

The Rule of Law: Its Virtues and Limits

Robert Deinhammer*

Abstract

In this paper, I shall address the important role of the rule of law as an ideal of political morality. I will be outlining the virtues and limits of the rule of law. My central thesis is that the rule of law is crucial for the moral legitimacy of a political system and for an open society, understood in the Popperian sense. Its limits, however, are similar to the limits of positive law in general. Ultimately, the virtues of the rule of law depend on the moral virtues of people and on the moral quality of positive law. In this respect, the benefits of the rule of law ultimately depend on natural moral law and its realization in human affairs.

Key words: rule of law, principle of legality, political morality, democracy, natural law, philosophy of law

Introduction

The *rule of law* is an important ideal of political morality. However, it is only one among many ideals, such as respect for autonomy and human rights, social justice and welfare, economic freedom or democracy. For the sake of conceptual clarity, it may be helpful not to confuse the rule of law with these other more substantial ideals. In brief, the rule of law requires that political power and government operate within the constraints of positive law, i.e. within the framework of a legal and constitutional system. Positive law is binding both for state authority and for the citizens who are to comply with it. It is my assumption that the current crisis of democracy in Europe has several causes. One aspect of this crisis may be identified with the rule of law crisis or its proper application, both in regard to the EU as well as its member states.

In this short paper, I shall outline the virtues and limits of the rule of law.¹ The central thesis is that the rule of law is crucial for the moral legitimacy of a political system and for an open society, understood in the Popperian sense. Its

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1 To be sure, only persons can have "virtues" in the strict sense. My phrasing alludes to 2011b.

Rule Of Law And Its Limits

Ása Gunnarsson, Eva-Maria Svensson



Rule Of Law And Its Limits:

The Limits of the Rule of Law in China Karen G. Turner, James V. Feinerman, R. Kent Guy, 2000-02-01 In *The Limits of the Rule of Law in China* fourteen authors from different academic disciplines reflect on questions that have troubled Chinese and Western scholars of jurisprudence since classical times Using data from the early 19th century through the contemporary period they analyze how tension between formal laws and discretionary judgment is discussed and manifested in the Chinese context The contributions cover a wide range of topics from interpreting the rationale for and legacy of Qing practices of collective punishment confession at trial and bureaucratic supervision to assessing the political and cultural forces that continue to limit the authority of formal legal institutions in the People's Republic of China

Complicity and its Limits in the Law of International Responsibility Vladyslav Lanovoy, 2016-09-22 This book examines the responsibility of States and international organizations for complicity aid or assistance in an internationally wrongful act Despite the recognition of responsibility for complicity as a rule of customary international law by the International Court of Justice this book argues that the effectiveness and utility of this form of responsibility is fraught with systemic and operational limits These limits include a lack of clarity in its constituent elements its co-existence with primary rules prohibiting complicity and the obligations of due diligence its implementation and the underlying causal tests its uncertain relationship to other forms of shared and indirect responsibility and its potential as a form of attribution of conduct This book submits that the content and elements of this form of responsibility need adjustments to respond more effectively to the phenomenon of complicity in international affairs Awarded The Paul Guggenheim Prize in International Law 2017

Facing the Limits of the Law Erik Claes, Wouter Devroe, Bert Keirsbilck, 2009-04-21 Many legal experts no longer share an unbounded trust in the potential of law to govern society efficiently and responsibly They often experience the limits of the law as they are confronted with striking inadequacies in their legal toolbox with inner inconsistencies of the law with problems of enforcement and obedience and with undesired side effects and so on The contributors to this book engage in the challenging task of making sense of this experience Against the background of broader cultural transformations such as globalisation new technologies individualism and cultural diversity they revisit a wide range of areas of the law and map different types of limits in relation to some basic functions and characteristics of the law Additionally they offer a set of strategies to manage justifiably law's limits such as dedramatising law's limits conceptual refinement constructivism striking the right balance between different functions of the law seeking for complementarity between law and other social practices

John Gower and the Limits of the Law Conrad van Dijk, 2013 An examination of the ways in which Gower's poetry engages with contemporary law and legal questions It has long been thought that John Gower was probably a lawyer before turning to poetry and this study reveals his active engagement with contemporary legal debates they include constitutional questions jurisdictional issues private vengeance jurisprudential concepts such as equity and the rigor iuris and aspects of

criminal law The author argues that the *Confessio Amantis* in particular demonstrates Gower's uncertainty about how to reconcile the ideal of a just law with alternative modes of justice such as self help royal discretion and divine will The book also examines the parallel development of the *exemplum* and *casus* in medieval literature *Exempla* frequently create a sense of narrative closure by means of some form of punishment or as Gower would put it vengeance How then do we set Gower's reputation as a sympathetic writer alongside his frequent desire for closure and punishment What are the limits of exemplarity and law These questions are answered by reading Gower in relation to the volatile politics of the Ricardian period and in comparison with the poetic concerns of contemporary writers such as Chaucer and Langland In so doing the book provides a searching introduction to the intersection between literature and law in the late fourteenth century Dr Conrad van Dijk is Assistant Professor of English at Concordia University College of Alberta Edmonton Canada

