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No Fixed Address: Universality and the Rule of Law

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Résumé

Le présent texte porte sur une question apparemment fort simple : la primauté du droit est-elle universelle? Pourtant, les questions qui nous semblent simples le sont rarement : qu'entend-on, en fait, par « universelle »? Existe-t-il un seul type d'universalité ou en existe-t-il plusieurs? Et puis, qu'est-ce vraiment que la primauté du droit? Cherchant à répondre à ces questions et à déterminer si le concept de primauté du droit est un concept universel, le présent article s'attache à démontrer que les deux principales approches théoriques de la question (l'approche procédurale et l'approche substantive) sont loin d'être homogènes et qu'elles excluent nécessairement des concepts qui ne peuvent être ainsi mis de côté. De plus, cet article démontre qu'il n'existe au sein de la collectivité aucun consensus véritable en ce qui a trait à la primauté du droit. De plus, il soulève un doute quant à la possibilité que la notion d'universalité

Abstract

This paper addresses a seemingly simple question: is the Rule of Law universal? Yet, seemingly simple questions are rarely so: what, in fact, is meant by universal? Is there one type of universality or are there more? What is the Rule of Law, really? In an attempt to answer these questions and to decide whether or not the rule of law is a universal concept, this paper illustrates that the two major theoretical positions (procedural and substantive) are far from homogenous and that they necessarily exclude conceptions which cannot be so partitioned. Also, it shows that there is no meaningful consensus in the community at large with respect to the rule of law. Further, it questions the possibility of either a quantitative or transcendental universality.

Prescriptively, the paper proposes an alternative approach built on William Gallie's notion of contested concepts and on Richard Rorty's notion of commitment to one's contin-

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puisse être soit quantitative, soit transcendantale.

Le présent article propose une approche alternative, fondée sur la notion des concepts contestés de William B. Gallie et la notion d'engagement personnel à l'égard de ses propres croyances dépendantes, développée par Richard Rorty. Fondamentalement, cette approche est proposée afin de pouvoir éviter l'inaction qui pourrait survenir suite à la prise de conscience de la valeur relative de sa position personnelle. Cette approche démontre qu'une pluralité de possibilités ne mène pas nécessairement au nihilisme ou à l'inaction.

gent belief. This approach is offered, in essence, to move away from a position of inaction that could arise from the realisation of the relative merit of one's position. This approach shows that a plurality of possibilities need not necessarily lead to a position of nihilism, of inaction.

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To realise the relative validity of one's convictions and yet stand for them unflinchingly, is what distinguishes a civilised man from a barbarian.

Joseph SCHUMPETER

The question which this essay seeks to address is *prima facie* simple: is the Rule of Law universal? One is tempted to quickly answer "yes" (or just as likely "no") and then give a series of arguments which buttress the given quick answer. Yet, the more time passes the more the question itself becomes a source of further questions: What, in fact, is meant by universal? Is there one type of universality or are there more? And, what is the Rule of Law, really? Is it a unified concept? Is the Anglo-Saxon conception of the rule of law consistent within itself and its own tradition (British, American, Canadian, Australian)? What of the relationship between the *primauté du droit* (or *État de droit; suprémacie du droit; règne du droit*) in France (Québec?) and the *Rechtsstaat* in Germany and then what of their respective relations with the Anglo-Saxon rule(s) of law(s)? Do they all represent the same idea? If they do not, then are their differences significant? Finally, what is, indeed, the nature of a concept anyway? In an attempt to address and answer the main question of the universality of the Rule of Law, these sub-questions will form the object of discussion throughout this essay.

Without pretence to exhaustiveness, Part One of the essay will explore the Rule of Law concept in its myriad expressions. It will outline the two main constitutive poles of the concept, as well as what lies between, or outside of them. We will explore how the rule of law finds its expression in the Anglo-Saxon tradition, by both legal theorists and the courts, in their attempt to expound and, for the latter, to also implement the concept. Furthermore, this first part will briefly compare and contrast this tradition with the Germanic formulations as a way of rounding out the discussion. If a common element (or common elements) can be found to exist

within and between the various expressions, this will be highlighted as a way of concluding Part One.

Once the Rule of Law is outlined, Part Two of the paper will then adumbrate the possible ways that a given thing can be classified as universal (universality). It will be shown that there are two possible ways to classify something as universal (empirical/quantitative and metaphysical/transcendental). By applying this classification, the second part of the essay seeks to illustrate that none of the possible ways to approach universality so outlined meshes with the Rule of Law.

Part Three builds on the conclusion in Part Two that the Rule of Law cannot mesh with any definition of universality. Adopting a methodology adapted from William Gallie's famous essay of 1956 ("Essentially Contested Concepts"), it will attempt to explain that the Rule of Law itself is best understood within the Galliean framework. Consequently, Part Three will propound a conceptual framework for future discussions of the Rule of Law away from the discourse of universality; a conceptual framework which is more accommodating to the concept's reality.

At the outset, a preliminary position must be explained. Already, in the foregoing paragraphs, the Rule of Law has received two distinct spellings: "Rule of Law" and "rule of law". It is commonly observed that when the expression is capitalised in a given work, the author is taking a position – consciously or tacitly – as to its worth or value: elevating it to a grand stance. When it is written in lower case, the opposite position is taken. For the purposes of this essay, such a value position should not be so construed: its respective use is merely methodological, that is to say, its different spelling must not be viewed as an epistemic position. In this essay, when it is spelt "Rule of Law", it is meant to signify an encompassing conceptual referent, i.e., a sign. It is a way of grouping under one heading a plurality of possibilities. On the other hand, when it is spelt "rule of law", it is meant simply to refer to its particular expression by a given author or society under discussion or exposition at that particular moment. In lower case, therefore,

reference is being made to its particularity, its specificity. In short, therefore, the different spelling is not meant as a value position elevating or debasing, but rather as a methodological device to distinguish the object of discussion.

I. The Rule of Law: *propriement dit*!

> *The principles of constitutionalism and the rule of law lie at the heart of our government. The rule of law* [...] *is "a fundamental postulate of our constitutional structure"*[...]"[it] *is a highly textured expression, importing many things* [...] *for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level,* [it] *vouchsafes to the citizen and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.*[1]

The following story is compelling. S was accused and stood trial for a crime his society deemed grave. S was given all the legal support which was available to those who stood accused. S, indeed, gave "full answer and defence". Nevertheless, S was found guilty; found guilty of crime for which he did not commit. Hearing on sentence was proceeded with and, as was the law, S was to die by drinking a poisonous unction.

Awaiting execution of the sentence, S was, on that fateful day, visited by his long-time friend C. C proceeded to explain to S that a plan for escape had been finalised – a plan which all would admit could only produce success. C was emphatic: a) since S did not commit the crime and b) that laws are meant to punish the guilty, therefore c) S's escape is a just action. S, who was not easily fooled by sophistic formal logic, began to rebut the conclusion and insisted that he would not flee punishment. The reason S offered was simple: we live by and under law and, even if a person is innocent, the law must never be violated. For, *nulla lege nulla societatis*.

Though this tale is quite old it remains quite fresh and pertinent. It is the story told by Plato in his famous dialogue *Crito*. It is the story of Socrates' refusal to break the law, even though an error has been made. Though Plato's dialogue did not expressly

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1 *Reference re Secession of Québec*, [1998] 2 R.C.S. 217, par. 70 (judgement delivered by the Court).

concerned itself with the Rule of Law, the story nevertheless illustrates the fundamental, irreconcilable, dichotomy of conceptions that is inherent in the Rule of Law: procedural or legal formalism (as argued by Socrates) and substantive (as argued by his interlocutor Crito). A dichotomy which will become manifest by the end of this section.

