



The Constitution and the Rule of Law: Are They Equal in Value?

By José Stelle

In 2005, seeking to transform Brazil into a revolutionary dictatorship like Cuba or Venezuela, President Lula da Silva's socialist coalition began agitating for an end to the separation of powers embedded in the country's several constitutions since 1891.¹ Seeing the president's authoritarian measures repeatedly struck down or modified by the Supreme Court, and being unable to "pack" the Court or to reshuffle the armed forces, Silva's supporters complained, "Why this vaunted separation? Why should the people accept this old-fashioned, unworkable system? Why not make the government more effective by concentrating all power in the hands of the president?"²

Brazilians did not take the bait. By a whopping margin, they voted down a gun-registration measure advanced by the same "United Left" to forestall possible armed rebellion against other confiscatory measures that Silva wished to decree; so, outside of revolutionary-socialist circles, the attempt to end the separation of powers soon fizzled. The aggressive proposal did, however, have one positive effect: it sparked a debate in Brazil about the meaning of the Constitution and of the rule of law. Were they the same thing? Is a Constitution an effective defense against an aspiring dictator such as Lula? What does political philosophy say about this?

Given President George W. Bush's alleged violations of the American Constitution, a similar debate could be of benefit if carried out in the United States, the country that first attempted Montesquieu's idea of establishing the rule of law through a division of labor in the government. Although this "American contribution"³ to political thought has been viewed by many scholars as at least a partial failure, Americans continue to believe not only that the Constitution amounts to liberal constitutionalism, but that it is "near to perfection"⁴ as a representative of the rule of law. But is the Constitution *the* rule of law or *a* rule of law? In consequence, is a constitutional act necessarily under the rule of law? And is an unconstitutional one necessarily against it?

Because the individual is fragile and the government strong, and capable of injustice even in the best liberal state, one may describe the rule of law initially by saying that "government must never coerce an individual except in the enforcement of a known rule"⁵ and that therefore this requirement constitutes "a limitation on the powers of all government, including the powers of the legislature."⁶ Nevertheless, this contextual definition is insufficient, as it leaves out both the *qualities* and the *hierarchy* of the "known rules." This is so because the rule of law does not determine that laws should exist, but, rather, "what the law ought to be,"⁷ that is, the real, general, virtual, implied, or inherent characteristics "that particular laws should possess."⁸

As such, the rule of law presides over and permeates all laws and regulations. It aims to guarantee justice by especially barring all servants of the state from any partiality they might be tempted to exercise; on the positive side, it helps them to formulate, interpret, and enforce the laws by clarifying for them not only the origin, nature, and function of the law, but also that of their own function as servants of the state — which is to say, servants of the free people who are the source of their duly constituted authority and whose non-personal affairs they, as public servants, have (temporarily and within limits) been permitted to manage under the same conception of law. This is a quality that the U.S. Constitution has rarely exhibited; rather,

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U.S. history aside, the daily acts of America's legislatures alone are sufficient proof to the contrary. Hayek explains the difference:

The rule of law . . . presupposes complete legality, but this is not enough: if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles.⁹

Further, the rule of law's essence and capacity as a limitation on all government means that it cannot be interpreted as a law in the same sense as the laws commonly approved by legislatures, which have a subsidiary quality, possibly an illegitimate one. Constitutional checks may reduce the government's violations of the rule of law. However, legislators (in particular those who make up the adversarial, party-based system of representation engendered by the Constitution) rarely limit their imagined "sovereignty," especially with regard to routine legislation and taxation. They show special contempt for limitations on their arrogated supremacy when the bills they are promoting can assure their reelection, with all the doubtful privileges and, not unusually, the illicit wealth and power attaching to their arrogated autonomy as "representatives." The rule of law is therefore not a rule of the Constitution, of the established body of law, or of the government, but "a rule concerning what the law ought to be."¹⁰ It is, in sum, the representative of justice; it refers not to the temporary origin of the law (Congress), but to actual, timeless, and permissible qualities the law embodies regardless of its origin. Under that definition, any campaign promise and any bill passed by Congress may fall under the category of crime.

Therefore, more so than the Constitution, the rule of law can be regarded as an expression of human reason and sensibility, indeed of the people's moral conscience, by which to understand and test the appropriateness not only of all governmental acts, but also of the public acts of all persons, with exception only for that intimate area of life included in the word "privacy."¹¹ Being older than constitutions, the [rule of] law is therefore superior to them; and the value of a constitution (including the U.S. Constitution) or of a law can be ascertained by the degree to which it reflects that ideal. In that sense, perhaps in that sense only, is it correct to say that written constitutions are not needed or may in fact hinder a regime of liberty under law. At any rate, the Constitution and the rule of law are not equal in value. Prudently reformed, the Constitution may some day approach the status of the rule of law. Until then, Americans are justified in not putting all their eggs in the constitutional basket. The traditions of the law are a safer guarantee of liberty.

Endnotes:

¹A feature derived from the U.S. Constitution, it has survived all political reforms. Even during the 1964-84 period of military rule, the Executive often resisted demands for intervention in state matters or in local anti-crime operations because "it would violate the federalist principle."

²The gist of the devious complaints by Silva's supporters; quoted from memory.

³F. A. Hayek, *The Constitution of Liberty*, University of Chicago Press, Chicago, p. 176.

⁴The hopeful phrase used by Benjamin Franklin to describe the Constitution he had helped to frame. Sadly, the Constitution does not expressly define what law is (that is, what attributes the laws should have); neither does it truly limit legislative "discretion" or establish principles of taxation for the United States.

⁵ Hayek, pp. 205-206.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ As such, the rule of law acts as an immaterial but nevertheless real "force field" representing the people's best aspirations and most honest values, connecting and uniting all understandings, informing them directly and indirectly about the meaning of justice, bringing the otherwise-scattered community together rationally and affectively, mediating the difficult relationship between the government and the governed, suggesting natural assent, and commanding peace.

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