Rule of Law, Human Rights and Judicial Control of Power Rainer Arnold, José Ignacio Martínez-Estay, 2017-05-16 Judicial control of public power ensures a guarantee of the rule of law This book addresses the scope and limits of judicial control at the national level i.e. the control of public authorities and at the supranational level i.e. the control of States It explores the risk of judicial review leading to judicial activism that can threaten the principle of the separation of powers or the legitimate exercise of state powers It analyzes how national and supranational legal systems have embodied certain mechanisms such as the principles of reasonableness proportionality deference and margin of appreciation as well as the horizontal effects of human rights that help to determine how far a judge can go Taking a theoretical and comparative view the book first examines the conceptual bases of the various control systems and then studies the models structural elements and functions of the control instruments in selected countries and regions It uses country and regional reports as the basis for the comparison of the convergences and divergences of the implementation of control in certain countries of Europe Latin America and Africa The book's theoretical reflections and comparative investigations provide answers to important questions such as whether or not there are nascent universal principles concerning the control of public power how strong the impact of particular legal traditions is and to what extent international law concepts have had harmonizing and strengthening effects on internal public power control

The Routledge Companion to Philosophy of Law Andrei Marmor, 2012-04-27 The Routledge Companion to the Philosophy of Law provides a comprehensive non technical philosophical treatment of the fundamental questions about the nature of law Its coverage includes law's relation to morality and the moral obligations to obey the law the main philosophical debates about particular legal areas such as criminal responsibility property contracts family law law and justice in the international domain legal paternalism and the rule of law The entirely new content has been written specifically for newcomers to the field making the volume particularly useful for undergraduate and graduate courses in philosophy of law and related areas All 39 chapters written by the world's leading researchers and edited by an internationally distinguished scholar bring a focused philosophical perspective to their subjects The Routledge Companion to

the Philosophy of Law promises to be a valuable and much consulted student resource for many years *EU Executive Discretion and the Limits of Law* Joana Mendes, 2019-05-02 The increase in the European Union's executive powers in the areas of economic and financial governance has thrown into sharp relief the challenges of EU law in constituting framing and constraining the decision making processes and political choices that have hitherto supported European integration The constitutional implications of crisis induced transformations have been much debated but have largely overlooked the tension between law and discretion that the post 2010 reforms have brought to the fore This book focuses on this tension and explores the ways in which legal norms may or may not constrain and structure the discretion of the EU executive The developments in the EU's post crisis financial and economic governance act as a reference point from which to analyze the normative problems pertaining to the law's relationship to the exercise of discretion Structured in three parts the book starts by analyzing the challenges to the maxim that the law both grounds and constrains EU executive and administrative discretion setting out the concepts problems and approaches to the relation between law and discretion both in general public law and in EU law It progresses to analyze how these problems and approaches have unfolded in EU's financial economic and monetary governance Finally it moves on from these specific developments to assess how existing legal principles and means of judicial review contribute to ensuring the rationality and legality of EU's discretionary powers

Reforming Justice in Russia, 1864-1994: Power, Culture and the Limits of Legal Order Peter H.

Solomon, 2017-07-05 Measuring Russian legal reform in relation to the rule of law ideal this study also examines the legal institutions culture and reform goals that have actually prevailed in Russia Judgements about future prospects are measured adding new dimensions to our understanding of the Soviet legacy Human Rights and their Limits Wiktor

Osiatyński, 2009-09-14 Human Rights and their Limits shows that the concept of human rights has developed in waves each call for rights served the purpose of social groups that tried to stop further proliferation of rights once their own goals were reached While defending the universality of human rights as norms of behavior Osiaty ski admits that the philosophy on human rights does not need to be universal Instead he suggests that the enjoyment of social rights should be contingent upon the recipient's contribution to society He calls for a soft universalism that will not impose rights on others but will share the experience of freedom and help the victims of violations Although a state of unlimited democracy threatens rights the excess of rights can limit resources indispensable for democracy This book argues that although rights are a prerequisite of freedom they should be balanced with other values that are indispensable for social harmony and personal happiness The Limits of Law Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, 2005 This collection brings together well established scholars to examine the limits of law a topic that has been of broad interest since the events of 9 11 and the responses of U S law and policy to those events The limiting conditions explored in this volume include marking law's relationship to acts of terror states of emergency gestures of surrender payments of reparations offers of amnesty and invocations of retroactivity