By reviewing the plurality of attempts at defining this elusive concept, this section of the paper is on a quest: to establish whether or not, amidst all the definitions given, a unifying kernel conception can be said to exist. This section seeks neither to enter into a detailed analysis nor criticism of the various positions. This section's goal is to highlight the fact that, unfortunately, there is no *one* Rule of Law. H. W. Arndt's correct assertion more than forty years ago that "the rule of law has meant many different things to many different people" still, as we shall see, rings true today[2].

It is generally recognised that the first pronouncement of the rule of law in the Western tradition was Aristotle's. In the *Politics*, Aristotle instructed that his exposé "shows nothing more clearly as that *laws, when good, should be supreme*"[3]. How far we have strayed, how far we have stayed and how far we have come will become evident throughout this section[4]. To get there, we will start with A.V. Dicey, the noted nineteenth century British professor of constitutional law.

A. A.V. Dicey and the Rule of Law

In 1885, Dicey formally sketched out, and that for the first time, the concept of the rule of law[5]. This was done in his famous *An Introduction to the Study of the Law of the Constitution*[6]. It was not,

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2 H.W. ARNDT, "The Origins of Dicey's Concept of the Rule of Law", (1957) 31 *Austl. L.J.* 117.

3 ARISTOTLE, *The Politics*, Stephen EVERSON (ed.), Cambridge, Cambridge University Press, 1988, par. 1282^{b}, 1 and 2 (emphasis added). It is noteworthy that Aristotle provides a strong qualifier to his maxim: "if good". For Aristotle, this meant that only laws arrived at by Reason are valid and thus supreme. This issue is discussed further below in the third section.

4 Due to the nature and size of this paper, this section has no pretension as to exhaustively explain all the definitions of the rule of law. Rather, it seeks, on the one hand, to offer a fair representation of the ambit of definitions given, and on the other, to illustrate the lack of unity in the definitions put forward.

as Dicey notes, a new concept. Rather, it formed, along with the supremacy of the central government, a fundamental feature of the political institutions of England since the Norman Conquest. Dicey set for himself the task of establishing, in the second and most substantial part of the text, what is meant by the "rule, supremacy or predominance of law". Why? Why does he need to do this if the concept, as he explained, dates back to the Norman Conquest? Confusion.

Dicey maintained that although the concept was well known to "all Englishmen" – as it is a characteristic feature of the English Constitution –, its content remained a mystery. Consequent of this, Dicey would present a formal definition of the "rule of law" in three parts.

Dicey set about to elaborate what he terms "three distinct though kindred conceptions" of the rule of law[7]. First is the absence of arbitrary power of the government. Next, what can and has been termed "the equality principle". And finally, for lack of a better term, "judicial result".

If we were to look at this first, self described, narrow conception of the rule of law (*viz.,* absolute supremacy or predominance of regular law / a man can be punished only for a breach of law since ruled by law only), three facets of the definition present itself. First, it maintains that a person can only be punished or be held accountable for an act which is a "distinct breach of law". That is to say, no law, no punishment (*nulla poena sine lege*). Second, the law must be established in the "ordinary manner". If the law was not established in an authorised way, then no punishment for breach is possible. Should the two first conditions be met, the person is to be tried before the ordinary courts of the land. This conception should be understood as contrasting markedly with wide arbitrary or discretionary power of persons in authority. For Dicey, this facet of the rule of law is not necessarily particular to the

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5 In 1957, H.W. Arndt argued that although Dicey's is commonly believed to have been the first formalised account of this long-standing British constitutional principle, it had already been done a few years prior: H.W. ARNDT, *loc. cit.*,note 2.

6 Albert Venn DICEY, *An Introduction to the Study of the Law of the Constitution*, 10th ed., London, MacMillan, 1960.

7 *Id.*, p. 188.

English Constitution (though he does concede it to be essential). Rather, he sees it as "a trait common to every civilised and orderly state"[8].

The second conception is the equality principle. This principle holds that all persons are to be equally subjected to the law – position in society is to have no bearing. No person is above the law. This means that every person – regardless of their rank – is subject to the ordinary law. There is not, in other words, a plurality of laws for the object. Included in this second conception is the notion that since all are subject to the ordinary law, *all* are to be brought before the ordinary tribunals.

The last conception of the rule of law for Dicey is that the general principles of the Constitution (like personal liberty or public assembly) are the result of judicial decisions which determine the rights of private persons in particular cases brought before the courts. This facet is juxtaposed with the idea that general principles derive from a written Constitution (this is perhaps the clearest example of the English nature of the concept). To put it another way, for Dicey, flowing from this is the idea that the rule of law can be used as a formula for expressing the fact that the laws of the Constitution are not the source but the consequence of rights of individuals, as defined and enforced by the courts[9].

B. Beyond Dicey... Theorists and Case Law

While starting with Dicey seems somehow unavoidable, ending with Dicey is unimaginable. There have been a number of attempts to reinforce, adapt, incorporate and even move beyond the formulation of the rule of law by this nineteenth century Whig, through the various writings of theorists and the numerous verdicts of the courts. All basically fall into the two categories mentioned at the outset of this section.

1. The Proceduralists

There is, on the one hand, a "grouping" of theorists who conceive of the Rule of Law along strictly procedural (or legal positivist)

8 *Id.*
9 Id., p. 203.

lines[10]. Their conception of the rule of law can be viewed as a thin one. In its most pure form, it is a view which dissociates from its conception all considerations other than those of procedure. It is a conception that justifies its view from the standpoint of certainty and predictability. At its most rudimentary, it holds that a state is a rule of law state if it is governed by established standing laws which are binding on all, no matter their content. Joseph Raz is one proponent of this camp. For Raz, the rule of law must not be confused with democracy, justice, equality, human rights or the dignity of the individual[11]. When assessing if a state is a rule of law state, one is simply to look and see if that state has a defined and enforced legal system.

It is sufficient, from within this conception, for a state to establish a set of rules and for those rules to be made public. This is so, since inherent in the procedural position is the notion of certainty. With established public rules, citizens of a state can govern their lives predictably, with certainty. This position would fall within the first part of Dicey's definition. This framework was also adopted and argued by Justice Scalia of the United States Supreme Court. For Justice Scalia, any uncertainty is "incompatible with the Rule of Law". Taken to its logical extension, as he does, Scalia will even argue that there "are times when even a bad rule is better than no rule at all"[12].

Justice Scalia and Joseph Raz are, of course, not alone in arguing for this conception of the rule of law. Indeed, this particular understanding can find its origin in Hobbes' *Leviathan*[13]. More recently, Franz Neumann, the noted German theorist, was clear when he said that "*a predictable action* of the state, i.e., *its measurable interference, even if oppressive, is to be preferred to immeasurable intervention* (unpredictable, arbitrary action), *even if*

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10 I use the word grouping here very loosely. As will become evident, though a number of theorists and judicial decisions can be bracketed within the proceduralist camp, their respective positions are generally nuanced and hence slightly different.

11 Joseph RAZ, "The Rule of Law and its virtue", (1977) *L.Q. Rev.* 195.

12 A. SCALIA, "The Rule of Law as a Law of Rules", 56 *U. Chi. L. Rev.* 1179 (1989).

13 I think Hobbes can be seen as a rule of law proceduralist since Hobbes argues for the certainty of absolute sovereign power. There is no question as to the external value of the law, having a law is the supreme value.

at one time benevolent, as such immeasurable state of affairs creates insecurity"[14].

