufficiently clear which authoritative rules are applicable to them in a specific situation and that the rules of the various normative systems that claim authority over a society as a whole must define a clear and unequivocal standard to which each person can be held responsible and accountable. As such, the requirements of the Rule of Law fit in well with the central doctrine of MacIntyre's communitarian theory that the idea of personal identity requires that the normative systems that define the social practices that are constitutive of people's personal identity form a unity. Thus, this interpretation of the formal requirements of the Rule of Law not only is not biased towards liberalism, but is also not incompatible with or detrimental to societies with systems of informal justice, including traditional, tribal, and religious societies and the personal identity of its members.

If we compare this rendering of the Rule of Law with the criteria formulated by the World Justice Project, two things are noteworthy. First, the WJP focusses predominantly on the formal legal system of state institutions and regards informal legal systems of importance mainly when the formal legal institutions fail to provide effective remedies (WJP: 17). But although this focus on formal state institutions is understandable given the vast prevalence of state law in the contemporary institutional setting, the importance of informal systems of justice is not limited to their ability to function as a backup system in situations where the formal legal system fails. From the perspective of the Rule of Law, informal systems of law are relevant to the extent that they are capable of exercising authority over the members of a society. And in traditional and religious societies their influence can be considerable, irrespective of the extent to which the formal legal system meets the Rule of Law principles identified by the WJP. Secondly, it was mentioned in the above that the WJP treats formal and informal systems of law as self-contained systems that can be assessed independently. However, as the foregoing makes clear, it follows from the basic formal requirements of the Rule of Law that what has to be assessed is the set of institutions, rules and procedures that claim authority over a specific society considered as a whole. The Rule of Law does not require every society to have a formal system of law comparable to those of Western democratic states. Remedying possible shortcomings in the existing constellation of institutions, rules and procedures can equally consist in strengthening formal or informal institutions, rules and procedures. By requiring that the totality of normative systems that claim authority over a society must form a coherent whole, the Rule of Law is not opposed to, but rather supportive of, the type of communitarian society advocated by MacIntyre.

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¹ As for example Carruthers and Halliday write: “Rule of law” as a modern ideology has frequently been conjoined to the neo-liberal economic policies (privatization, deregulation, liberalization, balanced budgets, etc.) of the so-called “Washington Consensus”, although it need not be’ (Carruthers and Halliday 2006: 524).

² *The World Justice Project Rule of Law Index 2012-2013*, available at http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf.

³ This does not mean that the norms of the formal legal system necessarily take precedence over all other norms. For example, under certain circumstances the Dutch criminal law recognizes as a ground of exculpation the *situation of necessity* (‘noodtoestand’), which bars the government’s authority to impose criminal sanctions and requires the court to dismiss the charges against a person. This *situation of necessity* exists where a person acts in breach of the law because he feels compelled to follow the norms of a social practice that is constitutive of his personal identity (for example the norms that apply to him in his capacity as a doctor or as an optician. See HR 15-10-1923, NJ 1923/1329 (optician case)). The *situation of necessity* is characterized as ‘a situation of conflicting duties’, namely a conflict between the duty to obey the formal criminal law and the duty to act in accordance with the standards of excellence of an informal authoritative system. Thus, in such a situation of conflicting duties, the formal legal system does not claim precedence and allows a person to act in accordance with his informal duties.

⁴ The system of PIL does not form a unified hierarchical system, but is composed of a wide range of bilateral and multilateral agreements from a number of sources, like the Hague Conference on Private International Law (HCCH) as well as, for example, EU regulations.