Philosophy, Law and Culture of Liberal Democracy and the Authoritarian Challenge

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By

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To Anya and Avin

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Suri Ratnapala

INTRODUCTION

The human race throughout its known history has lived under some form of authoritarian rule. In the celebrated democracy of Athens slaves vastly outnumbered male citizens who alone had political rights. At the height of Rome's grandeur, slaves, glorified as gladiators, were forced to engage in mortal combat with each other and with wild animals for the entertainment of assembled citizens and patricians. Women until recently were the dependents of male patriarchs. Even today, less than 12.5 per cent of the world population live in liberal democracies. This proportion is likely to diminish further if the current authoritarian tide keeps rising.

Political liberalism has its genesis in the thinking of great Enlightenment philosophers John Locke, Baron de Montesquieu, David Hume, Adam Smith, Jeremy Bentham and Immanuel Kant and the French Physiocrats. Their thought inspired British democracy and the design of the American Constitution that supplied the blueprints for democratic constitution building in many parts of the world.

Liberal democracy is the most precious gift of the 17th and 18th Century Enlightenment. It established the principle of government by consent and the rule of law in its classical sense and created spheres of individual autonomy by recognising fundamental rights and liberties. It released human ingenuity and energy that produced immense wealth, reduced extreme poverty from 85 to 9 percent of the world's population, and raised average life expectancy from 30 years to 72 over the period 1800 to 2019. Today almost everyone in the world can read; 200 years ago, hardly any could. Importantly, liberalism widened humanity's moral compass. We do not enslave fellow humans. Our laws treat all human beings equally irrespective of race, faith, gender, sexual preference or political opinion. We have some way to go in this direction but have made impressive progress. We have prohibited torture and inhumane punishment. We do not inflict pain on animals for pleasure. We have created social safety nets for all persons and special provision for the aged, the disabled and others struck by misfortune. Liberal democracy is not perfect but it has driven the moral and material progress of humanity beyond anything conceivable by generations before.

Millions of people, many barely out of high school, sacrificed their blossoming lives in the defence of liberal democracy in two World Wars. They had no idea of the Enlightenment and had never heard of Montesquieu, Locke or Hume. They just knew freedom and they knew they were fighting fascists seeking to control the world. Ukrainians today are dying in defence of their democracy against the invading forces of the fascist regime of Russia. Millions each year migrate to liberal democracies from autocratic states. The traffic is all one way from tyranny to liberty.

Yet, for all its remarkable economic and moral successes, liberal democracy remains under continuous threat from dictators who wish to make the world safe for tyranny and domestic opponents of the far left and far right who fear freedom. Barely three dozen countries of the world are rated as functioning and stable liberal democracies by credible ranking agencies. The perilous state of democracy in the world is driven home by the former US President's continuing refusal to accept his defeat at the 2020 presidential election which was validated by 60 state and federal courts and the US Congress.

The defense of liberal democracy must begin at home. A country divided and lacking in conviction of its founding principles is a much weakened nation. Liberal nations thrived economically and morally under the rule of law, consensual government, civil liberties, an epistemic consensus based on critical rationalism and open debate, economic freedom, and a culture shaped by liberal values. These are not isolated conditions but form the interlocking architecture of liberal constitutionalism. Erosion of one pillar destabilises the whole edifice.

These pillars have been weakened by public apathy, civic neglect, self-interested partisanship, intellectual misunderstanding of their importance and interconnectedness and outright hostility of the nativist, fascist leaning far right and the postmodern radical, utopian far left. There is no panacea for the ills of liberal democracy. Nevertheless, revival is possible and urgent. This book is dedicated to the defense of liberal democracy by restating and reaffirming its moral case and its fundamental institutions while identifying and clarifying the nature and scale of the threats they face.

The book is presented in four Parts. The first Part is a philosophical investigation of the theoretical and moral foundation of liberal democracy and the institutional framework necessary for this form of government. The classical ideal of the rule of law that is an indispensable feature of liberal democracy is explained and distinguished from its perverse conceptions that

that has been used by dictatorial regimes through history to legitimise tyranny. The concept of liberal democracy is discussed in Chapter 3 and distinguished from other forms of democracy. This Part further investigates the dependence of the rule of law and representative democracy on the separation of powers in both its institutional and methodological dimensions. The catastrophic consequences of misunderstanding the rule of law are exposed using the world's experience of the Nazi holocaust and the legal defences of its perpetrators at the post war Nuremburg trials.