Implicit from the proceduralists is the idea that the law, no matter its content, is supreme. The proceduralists tend toward the idea that a state cannot be a rule of law state if the executive branch of government is able to wield arbitrary power. In the United States, for example, this belief got its first expression – indeed its only expression – in the Constitution of Massachusetts. It is found in this excerpt outlining the notion of the separation of powers:

> *In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial powers shall never exercise the legislative and executive powers, or either of them:* to that end it may be a government of laws and not of men.[15]

The proceduralist seeks, in the establishment of a predictable rule based state, to in fact bind the actions of the state itself. In 1971, Friedrich Hayek wrote that the rule of law requires – *i.e.* it is an essential condition – that

> *government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.*[16]

Though Hayek is undoubtedly a proceduralist, he is slightly outside the camp. Though other proceduralists would agree with the above statement, Hayek's proceduralism has an ulterior purpose which they would not: the market. Whereas Raz would see the establishment of a proceduralist rule of law as good in itself[17], Hayek favours it since this type of rule of law is indissociable from a market based economy. The market *is* the economic framework for the rule of law and the rule of law *is* the legal framework for the market[18].

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14 Franz Leopold NEUMANN, *The Rule of Law: Political Theory and the Legal System in Modern Society*, U.K., Berg Publishers, 1986, p. 32 (italics in original).

15 *Massachusetts Constitution 1780*, Part the First, Article XXX (emphasis added).

16 Friedrich A. Von HAYEK, *The Road to Serfdom*, London, Routledge, 1971, p. 54.

17 See, for example: J. RAZ, *loc. cit.*, note 11.

18 For an excellent discussion of this typically Hayekian position, see: Christine SYPNOWICH, *The Concept of Socialist Law*, Oxford, Oxford University Press, 1990, esp. Chapter Three.

Hayek's conception of the rule of law illustrates what is in fact common amongst most theorists of the rule of law, even if proceduralist in nature: that there is a substantive component as well. The problem (as we shall explore in detail in the third part of this essay), is that once a move is taken away from the pure proceduralist position, the distinctive rule of law conceptions become numerous and a unifying theory of what constitutes the rule of law tends to become more and more elusive.

2. The Substantive Position

John Rawls' *A Theory of Justice* provides a nice transition example from the proceduralist position toward the substantive. In his book, he devotes section 38 to a discussion and outline of the rule of law. For him, formal justice (which is the regular and impartial administration of public rules) becomes the rule of law when it is "applied to the legal system"[19]. The main purpose of the rule of law, according to Rawls, is to enable the citizens of a given state to regulate their lives. With this he is admittedly well within the proceduralist camp of fixed rule based certainty. When he fleshes out the concept, he gives four necessary criteria[20]: 1° ought implies can – which means, simply, that the legal rule must be understandable and thus observable; 2° similar cases to be treated similarly; and 3° the *nullem crimen sine lege* rule. The fourth element, which leans him away from the proceduralist camp but not too far, is the idea of incorporating the principles of natural justice into the definition itself as a necessary aspect of the rule of law, since it serves to preserve the integrity of the judicial system. Examples given by Rawls to illustrate what he means by natural justice, include an independent and impartial judiciary as well as open and fair trials.

If we take one step further, we arrive at Ronald Dworkin. In *A Matter of Principle*, Dworkin asked the very same question we are attempting to answer: *viz.*, *what is the rule of law*? His answer is that there are two "very different conceptions of the rule of law". The first is what he calls the "rule book conception", which is in fact what we have called the proceduralist camp. From this perspective,

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19 John RAWLS, *A Theory of Justice*, Cambridge, Harvard University Press, 1971, p. 235.

20 *Id.*, p. 236-239.

"what ever rule has been put into the book ['the law books'/statutes] must be followed until changed"[21]. The rule book conception is concerned with the application of positive law placing substantive questions to the side. Dworkin argues in favour of a second type of rule of law, what he refers to as the rights conception. This conception argues from a substantive basis and holds that the thin rule based conception of the rule of law is untenable. It maintains that citizens of a state have rights that are prior to the positive law contained in *the book*.

> *It* [the rights conception] *does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.*[22]

Building on the Dworkinian conception of the rule of law, Luc Tremblay's recent treatise[23] outlines one of the most substantive accounts of the rule of law coupled with a strong attempt to build the case for its universal application. Tremblay's rule of law is not procedural. He maintains that the concept is best conceived as "the rule of law as justice" (hence the obvious parallel with the Dworkin "rule based" conception).

Tremblay is interested in moving away from a "positive rules" based conception – what we have been calling the proceduralist position – since he argues it inevitably leads to a nihilistic conclusion. To counter this nihilistic tendency, Tremblay sets for himself the goal of outlining a "more coherent conception" of the rule of law[24]. He maintains that first and foremost, the concept of the rule of law implies, necessarily, "the supremacy or rule of one legal idealtype[25] recognised by the judges from an internal point of view as the ultimate reason for decision within the legal process of practical legal reasoning"[26]. For Tremblay, the constitutive principles of the idealtype – the rule of law as justice – are threefold: 1°

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21 Ronald DWORKIN, *A Matter of Principle*, Cambridge, Harvard University Press, 1985, p. 11.

22 *Id.*, p. 12.

23 Luc B. TREMBLAY, *The Rule of Law, Justice, and Interpretation*, Montréal, McGill-Queen's University Press, 1997.

24 *Id.*, p. 51. The argument away from nihilism is a valid one and is a point which will be addressed in the fourth section of the paper, but the solution offered will be different.

25 See, *infra*, note 30.

26 L.B. TREMBLAY, *op. cit.*, note 23, p. 138.

that law is formally just (fundamental obligation to treat those who are alike in the same way)[27]; 2° that the law is materially just (content of the law must be morally just)[28] and; 3° the law must be equitable (there must be place in the law for individual justice)[29].

As we can see, Tremblay's is a much more developed notion of the rule of law. Furthermore, his conception of the concept is a universal one – hence the *ability* to move away from nihilism. He attempts to establish the universality of the rule of law by way of Weber's notion of the idealtype[30]. For Tremblay, the principles of the idealtype incorporate themselves as the principles of the rule of law. The idealtype is, simply, "the constitutive features of the governing abstract conception of law accepted by judges"[31]. And, since its referent is the "governing abstract conception", it is internally coherent. Consequent of the internal coherence, Tremblay maintains that it can be viewed as universal.

3. The *Rechtsstaat*

So far we have exclusively focused on how a number of major writers from within the common law tradition have conceived and talked about the rule of law (with the passing exception of Neumann). There is of course another tradition, where the rule of law goes under the name of *Rechtsstaat*. In fact, the noted legal historian R.C. Van Caenegem, in his recent treatise, uses *Rechtsstaat* and rule of law synonymously, interchangeably. Indeed, the interconnection between the two concepts could not have been more clearly expressed than as it was done by Hart in his famous essay of 1958:

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27 *Id.*, p. 169.
28 *Id.*, p. 170.
29 *Id.*, p. 172.
30 "Idealtype": "is best seen as a tool for understanding in a clear and pragmatic way the various ideas, concepts, or beliefs that govern human conducts, practices, and discourses and that are more or less clearly defined, articulated, or rigorously understood by those whose actions and discourses are consciously determined and constituted by them. Similarly, *and this is the most important proposition for my purpose*, judges themselves, whenever they try rigorously and unambiguously to clarify the body of concepts, ideas, or beliefs they recognise and accept as reasons for decision within the process of adjudication, must refer to one or many idealtypes" (*id.*, p. 137 and 138).
31 *Id.*, p. 138.

