

The Rule of Law and decision-making: scaffolding the Inspection Framework

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What is the Rule of Law?



Introduction: ideal of political morality

- Aristotle
 - Plato
 - Locke
 - Montesquieu
 - Beccaria
 - Dicey
 - Hayek
 - Dworkin
 - Fuller
- “Wherever there is **discretion**, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom on the part of its subjects.” (*known in advance*)
 - ‘**every man**, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’ (*equality*)
 - (Enforceable rights)

Beccaria

- Robert-François Damiens attained notoriety by attempting to assassinate Louis XV in 1757.
- Before the torture, on 28 March 1757, he said 'the day will be hard'. He was tortured first with red-hot pincers; his hand, holding the knife used in the attempted assassination, was burned using sulphur; molten wax, lead, and boiling oil were poured into his wounds. Horses were then harnessed to his arms and legs for his dismemberment. Damiens' limbs and ligaments did not separate easily; after some hours, representatives of the Parlement ordered the executioner and his aides to cut Damiens' joints. Damiens was then dismembered, to the applause of the crowd. His torso, apparently still living, was then burnt at the stake. After his death his house was razed to the ground, his brothers and sisters were ordered to change their names, and his father, wife, and daughter were banished from France
- *In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary the lest possible in the given circumstances, proportionate to the crimes, **dictated by the laws.** (Of Crimes and Punishment)*



So certainty is vital; rules are prospective in orientation

- Swimming pool and the University of Toronto
- **Regulation 2.6** “The winner is the person who touches the end of the pool with both hands after completing the requisite number of laps”.



- *It may even be said that for the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is. Often the content of the Rule is indeed of minor importance, provided the same rule is universally enforced. ...**The important thing is the rule enables us to predict other people's behaviour correctly, and this requires that it should apply to all cases – even if in a particular instance we feel it to be unjust.** F. A. Hayek, **The Road to Serfdom***



Formalism and doctrinal reasoning

Law is a system of principles that you simply apply to cases; it involves **deductive logic**; agents should just apply it – whether or not justice is being served is not their business; this is the **syllogism**; the integrity of law necessitates consistency even if it is wrong; rules have lasted as long as they have for a reason – they contain pragmatic value and emphasise certainty.

Deductive Logic

Major Premise:

All men are mortal

Minor Premise:

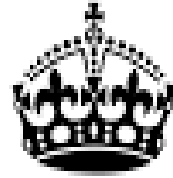
Shane is a man

Conclusion

Shane is mortal

Example: $R + F = C$

The important thing about syllogistic deduction is that the **validity of the argument depends** purely on logical form. So long as the premises are true, the conclusion must also be true



KEEP
CALM
&
FOLLOW
THE RULES

What about morality and justice?

- Grudge Cases



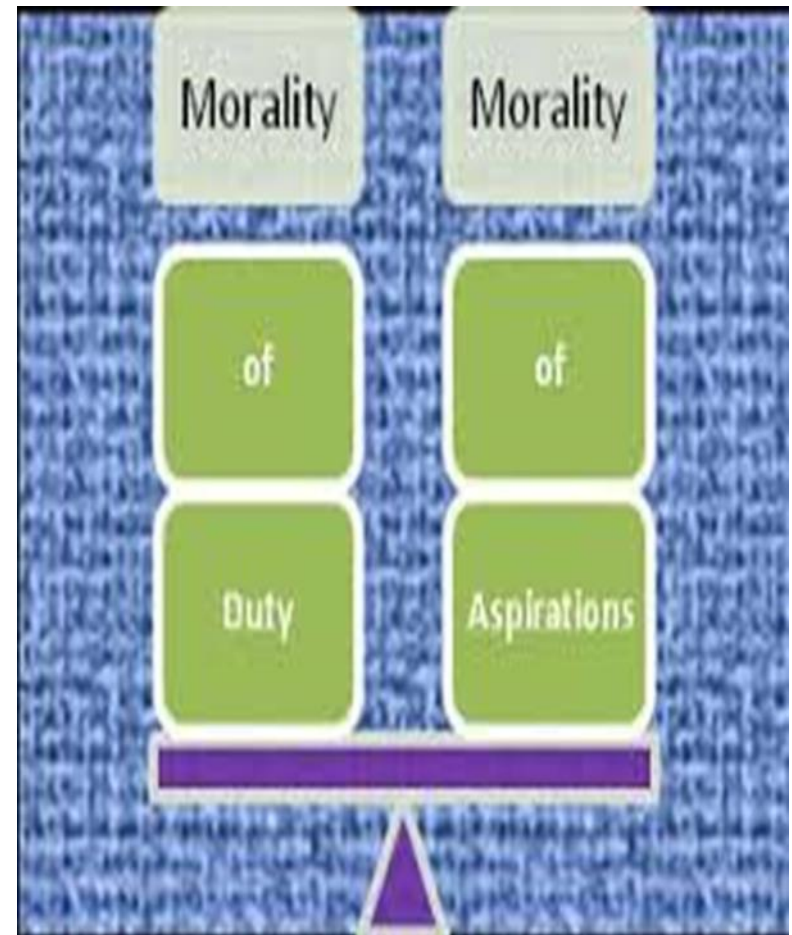
What is the problem with substantive morality? Should it be argued in Law?