Part 2 of the book is an extended discussion of the threat to liberal democracy by the growth of an overbearing administrative state with vast legislative and judicial powers that undermine the principles of representative democracy and the rule of law and destabilises the rights and freedoms of individuals. The investigation is informed by a comparison of the relevant law and practise in the United States, Canada, the United Kingdom, Australia, France and Germany. The jurisprudential theories justifying the administrative state are critically considered and found wanting by the norms of liberal democracy defended in this work.

Part 3 of the book examines the cultural underpinning of liberal democracy and the forces that are eroding the unwritten liberal consensus. No system of government is self-sustaining. Dictatorial governments maintain themselves by overwhelming force. Repressive rule is the antithesis of liberal democracy which Abraham Lincoln famously declared at Gettysburg was government "of the people by the people for the people". Liberal democracy cannot exist without uncoerced popular acceptance. In a free society, laws gain force not by fear or magic, but by human behaviour.

A culture is shaped by knowledge. For most of history, human knowledge was derived from spiritual and political authority. Galileo Galilei (1564 – 1642) father of astronomy, inventor, and the greatest scientist of his time was convicted of heresy by the Inquisition and spent the rest of his days under house arrest. His crime was proposing the theory of heliocentrism: that the Earth rotated on its axis and orbited around the Sun. This was an unpardonable sin against the Christian doctrine that the Earth was the centre of the Universe. Tens of thousands of women were not so lucky. Accused of causing misery by witchcraft, they were tortured and burned at the stake. Among them was Joan of Arc the legendary heroine of France accused of heresy.

Liberal culture is built on the Enlightenment spirit of open inquiry captured by Immanuel Kant's inspirational maxim: *Sapere Aude*. Dare to know. This

means that no point of view must be suppressed and every knowledge claim is contestable. As Jonathan Rauch in his excellent work *The Constitution of Knowledge: A Defense of Truth s*ays, "liberal science", which includes the social sciences and philosophy, is founded on two cardinal rules: *no final say* and *no personal authority*. (2021, 15) Michael Shermer, in his book *The Moral Arc: How Science and Reason Lead Humanity Toward Truth, Justice and Freedom*, argues that the experimental method and analytical reasoning of science when applied to the social world created "the modern world of liberal democracies, civil rights and civil liberties, equal justice under the law, open political and economic borders, free markets and free minds, and prosperity the likes of which no human society in history has ever enjoyed". (2015, 7)

The norms of this epistemic system have been under assault from both ends of the political spectrum. Postmodern critical theory has for decades assailed the basic premises of liberal epistemology questioning the possibility of objective knowledge and the methodologies of science and law. More recently, the emergence of politically correct conformism, compelled speech, deplatforming of opponents, cancel culture, and diversity mandates are stifling open inquiry and debate in centres of learning and public administration. Conservative responses such as the control of educational curricula, book banning, disinformation and subversion of truth seeking institutions such as the courts and electoral processes are no less harmful to the cause of knowledge and freedom.

Part 4 is a single chapter that considers the nature of fascism and the threats to liberal democracy posed by the major fascist powers China and Russia and their allies in nations ruled by increasingly authoritarian regimes. These are the greatest and most immediate external challenges to the liberal democratic world since the collapse of totalitarian communism. Fascist powers work relentlessly to dismantle the rules based international order, undermine liberal states by disinformation and divisive interventions, sway emerging democracies to authoritarianism by corrupting their leaders, and where possible, by naked aggression as witnessed in Ukraine. The China model is presented by the CCP as the successful alternative to the US led decadent and declining liberal system of what it derisively calls the "Global North" which somehow excludes the northern hegemonistic powers Russia and China. This claim is closely considered and the true potential for the China model to achieve global dominance is found wanting owing to the country's faltering economy, its demographic crisis, youth unemployment, growing disaffection with cultural repression and souring relations with neighbouring nations because of its territorial expansionism.