> *One by one in Bentham's works you can identify the elements of the* Rechtsstaat *and all the principles for the defence of which the terminology of natural law has in our day been revived.*[32]

Yet, are they interchangeable and can the elements be found in Bentham's work? We briefly turn to the *Rechtsstaat* then in order to see what this tradition can bring to our understanding of the concept generally[33].

As we shall see in this section, perhaps contrary to Hart, there is the same lack of consensus amongst *Rechtsstaat* theorists as we saw amongst rule of law theorists. One example can be gleaned from Van Caenegem who considered it to be an historical concept which has developed from political struggle, the various writings of jurists and the treatises of political theorists[34]. One could, from his position, see it as a concept with "no fixed address", that is to say, a concept which is in constant development, or constant flux.

The roots of the *Rechtsstaat* run historically quite deep. According to Neumann, that the state has to have the character of a *Rechtsstaat* was outlined by Friedrich Julius Stahl in the beginning of the nineteenth century[35]. One German theorist in the mid-nineteenth century, Otto Bähr (*Der Rechtsstaat*, 1864), explained that

> *a* Rechtsstaat *is given if the postulate is fulfilled that the state makes the law the fundamental condition of its existence, and that all life within its boundaries, of individual as well as of the state in relation to its members, must move within the limits of law.*[36]

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32 H.L.A. HART, "Positivism and the Separation of Law and Morals", 71 *Harvard L. Rev.* 595 (1958).

33 In 1949, Bernard Schwartz (in *Law and the Executive in Britain*) limited, perhaps short-sightedly, the effective operation of the rule of law to common law states. Defining the rule of law as "a bridle upon governmental power", he goes on to claim that "the Rule of Law must of necessity be based upon Common Law constitutional practice", reproduced in Anthony Gordon GUEST (ed.), *Oxford Essays in Jurisprudence: a Collaborative Work*, London, Oxford University Press, 1961, p. 229. *Cf.* Tremblay's hesitation to view to the two as interchangeable: L.B. TREMBLAY, *op. cit.*, note 23, p. 244, note 31.

34 R.C. VAN CAENEGEM, *An Historical Introduction to Western Constitutional Law* 17 (1995).

35 F. NEUMANN, *op. cit.*, note 14, p. 180 and 181. For Stahl, there was to be radical separation of state from the legal structure.

36 *Id.*, p. 181.

This formulation obviously presents notable similarities with the proceduralist rule of law camp. For Bähr, it is clearly a formulation of legal proceduralism: "In the realisation of the law the State realises the germ of its own Idea"[37]. Bähr's is not the only proceduralist formulation of the *Rechtsstaat*. Lorenz Von Stein (1879) observed that "it is clear that properly speaking there is no State without law. In a certain sense, every State is a *Rechtsstaat*"[38]. The type of law from within this postulate does not matter, since its conception is within the establishment of a normative order.

This strong position toward a proceduralist conception has been modified somewhat of late (perhaps as a consequence of events in Germany from 1933-1945). One modern theorist of the *Rechtsstaat* is Otto Kirchheimer, member of the famed Frankfurt School.

In his essay "The *Rechtsstaat* as Magic Wall", seeing a similarity between the rule of law and the *Rechtsstaat*, Kirchheimer transforms *Rechtsstaat* into what he calls the *Sozialrechtsstaat*[39]. He maintains that availability of legal redress cannot satisfy the full *Rechtsstaat* concept. At the end of his critique of the "botched" proceedings against the "Nazi Murderers", Kirchheimer laments that "the *Rechtsstaat* concept can be honoured by scrupulous observation of all prescribed forms and proceedings while its *spirit* is constantly violated"[40]. It is the "spirit" of the *Rechtsstaat* which is to be encompassed in the notion of *Sozialrechtsstaat*. For Kirchheimer,

> [w]*hat comes to the fore, therefore, is the* Rechtsstaat*'s need to strive for the attainment of substantive justice through procedures that are not liable to negate the very goal of the* Rechtsstaat *itself.*[41]

This idea of mixing the *sozial* with the *recht* is recognition of the place of substantive justice within a *Rechtsstaat*. This position has also been articulated by Jacques-Yvan Morin in his "The Rule of Law and the *Rechtsstaat* Concept: A Comparison". He concludes

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37 *Id.*
38 *Id.*, p. 180.
39 O. KIRCHHEIMER, "The *Rechtsstaat* as Magic Wall", in W.E. SHEUERMAN (ed.), *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (1996).
40 *Id.*, p. 254 (emphasis added).
41 *Id.*, p. 255.

that the *Rechtsstaat* and the *Sozialstaat* are 'inextricably interwoven, tending together towards the establishment of 'justice'"[42].

4. Jurisprudence

There is another way to arrive at the nexus of the concept; theorists do not have the monopoly of interpretation. Constitutions and courts are another possible definitional source.

As opposed to the United States (see, *supra*) and Great Britain, the Canadian situation is different: the principle of the rule of law is now written into the Constitution. In 1982, with the adoption of the *Constitution Act, 1982*[43], Canada formally recognised that its society is one which recognises the principle of the rule of law. Prior to 1982, the rule of law was part of Canadian law by the back door, as it were; reliance was placed on the phrase "with a Constitution similar in Principle to that of the United Kingdom" found in the preamble to *The Constitution Act, 1867*[44]. And, since the rule of law was part of the United Kingdom's law, so too was it part of Canada's. Today, there is no longer the need to invoke the "Constitution similar in principle to" phrase since the preamble to the *Constitution Act, 1982*, states clearly that "Canada is founded upon the principles that recognise the supremacy of God and the rule of law"[45]. Though part of the Canadian Constitution, the Constitution itself offers no guidance as to the meaning of the principle. Its elaboration therefore, has thus been left to the Supreme Court of

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42 Jacques-Yvan MORIN, "The Rule of Law and the *Rechtsstaat* Concept: A Comparison", in Edward McWHINNEY, Jerald ZASLOVE and Werner WOLF (ed.), *Federalism-in-the-Making: Contemporary Canadian and German Constitutionalism, National and Transnational*, Dordrecht, Martinus Nijhoff, 1992, p. 77 (emphasis in original).

43 *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (1982, U.K., c. 11).

44 *The Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3. *Cf.*: *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121, where the Supreme Court of Canada, per Rand J., wrote that "the rule of law [i]s a fundamental postulate of our constitutional structure" (p. 142). In *X Ltd.* v. *Morgan Granian Ltd.*, [1991] 1 A.C. 1, Bridge J. wrote that in "our society [U.K.] the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament and the Sovereignty of the Queen's courts in interpreting and applying the law" (p. 48).

45 *Supra*, note 43, preamble. In *B.C.G.E.U.* v. *British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, Lamer J., to ground the requirements of judicial independence, characterised the rule of law as "the very foundation of the *Charter*" (p. 230).

Canada (amongst others), and that, on numerous occasions. We will limit our exposition to but a few decisions.

The first case to elaborate the content of the rule of law was the *Manitoba Language Rights* case[46]. The court stated that the rule of law means *at least* two things: 1° law is supreme over officials as well as private individuals (this is a check on arbitrary power argument) and; 2° the creation and maintenance of an actual order of positive law (this is a security argument). The court was quite clear that the rule of law could not be said to exist in the absence of positive law[47]. From the ruling, one is left with the impression that, for the Canadian Supreme Court, the maintenance of positive law is paramount (notice that there is no discussion as to the substantive content of this normative imperative). It is noteworthy that the Court would further maintain that in order to preserve the rule of law it is justifiable to "temporarily treat as valid and effective laws which are constitutionally flawed"[48].