Can we use procedural morality?

- Fuller and the morality of duty
it is not the business of law to prescribe for excellence but rather to ensure a **minimum standard – procedural morality**

[T]he first observation that needs to be made is that law is a precondition of good law. A conscientious carpenter, who has learned his trade well and keeps his tools sharp, might, we suppose, as well devote himself to building a hangout for thieves as to building an orphans' asylum. But it still remains true that it takes a carpenter, or the help of a carpenter, to build an orphan's asylum, and that it will be a better asylum if he is a skillful craftsman equipped with tools that have that have been used with care and kept in proper condition



The criteria of law making which protects the integrity of decision-making (inner morality)

- 8 ways to fail to make law
- Failure to establish rules
- Failure to promulgate rules
- Retroactive lawmaking
- Failure to make comprehensive rules
- Making rules which contradict each other
- Making rules which impose requirements with which compliance is impossible.
- Changing rules frequently so that the required conduct becomes unclear.
- Discontinuity between express rules and their application



- John Finnis, believes that there are five features of any legal system:
- (1) law brings **predictability and clarity** into human interactions,
- (2) it regulates what it brings into existence, that is, its rules define and regulate institutions, until it determines according to its own terms or to some valid act or rule of repeal.
- (3) it provides rules by which to alter or modify a position
- (4) legal thinking brings a way of treating past acts as giving sufficient reason for acting in the present: it **provides a stable point of reference** unaffected by present and shifting interests and disputes- **so it gives people a way of now determining the framework of their future.**
- and (5) all practical questions or coordination problems are provided for in law; there are no gaps



- The purpose of the rule of law is to promote the wellbeing of a community and thereby allow individuals to develop themselves in a stable environment. As Finnis says:
- Individuals can only be selves – i.e. have the “dignity of being “responsible agents” – if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a lifetime.” [+ Kant]
- The rule of law means that “a certain quality of interaction exists between the ruler and the ruled”, securing ‘to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation’. It restricts the government’s ‘freedom of manoeuvre’.



But morality infuses fairness of procedures

- Nemo iudex in causa sua
- Audi alteram partem



In Re Haughey [1971] IR 217 at 264 Dalaigh C.J. stated as follows:

"... In proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his personal property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State either by its enactments or through the courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights." On that basis, the Court found that a person in that position was entitled to the following "minimum protection":

"(a) That he should be furnished with a copy of the evidence which reflected on his good name;

(b) That he should be allowed to cross-examine, by counsel, his accuser or accusers;

(c) That he should be allowed to give rebutting evidence;

(d) That he should be permitted to address, again by counsel, the committee in his own defence."

Dalaigh C.J. continued that without these rights:

"... No accused - and I speak in the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of clocha ceangailte agus madra scaoilte. Article 40, s.3 of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness and it is the duty of the Court to underline that the words of Article 40 s.3 are not political shibboleths but provide a positive protection for the citizen and his good name