The chapter explains the reasons to believe in the future of liberal democracy, contrary to the obituaries written by pessimistic friends and optimistic enemies. The price of freedom, it is often said, is eternal vigilance. The price tag is actually much higher. It includes the study and understanding of the legal, economic and cultural conditions that make freedom possible. It demands unceasing efforts to monitor, correct and improve the institutions that secure freedom. It demands deep moral commitment to the cause of liberty. The price also includes unwavering resolve to defend liberty against its belligerent foes.

The book closes with the reminder of the moral burden of each generation to preserve and improve their greatest legacy: freedom, prosperity and justice under liberal democracy.

PART 1

RULE OF LAW AND LIBERAL DEMOCRACY: AN INSEVERABLE RELATION

CHAPTER 1

THE CLASSICAL IDEAL OF THE RULE OF LAW: THE BEDROCK OF LIBERAL DEMOCRACY

> Nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities this means 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.
> —F A Hayek, *Road to Serfdom*

The rule of law in its classical sense is the indispensable feature of the political system known as liberal democracy. The rule of law distinguishes liberal democracy from purely majoritarian democracy and from all forms of autocracy. The rule of law is an ideal that is not perfectly attainable among fallible individuals. Yet, a free, harmonious and prosperous society cannot be sustained without its practical achievement. It is the core value of constitutionalism and the basis of peace among nations. The ideal of the rule of law defended in this book is not a modern invention. Its intellectual roots can be traced to classical Greek political theory with its clearest early exposition found in the work of the philosopher Aristotle in the 4th Century BCE. Hence the adjective "classical" to distinguish this conception of the rule of law from other understandings. It is also appropriate because of its centrality in Enlightenment classical liberal thought. It is important, however, to notice that the Enlightenment ideal departs from the Hellenic conception in a critical aspect. Aristotle did not extend the protection of the rule of law to slaves who vastly outnumbered citizens or to women. The rule of law in Enlightenment thinking is a universal value that condemns slavery and forms of discrimination.

The rule of law is under perpetual stress wherever it exists. It faces innumerable threats, some obvious and others not so well understood. The rule of law suffers in conditions of war, civil disorder, uncontrolled crime

and lawlessness, endemic government corruption and incompetence, institutional decay, public apathy and serious misconceptions about its meaning and implications. It suffers from over-zealous and ill-conceived measures of well-meaning elected governments and administrators. It is weakened by the frailties of its guardians: the judiciary, the legal profession and law enforcers whose integrity, impartiality, competence and dedication are essential to its realisation.

The greatest threats to the rule of law, however, are posed by its avowed opponents of the left and the right who reject the ideal for philosophical, political, cultural, religious or personal reasons. The most persistent and potent threats arise from the ambitions of rulers who find the rule of law inconvenient to the pursuit of their private interests. As Lord Acton pointed out, power intoxicates the best of them. The rise of economically powerful fascist regimes with hegemonistic ambitions and the growth of nativist populism hostile to liberal democracy in hitherto successful law governed democratic states adds urgency to this work.

Intellectual opposition to the rule of law ideal is as old as its first exposition by Aristotle. The objections generally fall into four classes: (1) rule of law is less efficient than the rule of men, (2) rule of law is oppressive, (3) rule of law is impossible and (4) rule of law is incompatible with a nation's spiritual or cultural values. Many opponents mix and match these arguments regardless of contradictions. A defence of the rule of law ideal must address these objections that have persisted throughout political history. This is a principal undertaking of this Chapter.

1.1 Problem of Definition

The rule of law is one of the most widely discussed ideals in political and philosophical conversations. Yet, like democracy, justice and liberty, the concept has no agreed meaning. If there is a kernel of consensus, it is that state power must be exercised within the limits and according to the processes established by law. Beyond this lie an array of disputed questions concerning the essential elements of the rule of law, the nature of law that make the rule of law possible, the reach of the doctrine, justifiable departures from the ideal, the constitutional settings that promote the rule of law including the separation of powers and democracy, integrity of the legal system and the cultural underpinnings that make the rule of law possible. Then there are opponents who question the value of the rule of law and some who deny the possibility of the rule of law.