These essays explore how law is challenged, frayed and constituted out of contact with conditions that lie at the farthest reaches of its empirical and normative force

The Limits of Bodily Integrity Professor Ruth A Miller, 2013-01-28 This volume argues that legislation on abortion, adultery and rape has been central to the formation of the modern citizen. The author draws on rights literature, bio-political scholarship and a gender studies perspective as a foundation for rethinking the sovereign relationship. In approaching the politicization of reproductive space from this direction, the study resituates the role of rights and rights granting within the sovereign relationship. A second theme running throughout the book explores the international implications of these arguments and addresses the role of abortion, adultery and rape legislation in constructing civilizational relationships. In focusing on the Ottoman Empire, Turkey, France and Italy as case studies, Miller presents a discussion of what Europe is and the role of sexuality and reproduction in defining it.

Abraham Lincoln's Statesmanship and the Limits of Liberal Democracy Jon D. Schaff, 2019-07-03 This bold, groundbreaking study of American political development assesses the presidency of Abraham Lincoln through the lenses of governmental power, economic policy, expansion of executive power and natural rights to show how Lincoln not only believed in the limitations of presidential power but also dedicated his presidency to restraining the scope and range of it. Though Lincoln's presidency is inextricably linked to the Civil War and he is best known for his defense of the Union and executive wartime leadership, Lincoln believed that Congress should be at the helm of public policy making. Likewise, Lincoln may have embraced limited government in vague terms but he strongly supported effective rule of law and distribution of income and wealth. Placing the Lincoln presidency within a deeper and more meaningful historical context, *Abraham Lincoln's Statesmanship and the Limits of Liberal Democracy* highlights Lincoln's significance in the development of American power, institutions and social movement politics. Using Lincoln's pre-presidential and presidential words and actions, this book argues that decent government demands a balance of competing goods and the strong statesmanship that Lincoln exemplified. Instead of relying too heavily on the will of the people and institutional solutions to help prevent tyranny, Jon D. Schaff proposes that American democracy would be better served by a moderate and prudential statesmanship such as Lincoln's, which would help limit democratic excesses. Schaff explains how Lincoln's views on prudence, moderation, natural rights and economics contain the notion of limits, then views Lincoln's political and presidential leadership through the same lens. He compares Lincoln's views on governmental powers with the defense of unlimited government by twentieth-century progressives and shows how Lincoln's theory of labor anticipated twentieth-century distributist economic thought. Schaff's unique exploration falls squarely between historians who consider Lincoln a proto-progressive and those who say his presidency was a harbinger of industrialized, corporatized America. In analyzing Lincoln's approach, *Abraham Lincoln's Statesmanship and the Limits of Liberal Democracy* rejects the idea he was a revolutionary statesman and instead lifts up Lincoln's own affinity for limited presidential power, making the case for a modest approach to presidential power today based on this understanding of

Lincoln's statesmanship As a counterpoint to the contemporary landscape of bitter uncivil politics Schaff points to Lincoln's statesmanship as a model for better ways of engaging in politics in a democracy

The Limits of International Law Jack L. Goldsmith, Eric A. Posner, 2005-02-03 International law is much debated and discussed but poorly understood Does international law matter or do states regularly violate it with impunity If international law is of no importance then why do states devote so much energy to negotiating treaties and providing legal defenses for their actions In turn if international law does matter why does it reflect the interests of powerful states why does it change so often and why are violations of international law usually not punished In this book Jack Goldsmith and Eric Posner argue that international law matters but that it is less powerful and less significant than public officials legal experts and the media believe International law they contend is simply a product of states pursuing their interests on the international stage It does not pull states towards compliance contrary to their interests and the possibilities for what it can achieve are limited It follows that many global problems are simply unsolvable The book has important implications for debates about the role of international law in the foreign policy of the United States and other nations The authors see international law as an instrument for advancing national policy but one that is precarious and delicate constantly changing in unpredictable ways based on non legal changes in international politics They believe that efforts to replace international politics with international law rest on unjustified optimism about international law's past accomplishments and present capacities

The Limits of Legal Reasoning and the European Court of Justice Gerard Conway, 2012-01-12 The European Court of Justice is widely acknowledged to have played a fundamental role in developing the constitutional law of the EU having been the first to establish such key doctrines as direct effect supremacy and parallelism in external relations Traditionally EU scholarship has praised the role of the ECJ with more critical perspectives being given little voice in mainstream EU studies From the standpoint of legal reasoning Gerard Conway offers the first sustained critical assessment of how the ECJ engages in its function and offers a new argument as to how it should engage in legal reasoning He also explains how different approaches to legal reasoning can fundamentally change the outcome of case law and how the constitutional values of the EU justify a different approach to the dominant method of the ECJ