Other cases have elaborated that the rule of law is "an important societal goal"[49]; that it is a "fundamental value" along with "fundamental justice, equality, preservation of the democratic process"[50]; that the constitutional doctrine of void for vagueness finds its basis in it[51]; and recently that concerned citizens are able "to bring the excesses of government to the attention of the courts"[52]. And most recently, in the *Québec Secession Reference*, the Supreme Court reviewed its jurisprudential principles and outlined a threefold definition of the rule of law (the two aspects from the *Manitoba Language* case and, from the *Provincial Judges Reference*, that "the exercise of all public power must find its ultimate source in a legal rule")[53]. It is noteworthy that this restatement by the court of what constitutes rule of law in Canada does not include a reference to substantive justice; the court was content to define the concept along procedural lines.

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46 *Reference re Manitoba Language Rights*, [1985] 1 R.C.S. 721.
47 *Id.*, 748-750.
48 *Id.*, 763.
49 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3, 10.
50 *Beauregard* v. *Canada*, [1986] 2 S.C.R. 56, 70.
51 *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.
52 *R.* v. *Consolidated Mayburn*, [1998] 1 S.C.R. 706, par. 25.
53 *Supra*, note 1, par. 71.

To contrast the Canadian case law, it is interesting to note that in Germany, according to Jacques-Yvan Morin, the situation is quite different: their courts have never sought to define it. Morin's analysis led him to conclude that the German courts have intentionally sought to leave the principle open, "so as to be able to meet new questions arising out of the evolution of society"[54]. The German courts seem to give the *Rechtsstaat* the developmental room it needs and deserves.

5. Beyond the "Stand-alone"

Finally, let us briefly turn to a different way of conceiving the rule of law which will complement our understanding of the concept. It is the position away from the rule of law as, what can be called, a "stand-alone" concept[55]. For some, the rule of law is an integral part of another concept, and that other concept is inextricably linked to it (this position is akin to the substantive position, yet not altogether similar). We have already seen one example of this in the conception of rule of law outlined by Frederich Hayek[56]. There are others who argue along similar lines when looking at the rule of law. Two examples will be given of this position.

One association which has been made is that between the rule of law and development. The proponents of this position argue that you cannot speak of a rule of law regime (however defined) in the absence of an advanced level of socio-economic development. Conversely, they argue that you cannot speak of development without at same time speaking about the rule of law. This is precisely the position adopted in Ama Baawah Beecham's recent doctoral dissertation. Beecham maintains that "the rule of law and development, contrary to prevailing thought, are mutually reinforcing and integrally related"[57]. By placing the discussion along these lines, it seems that a level of complexity is added to (or, from their

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54 *Loc. cit.*, note 42, 75.

55 This other method, though substantive on one level, cannot be properly characterised as such. This distinction will become clear by the end of this exposition.

56 See p. 750 above.

57 Ama Baawah BEECHAM, *New Directions for the Rule of Law and Development in Ghana: The Ombudsman Alternative for the Twenty-First Century*, Doctoral dissertation, York University, 1997, p. iv.

perspective, inherent in) the concept. It moves farther away from the proceduralist position and even separates it from the substantive position. It is separated from the substantive position since it is not conceived as a definitional component but as a necessary compendium[58].

Another proponent away from a stand-alone conception is Jürgen Habermas. For Habermas, the rule of law (*Rechtsstaat*) is integral to or a necessary component of democracy[59]. Without going into the fine details of his discourse theory, it is sufficient for our purposes to know that He maintains that law is produced by way of the democratic procedure. Consequently, the democratic procedure for Habermas (an offshoot of his communicative action[60]) becomes the only possible "postmetaphysical source" for the law's legitimacy. From within this framework, He explains that there is a "*conceptual or internal relation*, and not simply a historically contingent association, *between the rule of law and democracy*"[61]. His position moves the rule of law beyond the polarity of the procedural/substantive positions since we are in the presence of twin concepts with a shared foundation, a "conceptual relation". As with Hayek and Beecham, one is again confronted with the idea that "you can't have one without the other".

6. A Kernel Conception?

As a way of concluding this section, it is important to look at what could constitute the kernel of the Rule of Law, as observed from the foregoing discussion. It would appear that ultimately the Rule of Law, amidst the various expressions of the rule of law, is a conception of society. It is, if you will, a political theory. Even amongst all its diversity of definitions, its interconnected goal is to

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58 If development is integrally related to the rule of law, then the rule of law cannot function but under a specific economic framework. If this is so, which seems highly doubtful as there are plenty of states which might fall under one branch but not the other, then universality seems all the more elusive.

59 This position of the inextricable link of the rule of law with democracy is also argued by Jean Hampton, though along very different lines: see Hampton's "Democracy and the Rule of Law", in I. SHAPIRO (ed.), *The Rule of Law*, coll. "Nomos", p. 13 (1994).

60 See, for example: J. HABERMAS, *Moral Consciousness and Communicative Action* (1995).

61 J. HABERMAS, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, p. 449 (1996) (emphasis added).

position the individual within the state, to position the individual with other individuals and, perhaps most importantly, to protect of the individual from the (abusive) actions of the state. The kernel of the Rule of Law, therefore, is the centrality of the individual. This conception would be contrasted, for example, with a conception of society that places the collective (viewed as collective growth) prior to the individual.

Indeed at the very centre of the Rule of Law is the idea that the state is fundamentally antagonistic toward the individual. The state, from within this discourse, is a necessary evil from which the citizen needs to be protected from potential abuses.

Let us now move the discussion to the next phase, and explore universality and see if the Rule of Law can be said to fall into one of its categories.

II. So, Is It universal?

> *The basic concept underlying the rule of law is that the rights and duties of persons should be subject to a set of generally accepted and enforceable rules, and not the arbitrary actions, coercion or use of force of those in power.* Reduced to this basic concept the rule of law is indeed a universal principle.[62]

> [N]*ous devons nous élever jusqu'à une conception des droits de l'homme qui les rendent vraiment universels* [...]
>
> *Encore faut-il que cette notion d'universalité soit clairement comprise et acceptée par tous* [...] [L]*'universalité ne se décrète pas et* [...] *n'est pas l'expression de la domination idéologique d'un groupe d'États sur le reste du monde.*[63]

When posing the question with respect to the universality of the Rule of Law, the real question is whether the Rule of Law transcends a particular method of state organisation. For example, can a state be a Rule of Law state if it does not also possess a liberal state

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62 A. OULD-ABDALLAH, "The Rule of Law and Political Liberalisation in Africa", in *International Commission of Jurists Review*, June 1998, No. 60, p. 32 (emphasis added).

63 Boutros BOUTROS-GHALI, opening speech given at the World Conference on Human Rights, 14th of June 1993, reproduced in Jacques-Yvan MORIN, "L'État de droit : émergence d'un principe du droit international", in *Recueil des cours: Collected Courses of the Hague Academy of International Law*, vol. 254, the Hague, Martinus Nijhoff, 1995, p. 39.

structure? Or, put differently, must the Rule of Law live within a liberal state structure? Some authors clearly see that one necessitates the other[64]. In what follows, we shall see that by no definition of universality and the rule of law can one claim that the Rule of Law is universal.