The term "rule of law" has no transcendent or incontestable meaning. Different persons attach different meanings or definitions to it. A purely stipulative definition or description says: This is what I mean by "X". We disregard such definitions if they are logically incoherent or premised on disproven science or false facts. An important exception is where a definition is stipulated in a valid statute and so becomes legally binding for certain limited purposes. A law, for example, might define adulthood by reference to a specified age. The prescribed age may be fair or unfair but not true or false as it does not report a fact but merely stipulates the age for certain legal purposes. In contrast, a lexical definition, one that claims to represent the meaning generally accepted in a language community, could be shown to be true or false by testing public opinion. A distinction is commonly drawn between intensional and extensional definitions. An intensional definition specifies the necessary and sufficient conditions needed for an item to be classified within a term. (A triangle is a polygon with three edges and three vertices.) An extensional definition exhaustively names all members of the defined class. (A's family comprises A, spouse B and their children C and D.) Any definition or description of a concept may also be questioned on its explanatory value. The statement "a horse is a quadrupedal animal" adds nothing to what most people know.

Definition of a noun or term, to be useful, must have a high degree of precision. A desirable or aspirational state of affairs that depends on complex social processes is hard to define. What is often presented as definitions are explanatory descriptions and theories on the subject. This is not per se wrong because people may reasonably have their own notions on what counts as a "definition". However, as I presently point out, there is danger in defining something too broadly. There are many political institutions such as representative democracy and independent courts that are instrumental in achieving the rule of law and which, in themselves, are key pillars of liberal democracy. There are also other worthy political and moral causes that demand attention in a liberal society. However, the tendency to conflate them all within a definition of the rule of law is unhelpful to a clear understanding of the ideal and its relation to other liberal values and institutions. It is not easy to separate with clinical precision the central aim of the rule of law from the conditions necessary for its attainment. However, to the extent possible, I will treat them separately so that the object and the means are more clearly visible in their relation to one another.

This book does not offer a universal definition of the rule of law but will endeavour to provide a clear statement and defense of a particular

conception of the rule of law. The central theme of the book is the theory that a liberal democracy cannot be maintained without the general supremacy of laws of a special kind. This is the classical theory of the rule of law first clearly stated in the *Politics* of Aristotle.

1.2 Normativism – Nature of Law that Makes the Rule of Law Possible

The law that makes the rule of law possible in the classical sense is what F A Hayek termed *nomoi* adopting the Greek word for law or convention as opposed to a command or decree. Such law consists of "of purpose independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected realm of each, enable an order of actions to form itself wherein individuals can make feasible plans". (Hayek 2013, 82) In simpler terms, this type of law consists of general rules of conduct that do not command specific actions or outcomes from an individual. This is known as normativism, and a state that enthrones this kind of law may be called a nomocracy. Athenians called an assembly authorised to change general laws *Nomothetae.*

An illustration is helpful here. The requirements in contract law that the seller of an article must deliver the article and that the buyer must pay the agreed price embody norms that are general and impersonal. They apply to any number of future contracts for goods and services of all kinds. Consider, in contrast, a statute that empowers an official to set aside the agreed terms of a contract according to ill-defined and subjective notions of justice and equity or the demands of state policy. In the latter case there is no intelligible rule of conduct which can inform the parties beforehand of their rights and duties.

1.2.1 Origins of Normativism

Aristotle is not the originator of the idea that the ruler is subject to the law. The origin is in fact the ancient view of law as existing from time immemorial without a known human author. In the natural history of humankind, deliberate lawmaking is a relatively recent activity. The anthropologist Edmund Leach pointed out that in the context of human history as a whole, law making is unusual (1977, 7). FA Hayek reminded us that humans lived in groups held together by common rules of conduct for something like a million years before they developed reason and the

language needed to articulate them. (2013, 71) David Hume argued that law preceded authority and that government arose out of the need to administer the law impartially, not the other way. (1975 (1748), 537) It is fanciful to think that ancient tribal leaders always upheld the folk law. Unwritten law, besides, was always open to interpretation and corruption. Nevertheless the sanctity of the inherited law and its value for the survival of the primitive community would have placed powerful restraints on customary rulers. Customary laws are by their nature *nomoi* or general rules of conduct. They grow out of the regularities of behaviour over time and not by specific *ad hoc* commands. This is also the reason that the English common law consists not of commands but of general rules.