Essential Cases on the Limits of Liability Bénédicte Winiger, Bjarte Askeland, Elena Bargelli, Martin Hogg, Ernst Karner, 2024-11-04 European legal systems have developed a broad range of instruments aimed at limiting liability These instruments are systematically examined within the present volume which builds on the experience gathered in the various jurisdictions over the past decades and thereby fills a major gap in tort law literature The publication contains a selection of the most important cases from 27 states across Europe as well as decisions by European Union courts it also highlights cases from earlier periods of legal history For each case the facts and the relevant court decision are presented and accompanied by an analytical commentary In addition comparative analyses of the reported cases are provided and a special report is dedicated to how key cases would be resolved under model European rules on tort law The

editors believe that the material gathered here may provide guidance for an organic convergence of the national legal systems in Europe It constitutes the basis of an *acquis commun* that is infinitely richer though also much more complex than the rather bland and abstract concepts contained in national codifications European legislation and modern model rules

The Limits to Union Jonathan Goldberg-Hiller, 2023-06-20 Revised and updated to include the most current information on same sex marriage The Limits to Union documents a legal struggle at its moment of greatest historical importance The Limits to Union is a superb book about the complexities of recent political struggles over same sex marriage Goldberg Hiller offers a sophisticated account of egalitarian rights advocacy and the reaction it has generated from established majorities animated by a new common sense of exclusionary sovereign authority The author's analysis is multidimensional and nuanced but the core argument is bold important and well supported I recommend it very highly to everyone interested in understanding the character possibilities and constraints of civil rights amid our contemporary culture wars Michael McCann author of Rights at Work Pay Equity Reform and the Politics of Legal Mobilization In this excellent book Goldberg Hiller uses Hawaii's experience to examine the interaction between courts and the political system Relying on briefs legislative statements and interviews with activists from both sides of the question he views this familiar debate through the unfamiliar prism of gay marriage which allows him to gauge the viability and the pliability of the American civil rights ideal and how gay and lesbian issues fit or don't fit within that ideal William Heinzen New York Law Journal Goldberg Hiller presents the history of the same sex marriage question since it first sparked debate in Hawaii He follows the shifting debate through court cases state propositions and state and federal legislatures considering questions about the constitutionality of the Defense of Marriage Act and the concept of equal protection under the law for gays and lesbians This detailed treatment of the legal issues surrounding same sex marriages is highly recommended R L Abbott University of Evansville A valuable contribution to the field situating the gay marriage debate in broader contexts of theory law and practice Same sex marriage is an important issue that finds itself caught in the friction points of much larger debates over the nature of rights the limits of sovereignty and the proper role of courts and law in a democratic society The Limits to Union should therefore be of interest even to those who do not think of themselves as interested in gay and lesbian rights issues Evan Gerstmann Loyola Marymount University Law and Politics Book Review

Lord Sumption and the Limits of the Law Richard Ekins, Paul Yowell, NW Barber, 2016-02-25 In Lord Sumption and the Limits of the Law leading public law scholars reflect on the nature and limits of the judicial role and its implications for human rights protection and democracy The starting point for this reflection is Lord Sumption's lecture The Limits of the Law which grounds a wide ranging discussion of questions including the scope and legitimacy of judicial law making the interpretation of the European Convention on Human Rights and the continuing significance and legitimacy or otherwise of the European Court of Human Rights Lord Sumption ends the volume with a substantial commentary on the responses to his lecture

The Weekly Reporter, 1864 **Exploiting the Limits of Law**

Åsa Gunnarsson, Eva-Maria Svensson, 2016-04-22 Moving beyond the question of whether an area of scholarly investigation can truly be characterized as legal Exploiting the Limits of Law combats the often unhelpful constraints of law's subject matter and formal processes Through a process of reflection on the limits of law and repeated efforts to redraw them this book challenges the general sense of pessimism among feminists and others about the usefulness of law as an instrument of change The work combines theoretical analysis of the law's boundaries with investigation of the practical settings for changing legal and policy environments Both the empirical focus of this volume and its underlying theoretical concern with the limits of the law and its gender implications render it of interest to legal scholars throughout the world whether of EU law feminism social policy or philosophy Prevention and the Limits of the Criminal Law Andrew Ashworth, Lucia Zedner, Patrick Tomlin, 2013-01-31 Are preventive justice measures justified Do they needlessly blur the boundaries between criminal and civil law signalling a change in the architecture of security The contributors in this volume reassess the foundations for the range of coercive measures that states now take in the name of prevention and public protection

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