There are two broad categories by which an occurrence, a concept, or a phenomenon can be classified as universal. One method of categorisation consists of a quantitative or an empirical analysis of data (a phenomenological approach) while the other method looks to a more transcendental or metaphysical justificatory explanation[65].

It is important to note at this juncture, that universality, by whichever method arrived at, does not *necessarily* posit a further truth claim. First, an empirically arrived at universal claim would always need a further truth claim: because it is observably so does not make it objectively right. Second, though a metaphysical/ theoretical based universal claim would most approximate a truth claim due to its very nature, it too, for reasons which will become apparent, does not necessarily do so.

Let us now analyse the Rule of Law in relation to the different categories of universality. We will first look at the quantitative category followed by the transcendental category.

A. Quantitative

> *UNIVERSAL: Extending over, comprehending, or including the whole of something specified or implied; prevalent over all.*[66]

When one speaks of universality from an empirical perspective, one is referring to the *act* of being universal. It is a straightforward

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64 *Cf.* D. WOOD and others, "Themes in Liberal Legal and Constitutional Theory", in Rosemary HUNTER, Richard INGLEBY and Richard JOHNSTONE (ed.), *Thinking About Law: Perspectives on the History, Philosophy and Sociology of Law*, Australia, Allen & Unwin, 1995, p. 47: "a central tenet of liberalism is the rule of law".

65 Breaking away from this two-fold approach is the one offered by Étienne Le ROY, "L'accès à l'universalisme par le dialogue interculturel", (1995) 26 *R.G.D.* 5. Le Roy argues away from the standard conception of universality in favour of a post-modern conception of it which would accommodate, or factor in, a recognition of difference.

66 *Oxford English Dictionary*, 2nd ed., Oxford, Oxford University Press, entry 1. a).

accounting of reality. It is this type of universality that the *Oxford English Dictionary* is referring to in its very first entry under universality. It reads[67]:

> *The fact or quality of extending over, existing in, or belonging to the whole (of something expressed in or implied by the context); esp. extension, occurrence, prevalence, or diffusion throughout the whole world, everywhere, or in all things.*

A universal claim within this expression is made posterior to a literal appraisal of factual evidence. The evidence required for an empirical conclusion of universality can be either material or theoretical.

A material basis for finding a given object of discussion to be universal means simply that the finder applied a scientific methodology to physical reality. The following can serve as an example: it is a universal fact that humans need oxygen. The material basis for this finding of universality would consist in the expounder of the statement having conducted a survey of physical nature and to have found no exception to the rule. Universal by material proof is the strongest bases for claim possible. If its occurrence is everywhere, it is of logical conclusion that it is universal.

In like manner, there is no reason why a concept cannot be the object of an empirical claim of universality grounded materially. Take for example the concept of democracy. If the entire world were governed by way of the same democracy, we could claim that it had achieved universal status as the method for societies to govern themselves.

An empirical universal claim can also be arrived at theoretically. What is meant by this is that the raw data upon which the empirical judgement is made exists not in the physical world, as such, but only in the theoretical. Of course, the theoretical claim might have as its subject an object in the physical world (or, indeed, the physical world itself). One could make a claim as to universality by having empirically surveyed all theoreticians on a given subject and found no dissent. "It is universally held that the earth is flat", could have been one such universal claim many years past. The claim is justified as there was consensus amongst cosmologists, at a given period in Western history, that the earth is indeed flat. One could

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67 *Id.*

almost assert that when a universal claim is made from an empirical position, the claim maker is simply stating a fact. There need be no concomitant value judgement taken on the part of the claim maker.

An interesting facet of the empirical approach to universality is that it can also permit the claim of universality to a situation in progress. Should an observer attest to the fact that a given situation is in the process of attaining widespread assent, almost like a wave, then one could say that since this is occurring, almost "in a rush", it is achieving universal assent, and thus must be universal.

From this we can say that there are two ways to assess the quantitative universality of the Rule of Law. First is to quantitatively examine the actual factual situation and second is to asses the doctrinal writings.

1. Actual Situation

By the actual or factual situation what is meant is to look at all states and assess if they are Rule of Law states. One could conclude from Section I that the Rule of Law is universal if by it one means the purely procedural variant as outlined above. Since, as von Stein rightly observed, "[i]n a certain sense, every State is a *Rechtsstaat*". Yet, such a formulation of the concept, as Neumann was quick to retort, is "simply meaningless"[68]. Would we be content with a universal concept which would bring together, under the same heading, democracy, dictatorship, fascism or any other type of state organisation?

When we move outside the confines of the proceduralist formulation and incorporate a thicker notion, then the possibility for quantitative universality breaks down. For example, is a secular based western country, like France, a rule of law state similar to Iran? That both have a legal system is obvious, and that both do not adhere to the same idea of the role of law in society, is likewise obvious. When the conception of the rule of law takes on the coloration of various substantive issues, which it must do in order for it to be at all meaningful, then it cannot fall under this heading of universality. Most states give to it the substance its society requires thereby demarcating itself from other states.

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68 *Op. cit.*, note 14.

2. In the Doctrine

It is obvious from the discussion above that there exists no universal definition of the rule of law amongst theorists. Perhaps aside from the possible kernel conception (which forms the object of discussion below), there is no meaningful consensus as to what the rule of law means. Indeed, nearly every treatise on the subject begins, or is a variation on the theme of: "And [...] the phrase 'rule of law' is elusive"[69]. Consequent of this leitmotiv must be the conclusion that universality does not exist amongst theorists.

Yet one could reasonably argue that all would agree that some procedural safeguards are a mandatory component. But, if we limit ourselves to a procedural definition and claim it to have universal assent, as it is a possible common denominator of both camps, the more substantive rule of law theorists would rightly claim that such is not a true definition of the rule of law: reduction to the lowest common denominator would have the semblance of giving credence to the strict proceduralist camp.

Then again, should we admit of some substantive component to the concept, the proceduralist will necessarily object and some in the substantive camp will do likewise. The former will denounce the influx of considerations which are properly dealt with elsewhere while the latter will decry that the substantive component allowed for is insufficient. On the other hand, should we completely fill the concept with substantive law[70], alienation again of the strict proceduralists for the same reasons will surface as well as those who argue a position not quite as substantively all-encompassing.

What about basing the universal claim on the kernel conception? Could we not say that it is a universal postulate of all theorists that the rule of law is in place to govern the relationship of State action with individual autonomy? Though it is possible to do so, the outcome would be just as disparate as before and thus not as universal as would first appear. Take the following as an example.

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69 *Op. cit.*, note 64.

70 The International Commission of Jurists provide one example of an attempt to fill the concept with a great deal of substantive considerations. For example, Article 4 of its Statutes states that "[t]he Commission is dedicated to the support and advancement of those principles of justice which constitute the basis of the Rule of Law": *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959*, p. 187.

Someone arguing from the proceduralist camp will state that individual autonomy is best served by known standing rules. So long as "everything is in the open", as it were, citizens will be able to govern their actions according to the established normative order. The problem is that a more substantive position would argue that the relationship between citizen and state cannot be limited to these safeguards. Rather, they would seek to make sure that the relationship between the state and the individual was not reduced to mere proceduralist considerations.

Consequently, one's position as to the "true" structure of the rule of law will undoubtedly colour one's position with respect to the kernel conception of protection of the individual. And, as such, any quantitative basis for universality would have to be set aside, since a plurality cannot give birth to unicity.

B. Beyond the Actual: Recourse to Metaphysical Claims

A claim to universality from a metaphysical position is not different from the first in its claim but rather in its basis for claim. A claim to universality from this perspective is one which seeks to transcend the empirical.