Ancient Greeks believed that the laws of the *polis* were received from a god, Zeus in the case of Athens. It is the sacred duty of the rulers not to violate this law. Plato considered the rulers to be servants or ministers of this law. He wrote in the *Laws*, "For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer". (Plato 2012 (369 BCE), 219) A polis for Plato was a law-state where rulers do not make law but serve the law; instead of a government which makes law to suit itself, there is a law which forces government to conform itself to the interests of all. (Ernest Barker 1959, 190). But it is in Aristotle's work that we find the first explicit discussion of the rule of law where legislation is a fact of political life.

Different models of state emerged among the Greek states. Aristotle noticed three beneficent models: monarchy, aristocracy and polity and their corruptions: tyranny, oligarchy and unrestrained democracy. The prevalence of the rule of law distinguished the beneficent models from their corrupt counterparts. The corrupt systems were founded on the belief that the public good is served by the best men whether they be absolute monarchs, elite groups or popular majorities. In the *Politics*, Aristotle posed the famous question whether it is better to be governed by the best men or by the best laws. His answer was: the just ruler cannot dispense with principle that exists in the law because "Whereas the law is passionless, passion must ever sway the heart of man". (1916 (350 BCE), 136) The "passionless law" of Aristotle is the *nomoi*, the rules of just conduct. Aristotle concluded that the "The law ought to be Supreme overall, and the magistracies and the government should judge only of particulars ... if democracy be a real form of government the sort of Constitution in which all things are regulated by decrees is clearly not a democracy in the true sense of the word, for decrees

relate only to particulars". He observed that when an assembly decides every detail, it ceases to express the popular consensus but becomes the tool of demagogues. (1916 (350 BCE), 157) He perceived that genuine consensus is more likely on general principles than on particular outcomes. In the *Nicomachean Ethics*, Aristotle developed his theory of governance based on these insights. He asserted that political science in the wider sense consists of "legislative science" and "political science" in the narrower sense which is the science of administration. Legislative science instructs administrative science. Administrators bear the same relation to the law giver as workmen to the master craftsman. (1976 (350 BCE), 213-14) This is the essence of the classical theory of the rule of law.

It must be noted, however, that Aristotle's conception excluded slaves and women from the protection of the rule of law. A slave, for Aristotle was "a piece of property which is animate living possession, a kind of animate property, useful for action rather than production". (1916 (350 BCE). 7; see also 31-2) In sharp contrast the rule of law of classical liberalism is a universal value that extends to all persons without distinction.

1.2.2 Normativism of the English Common Law

The common law evolved through judicial precedents over hundreds of years and, by its nature, consists of general rules of conduct. A basic demand of justice and also of the rule of law is that like cases be treated in a like manner. Judges make specific judgments and decrees in particular cases but they cannot do so arbitrarily or according to their subjective sense of justice. As Friedrich Hayek explained, "it is part of the technique of the common law judge that from precedents which guide him he must be able to derive rules of universal significance which can be applied to new cases." (Hayek 2013, 82) The result, in the words of Lord Mansfield (quoted by the historian William Holdsworth) is that the common law "does not consist of particular cases, but of general principles, which are illustrated and explained by those cases". (Holdsworth 1928, 18) The common law is not static as it adapts to new circumstances arising in a dynamic social order. The common law, as Chief Justice Sir Matthew Hale wrote in his magisterial work *The History of the Common Law,* is "accommodate to the Conditions, Exigencies and Conveniences of the People [and] as those Exigencies and Conveniences do insensibly grow upon the People, so many times there grows insensibly a Variation of Laws, especially in a long Tract of Time". (1971 (1713), 39) The common law is thus a self-maintaining spontaneous order. The role of the judge in such an adaptive system is to maintain the ongoing order by resolving conflicts, where necessary by refining the rules

to give effect to reasonably held expectations of the parties. In Hayek's words "The questions which they will have to decide will not be whether the parties have obeyed anybody's will, but whether their actions have conformed to expectations which the other parties had reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based". (Hayek 2013, 92)

While in Europe, royal absolutism became the standard of rule in the 17th and 18th Centuries, the monarchy in England was stripped of its legislative pretensions and made subject to the law of the land which predominantly was the common law. The distinct character of the law as general rules was therefore preserved whereas in the continental monarchies the law remained firmly tied to the will of the prince with no legal restraint. In the words of the great 18th Century legal scholar William Blackstone, law "is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal". (1876 (1765–1770,) 26) It is the supremacy of this kind of law that that secured the rights and freedoms of the people that so impressed European observers like Voltaire, Montesquieu and Tocqueville.