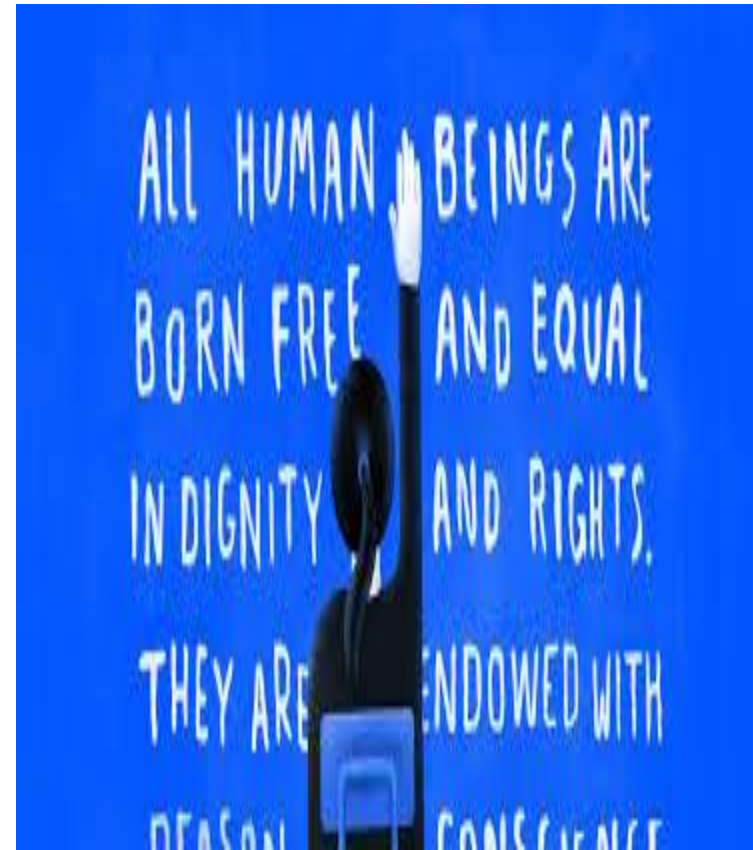
Moral principles often infuse background rights. Can the Rule of Law include Rights?

- Dworkin/Hayek/Bingham
- Logical consistency regarding rules (rule formalism or a 'rulebook' conception of the Rule of Law) should be buttressed by rights and principles—implemented through a constitutional structure—which commands that 'rules in the rule book capture and enforce moral rights' (**a rights-based conception of the Rule of Law**).



So can we revisit the swimming pool example?

- For Dworkin, there are **two basic principles** of human dignity:
- ‘The first principle – which I call the principle of intrinsic value – holds that each human life has a special kind of objective value. It has value as potentiality; once a human life has begun, it matters how it goes...
- The second principle – the principle of personal responsibility – holds that each person has a special responsibility for realising the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him.

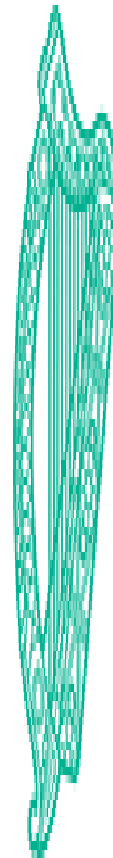


Why is the Rule of Law in decision-making an essential good?

- It means that power is **less arbitrary**, less peremptory, less coercive.
- The focus is on the **rules**, not the person
- It establishes a **bond of reciprocity** (a social contract)
- It establishes an environment that is **conducive to liberty** – not dependent on the will of others.
- It makes an important contribution to **predictability and the security of expectations**. *“The principle of security ... requires that events, so far as they depend upon laws, should conform to the expectations which law itself has created...”*
- It speaks to **human dignity** allowing people to plan and plot their futures (Franz Kafka, Aleksandr Solzhenitsyn)
- *To embark on the enterprise of subjecting human conduct to rules involves ... a commitment to the view that man is ... a responsible agent, capable of understanding and following rules.... Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey ... your indifference to his powers of self-determination. (Lon Fuller)*

Why is the framework document so important

- Applies to punishment 'beyond the walls'
- **Visibility** in specialist enclaves
- **Values**: independent, human-rights focused, transparent, systematic
- **Five Focus Areas**: 'respect and dignity'
- **Dimensions**: Compliance
- **Architecture created**: assessment rubric
- **Rights-based**: Constitution, s. 42 Equality Commission, UDHR, ICCPR, CPRD, UNCAT, ECPT, ECHR



Oifig An Chigire Príosún

Office of the Inspector of Prisons

Why is the framework document so important

- **Synthesising pulse:** domestic, international, IPS operational policies, operating procedures and delivery execution
- **Integrity:** elevating the awareness of rules and principles
- **Transparency:** for all stakeholders
- **Predictability:** sufficiently clear to permit self reporting on indicative measures
- **Procedural morality:** established rules, clear, published, not contradictory, compliance is possible, allow for change, and applied

A Framework for
the Inspection of
Prisons in
Ireland

Conclusion

- *They safeguard rights, and bring predictability and a very stable point of reference from which to judge behaviour and practice.*
- *They also promote a 'quality of interaction' which one would expect in a society that takes rights seriously*