In the quote which introduced this section, then Secretary-General of the United Nations Boutros-Ghali seems to be alluding to this type of universality. He said, "[N]ous devons nous *élever* jusqu'à une conception des droits de l'homme qui les rendent *vraiment universels*"[71]. True universality, from this standpoint, requires a certain "*dépassement*" of the actual to arrive at a different plane: a plane which transcends the immediate.

From within the transcendental position, that there might be no actual occurrence is of little importance. It is a belief that there is an idea/ideal that exists which is not contingent upon a given manifestation. It is this idea which transcends the actual that grounds the claim. In Platonic philosophy, for example, this was referred to as the Forms: pure expressions. The *jus naturalæ* philosophers provide another example of this type of reasoning. For them, by Reason humans could apprehend the pre-existing (hence universal) order and act in accordance with it. Another expression of this position is found amongst German Idealists philosophers:

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71 *Op. cit.*, note 63 (emphasis added).

postulating that through the use of reason the ideal can become manifest.

From within this universalist framework, empirical observations are not relevant. It does not matter to a transcendental universalist that there has yet to be an expression of the universal idea. To posit a universal claim from a metaphysical position, therefore, is to disregard its actual expression – or lack thereof. In essence, to argue the universality of something from a metaphysical position is an attempt to break free from the contingency of one's historical context. To, in essence, *elevate* one's self or society, away from the particular toward the unifying.

Dworkin's basis of claim falls squarely within this approach. With Dworkin's rights conception of the rule of law, the question that arises, almost automatically, is the following: "where do these pre-existing rights come from"? Dworkin's position is quite clear on where these rights come from: it is an assumption.

> *It* [the rights conception of the rule of law] ***assumes*** *that citizens have moral rights* [...] *and political rights against the state as a whole. It insists that these moral and political rights be recognised in positive law.*[72]

Of course, it is also a great deal more than an assumption. The Dworkinian rights based conception assumption is grounded within the *jus naturalæ* tradition. His theory "assumes" that rights exist *a priori* their discovery and subsequent application in positive law. This is clearly a position which requires a moving beyond the actual (indeed, as Dworkin explains, it takes a Herculean judge). Yet, it remains quite questionable whether the use of "right-reason" captures pre-existing rights, which somehow exist regardless of our realising them (not to mention the problematic reliance on a legal Hercules). Dworkin does not stand alone in attempting to ground a theory in a transcending ideal. His student makes the same attempt, though from a different angle.

Luc Tremblay openly attempted to present a substantive position of the rule of law (rule of law *as* justice) which could be viewed, at the same time, as a version which is universal[73].

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72 *Op. cit.*, note 21 (emphasis added)

73 As discussed in Section I above.

Tremblay's claim to universality is a consequence of his methodological approach: the use of Weber's ideal type. It is to be remembered that Tremblay seeks to ground his theory in the cloak of universality in order to avoid the abyss of nihilism[74]. Other transcendental possibilities – idealism, natural law, or other – appear insupportable for Tremblay. Yet, reliance on Weber and the positing of an ideal type which is justificatory remains equally problematic and unfortunately no more convincing.

If we return to the Aristotelian quotation which started our discussion of the Rule of Law, and indeed the discussion of the Rule of Law in the western world ("laws, *when good,* should be supreme"), we see yet another transcendental universalist position. Aristotle does not think that just any law should be supreme; only laws which are good merit our obedience. And, it should be understood that a good law, for Aristotle, is one which reflects the following: "he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of beast. [...] The law is reason unaffected by desire"[75].

However, it is difficult today, at the turn of the century, in a post-metaphysical age to adhere to notions which are not practically grounded. The following observation by Habermas on justice can be easily read as applying to the rule of law. He wrote that

> [w]*hen a theory of justice takes a directly normative approach and attempts to justify the principles of a well-ordered society by operating beyond existing institutions and traditions, it faces the problem of how its abstract idea of justice can be brought into contact with reality.*[76]

To invoke "self-evident" truths (abstract ideas) faces the same problem of loss of "contact with reality". The notion of the Rule of Law saw its birth in Greece and its development by theorists of the western tradition. To have recourse to a nebulous transcendental truth seems somehow dishonest: it ignores the particularity of the concept to the western tradition. Indeed, the transcendental grounding wrongly seeks to posit a single source of law (of the Rule of Law).

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74 *Cf.* above p. 752.
75 ARISTOTLE, *op. cit.*, note 3, 1287[a], 29-33.
76 J. HABERMAS, *op. cit.*, note 61, p. 197 and 198.

The rule of law, in the final analysis is not universal by any definition. It is a western concept which varies according to the needs of a society. In the early 1960's, Professor Marsh reached a similar conclusion in a report on parallel conferences discussing western and communist conceptions of the rule of law[77]. Marsh reluctantly states that "in so far as the Rule of Law purported to be a statement of fact it was untrue and in so far as it expressed a value-judgement it was unsound"[78]. In short, quantitative universality does not exist at any level, and a transcendental justification requires that one almost adhere to a Lutheran *sole fide* type dictum – which is very difficult to do today.

However, this conclusion is not meant to deny that, presently, the Rule of Law is a very powerful sign under which diversely organised states rally to place their flag. Indeed, the power of the sign is not limited to states, the same can be observed in doctrinal writings. Political theorist Christine Sypnowich offers one such example. In *The Concept of Socialist Law*, Sypnowich goes to great lengths in her attempt to construct a socialist law – a socialist regime – that would still follow the principles, as she defines it, of the rule of law[79]. The Rule of Law, from within this discourse, acts as a substantial legitimising factor. However, that something has been legitimised does not make the legitimiser universal.

There is a more plausible way to explore and consequently ground one's conception of the rule of law then by having recourse to a discourse of universality. It is, as we shall see in the next section, by way of applying and adapting the methodological approaches advanced by William Gallie and Richard Rorty, respectively. It is to this alternative way to approach the rule of law that we now turn.

III. The Rule of Law, Gallie and Rorty

> *Le temps a dévoilé les imperfections du droit «moderne». Il a montré combien l'universalisme était un leurre, et que le règne suprême de la loi ne réglait pas tout. L'observation de la réalité juridique quotidienne a amené de nombreux juristes qui s'intéressent au problème des fondements du droit, à reconnaître que* tout droit est relatif, qu'il existe

77 N. S. MARSH, "The Rule of Law as a Supra-National Concept", in A.G. GUEST (ed.), *op. cit.*, note 33.

78 *Id.*, p. 223.

79 C. SYPNOWICH, *op. cit.*, note 18.

> un pluralisme des sources du droit, et qu'un retour au pragmatisme s'impose.[80]
>
> [Our] *attempt to justify rules in order* [...] *to eliminate the arbitrary from them must come to a halt at an unjustified principle, an arbitrary value.*[81]

In her essay "Political Theory and the Rule of Law"[82] the late Judith Shklar asked, rhetorically, if there is much point talking about the rule of law[83]. Some might feel the need to ask the very same question if a conclusion that the rule of law is not universal is reached. Yet, just because something is not universal does not mean that it is without merit. This is a mistake frequently made by supporters of the rule of law, as the following quote illustrates: "The *assault* on universality is much talked about but little analysed"[84]. The fight for respect of a cherished value system need not be based on the understanding that it is universal. However, it would be insufficient to explain what the rule of law is not, without explaining what it is. What follows, therefore, is an attempt to propound an alternative way to approach the problem of arguing for the implementation of one's value system (for the rule of law, this refers to either the procedural or the substantive). The alternative is an hybrid solution which accepts both the fundamental nature of concepts generally and the rule of law specifically. For the purposes of this alternative approach, William Gallie's seminal paper on the nature of concepts is adopted.