The persistence of the supremacy of the general law was theoretically at odds with the new omnipotence of Parliament. Parliament began its life as the highest court of the land. It was not unusual for Parliament to enact bills of attainder or of pains and penalties to punish individuals after parliamentary trials. The mistrust of royal power following the constitutional convulsions of the 17th century led Parliament to concern itself with private and public matters best left to the executive. The constitutional historian Frederic Maitland observed: "to have erected boards of commissioners empowered to sanction the enclosure of commons or the widening of roads, to have enabled a Secretary of State to naturalize aliens, would have been to increase the influence and patronage of the crown, and considering the events of the seventeenth century, it was but natural that Parliament should look with suspicion on anything that tended in that direction". (Maitland 1911, 383).

The situation was inverted when in the 19th century executive power passed from the monarch to the Prime Minister and the ministry responsible to Parliament. The ministry, drawn from the majority party in the House of Commons, now controlled Parliament's legislative agenda. Parliament, under ministerial behest, developed the practise of delegating much legislative and quasi-judicial power back to the executive branch often with scant restraints. The constitutional challenge thereafter was to reconcile parliamentary supremacy, executive dominance and the rule of law.

In his influential book *The Introduction to the Study of the Law of the Constitution,* A V Dicey sought to do just that. The first attribute of the rule of law, he wrote, is the absence of arbitrary authority.

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. (Dicey 1915, 183-184)

The second attribute is that no person is above the law and "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". (Dicey 1915, 189) Dicey then claims that the rule of law is "a special attribute of the law of the English institutions".

> We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution. (Dicey 1915, 191)

This is not an attribute of the rule of law but a theory about its strength in England which is that the English constitution is an outgrowth of common law rights and freedoms of citizens whereas the rights and freedoms in other countries derive from an already existing constitution. The reality of the rule of law in modern liberal democracy is more complex. It is sustained by both traditional entitlements and their protection under formal constitutions as in the United States and in the enlightened democracies of Europe and elsewhere.

The two normative attributes of the rule of law that Dicey specifies is the absence of arbitrary discretions and equality before the law. The absence of arbitrary discretions can only result by their subjection to general principles. Equality before the law is only possible under general and impersonal laws that are administered without fear or favour.

1.3 Qualities of Normativism

What is so special about general, abstract and impersonal laws? As the American legal philosopher Lon Fuller theorised in his book *The Morality*

of Law, this kind of law is imbued with an internal morality without which the law cannot perform its social function of providing normative guidance to individuals and facilitating their harmonious cooperation. Fuller identified eight qualities of the internal morality of law.

(1) Generality. Generality is an attribute of a rule. Commands that express the ruler's momentary wishes do not establish rules that can guide citizens on right and wrong conduct.

(2) Publicity. A law fails its public purpose if it is unknown. In a complex legal system, not every law is known even by professional lawyers. However, if laws are not published where they are discoverable and if the more important rules that affect everyday life are changed without publicity, grave injustice results. Secret laws were a feature of the Nazi regime.

(3) Prospectivity. In law governed societies, laws with retrospective effect is a rarity. Such laws impose punishments or deprivations on persons who have committed no legal wrong.

(4) Clarity. Clarity is a legal virtue. Incomprehensible laws fail to offer normative guidance and unsettles legitimate expectations.

(5) Consistency. Contradictory laws cause legal uncertainty. There are means of resolving some of them through judicial interpretation but only at high costs.

(6) Constancy. Frequent changes to the law deprive citizens of their capacity to order their lives in the pursuit of their legitimate life aims, destabilises the legal order and impose high economic costs.

(7) Possibility of Compliance. A law that requires the impossible is ineffective and if it carries a punishment, is inhumane.