A. The Gallie Paper

In 1956, W.B. Gallie presented his paper on the nature of certain types of concepts at the meeting of The Aristotelian Society in London. Gallie maintained that there are disputes over concepts (not unlike the one outlined above) "which, although not resolvable by argument of any kind, are nevertheless sustained by perfectly

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80 A.-J. ARNAUD, "Repenser un droit pour un époque post-moderne", *Le courrier du CNRS*, April 1990, n° 75, in É. Le ROY, *loc. cit.*, note 65, 21 (emphasis added)

81 Chaïm PERLEMAN, *The Idea of Justice and the Problem of Argument*, London, Routledge, 1963, p. 52.

82 Judith SHKLAR, "Political Theory and the Rule of Law", in Allen C. HUTCHINSON and Patrick MONAHAN (ed.), *The Rule of Law: Ideal or Ideology?*, Toronto, Carswell, 1987, p. 16.

83 Her answer was a conditional "yes".

84 A. CLAPMAN, "Globalization and the Rule of Law", paper presented at the ICJ Triennial Meeting and Conference, Cape Town, South Africa, 20-24 July 1998, p. 4 (emphasis added).

respectable arguments and evidence". What we have seen in the first part of this essay surely confirms this. He continues:

> *This is what I meant by saying that there are concepts which are essentially contested, concepts which the proper use of which inevitably involves endless disputes about their proper use on the part of their users.*[85]

The examples he gives with respect to concepts falling under this category are, to name a few, Art, Democracy and Social Justice. Of course not just any concept can be classified as essentially contestable. In order to be so classified, the candidate concept must meet four necessary conditions (which are sometimes referred to as characteristics)[86].

The first of the four conditions is that it must be appraisive. That is, the concept must signify or accredit some type of valued achievement, in the sense of a goal cherished by the community. Next, the achievement referred to in the first condition must be "of internally complex character". Third, any explanation of the concept's worth "must include reference to the respective contributions of its various parts or features". And finally, the concept must be "open". That is to say, change in circumstance must be able to considerably modify the achievement. Aside from these conditions Gallie posits the following important point which must always remain in the fore:

> *Recognition of a given concept as essentially contested implies recognition of rival uses of it (such as oneself repudiates) as not only logically possible and humanly "likely", but as of permanent potential critical value to one's own use or interpretation of the concept in question; whereas to regard any rival use as anathema, perverse, bestial or lunatic means, in many cases, to submit oneself to the chronic human peril of underestimating the value of one's opponents' positions.*[87]

It seems that the concept Rule of Law falls squarely within this framework and can therefore be classified as an essentially contested concept. Let us look at the four conditions, one by one. There is no doubt that the concept is appraisive since it definitely signifies an achievement of state organisation which is valued. The

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85 William B. GALLIE, "Essentially Contested Concepts", (1955-56) LVI *Proceedings of the Aristotelian Society* 169.

86 *Id.* Note that the four conditions are outlined at pages 171 and 172.

87 *Id.*, p. 193.

internal complexity of the valued achievement is also without question with respect to the Rule of Law. With the Rule of Law, the accredited achievement specified in the first condition, as we have seen in the first part, can be initially variously described (third condition) and that the Rule of Law admits of considerable modification is clearly attested to by the multitude of past formulations. Therefore, one could conclude that the Rule of Law is an essentially contested concept, following Gallie's conditions. Once we accept that a concept is essentially contestable, we are driven to realise, at the same time, the impossibility of pinning one definition on the concept. Thus, the advice he offers with respect to recognition of rival conceptions should be heeded.

Does this mean that we are left in a bit of a quandary, unable to defend a given position since we admit of rival conceptions? The answer to this quagmire can be found by looking to Rorty's interesting proposal outlined in 1989 and adapt it to our needs.

B. Building on Rorty

Richard Rorty's essay "The contingency of a liberal community" sets for itself a very straightforward goal: to "reformulate the hopes of liberal society in a nonrationalist and nonuniversalist way"[88]. In a nutshell, this is precisely the goal set for this paper but applied to the Rule of Law. Rorty's reformulation for the purposes of a liberal society in the post-modern era coincides therefore with our attempts at proposing an alternative theory of the rule of law. Let us turn to the content of his paper and then examine how it can be adapted to form the basis of the alternative theory.

In his essay, Rorty rightly claims that freedom is the recognition of the contingency of one's beliefs. Indeed, Rorty goes as far as saying that such recognition is the "chief value" of a liberal society. Recognising the relative validity of one's own claims means a recognition of the idea that there can be no transhistorical absolutely true claim. Rorty is arguing his reader away from universal conceptions toward a contingent position in order to outline a "liberal utopia" and the citizens which are a part of it. The Rortian liberal citizen is described as follows: people who have a sense "of

88 Richard M. RORTY, *Contingency, Irony, and Solidarity*, Cambridge, Cambridge University Press, 1989, p. 44. (The essay in question constitutes its third chapter.)

the contingency of their language of moral deliberation, and thus of their community. They would be liberal ironists [...] who combined commitment with a sense of the contingency of their own commitment"[89].

Though Rorty is concerned with the type of citizen needed for his liberal policy, the message is undeniably applicable to those who recognise that there is no core conception of the Rule of Law, that it is an essentially contested concept. The message which can be adapted to form an integral element of the alternative approach, and which moves the discussion away from nihilistic inaction, is the idea of "commitment". Once one accepts the reality of the Rule of Law's essentially contested nature and realises that the way we chose to fill it is necessarily contingent upon a number of different socio-historical experiences, then one must take the final step of commitment. What is meant by commitment here is straightforward: one commits unflinchingly to the particular truth conception which forms the basis of *our* understanding. For example, one could commit to a definition of the rule of law as necessarily incorporating substantive elements – say Dworkin's rights conception. From there, the *act* of commitment would manifest itself in the attempt to convince others that it is the best and only framework.

It is the act of commitment which pulls away from nihilism's inaction, which is a possible consequence of a relativistic position. It is after all the sign of a civilised person to realise the contingency of one's conceptual claims "and stand for them unflinchingly". This position seems to represent the soundest approach to a discussion about, and subsequent implementation of, the Rule of Law.

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In an attempt to decide whether or not the rule of law is a universal concept, this paper illustrated a number of things. First, the paper has outlined the two major poles as they present themselves in the literature: what we have referred to throughout as the procedural and the substantive camps. It also showed that although it is convenient to simplify the literature into two camps,

89 *Id.*, p. 61.

these camps are far from homogenous and that they necessarily exclude conceptions which cannot be so partitioned. Also, it has attempted to show that there is no meaningful consensus in the community at large with respect to the rule of law. Further, it showed that when one looks at the possible definitions of universality, the rule of law cannot possibly mesh with it: the rule of law was found to be neither quantitatively nor transcendentally universal. Consequently, we came to the conclusion against the universality of the rule of law.

Prescriptively, the paper sought to move beyond the negative conclusion and propose an alternative approach. This approach built on Gallie's notion of contested concepts and on Rorty's notion of commitment to one's contingent belief. This approach was offered, in essence, to move away from a position of inaction that could arise from the realisation of the relative merit of one's position. This approach attempted to show that a plurality of possibilities need not necessarily lead to a position of nihilism, of inaction.

It seems that the proposed approach best deals with the realities of the post-modern age: it recognises the contingency of belief and at the same time allows for action.