(8) Congruence of the Law and its Administration. A law that meets each of the seven normative criteria would yet be meaningless or arbitrary if it is not enforced, or is applied selectively or capriciously. Faithful administration of the law is therefore an indispensable condition of the rule of law.

No state past or present has fully achieved these moral standards and no state will. However, Fuller's key argument was that the total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all except in the Pickwickian sense. Fuller wrote:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he has acted, or was

> unintelligible, or was contradicted by another rule of the same system, commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point, obedience becomes futile – as futile, in fact, as casting a vote that will never be counted (1969, 39).

The classical theory claims that the rule of law is found where there is a system of laws that generally and to a reasonable degree displays the qualities that Fuller associated with the internal morality of law. Fuller's list has been adopted with modifications by writers including Raz (1979) and Walker (1988).

1.4 An Initial Objection Considered

Opposition to the classical ideal of the rule of law appears in many forms – ideological, epistemological, technical, pragmatic and combinations thereof. They will be closely examined in this book. There is one criticism though that deserves immediate attention because by addressing it, we may deepen our understanding of the classical ideal. This often heard criticism asserts that the classical theory is too inflexible for the governance of a complex industrial democracy. This is an understandable and not unreasonable concern. However, the criticism proceeds from a misunderstanding of the classical ideal, the nature of complex social systems and the role of government in a modern successful liberal democracy.

The first point to note is that the classical notion of the rule of law is an ideal. Ideals by their nature are not perfectly achievable. Yet they are aspirational goals worthy of human emulation. Perfect rule of law is as elusive as perfect democracy, perfect justice and perfect liberty. The aim of perfection can indeed be harmful according to the law of diminishing returns. Yet, it is an indelible lesson of history that liberal democracy is maintained by ceaseless striving towards these ideals. A society that abandons them rapidly descends to tyranny.

Secondly, as Aristotle acutely observed, the force of the law is weakened, not strengthened by fickleness. He rejected the absolutist argument current in his time, as it is now, that lawmaking requires creative flexibility.

> The analogy of the arts is false; a change in a law is a very different thing from a change in an art. For the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law. (Aristotle 1916 (350 BC), 61)

This is as evident today as in the classical period. The corpus of law in a modern industrialised society consists of countless enactments unknown even to the great jurists. The society functions not because the people have read the law books but because by and large they have an intuitive understanding, strengthened by experience, of the basic rules of good behaviour. The fundamental principles of the laws of tort, crime and contract were in folk law before they were written down. They were not human artefacts. As Adam Ferguson memorably said, they "are indeed the result of human action, but not the execution of any human design". (1966 (1767), 122)

This insight leads us to the third weakness of the criticism that the rule of law is unsuited to modern conditions. The criticism flows from a misunderstanding of the complex and dynamic nature of the order that is modern society. Unlike a family or a close knit tribal group where everyone knows everyone else and their needs, a technologically advanced society comprises millions of individuals who are strangers to each other. They achieve cooperation not by intimacy but by observing basic rules of mutual respect for person and property found mainly in the laws of crime, tort and contract. The idea that the increasing complexity of a social order demands commensurately complex state management proceeds from a profound misunderstanding of the nature of society and the means of promoting its general welfare. Richard Epstein argued in his important book *Simple Rules for a Complex World* that society functions best on seven basic rules – four that uphold self-ownership, private property, sanctity of contract and the safety from aggression supplemented by three rules concerning dire necessity, compensated takings for proven public purposes and taxation for genuine public goods. (Epstein 1995)

Epstein supports his thesis with cogent utilitarian arguments drawing on historical experience. It is strongly supported by the science of emergent complexity. Emergently complex systems comprise large numbers of individual elements that adapt to local conditions while observing the general rules on which the overall order of the system is maintained. These systems are called emergent as they evolve in response to internal stimuli of their elements as they adapt to the changing external environment. Their defining feature is spontaneously forming order or self-organisation. This form of complexity is different to the pre-programmed complexity of a clock or computer program which cannot independently modify its own behaviour. (Artificial intelligence and machine learning are advancing the creative capacities of computers mimicking emergent complexity.) Emergent complexity is a feature of all living systems including biological