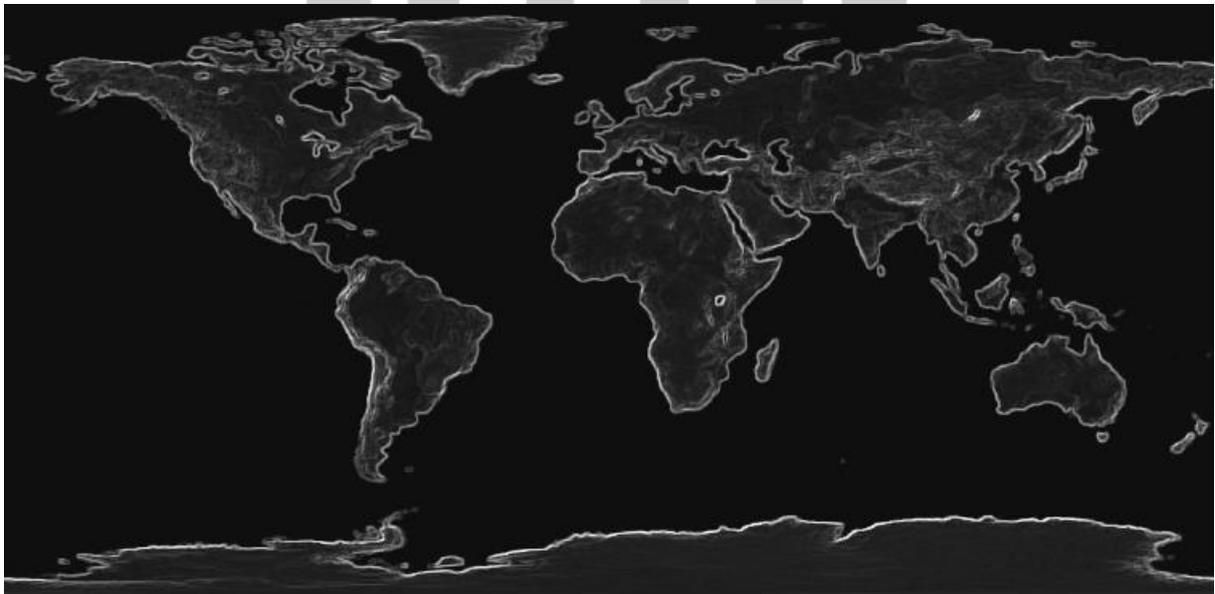




THE FACTORY OF FREEDOM: LIBERALISM AND THE RULE OF LAW

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Veritas et Aequitas



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The strict relation surrounding the rule of law and jurisprudence can be derived from a historical analysis of government rationality, or the “art of government” under Political Economy. The evolution of this government comes from the Divine Right of the Prince under a transcendent social contract, feudal agreements of obedience and protection under the Physiocrat, and the subsequent emergence of Mercantilism that has produced a heterogeneous debate on liberalism. The emergence of the Mercantile and the events that follow are condensed in *Raison d’État*^[1], a significant output of Michel Foucault’s research.

The advent of pre-capitalist structures in the sixteenth and seventeenth centuries created the modern state marked by features of international competition against a common objective of an amalgamated imperialist Empire, the interest in accumulation of wealth, and population growth and management, which also served as the requisite for the rise of biopolitics. It is this need for an omnipotent internal regulation of the populace that serves as a correlate for the limited reach of the state with regard to international diplomatic apparatuses. Initial attempts to oppose this unlimited regulation by the police state were of a juridical nature. The proponents of Natural and Fundamental law, which were positive multipliers of the power of the Monarch, now fit the role of a strong wind against the police. To optimize the position of the State and its limit of competence with necessary constraints about the objectives of its rationality and nature of governance is a true principle of liberalism. Such a theological and juridico-deductive environment of Rousseau’s Reason thus pursued its roots in the rule of law, which declined under the influence of Benthamite Utilitarian doctrines.

The Concert of Europe is a stressor that leads to significant literature on political theory, among others. It is the milieu of instability and a tussle between revolutionary republicanism and theocratic conservatism that created decades of disequilibrium. The Congress of Vienna captures the essence of the emergence of individual national interests and a stable ceasefire to deadly conquests. The five major powers of the United Kingdom, France, Austria, Prussia, and Russia presided over rounds of rather informal caucuses, contrary to plenary sessions as the name of the document suggests. Here, the apparatus of power shifted so as to give little significance to liberalist and nationalist conquests, and state lines were redrawn that virtually remained in stasis for much of the succeeding century. An important digression with regards to the rationale of mercantilism is crucial. For a closed State with limited resources, or a State with international, economic, and political interests with others, the mercantile or any economic agent may think of wealth and property accumulation as a zero sum game: one can acquire wealth only at the expense of others. If this game were interrupted so as to recognize the differences in the payoffs of the players involved, a form of economic equilibrium can arise which, in this context, balances the diplomacy of the State and relative prosperity of a near perfectly competing mercantilist. England as a major player in the Congress used such a concerted equilibrium as a force majeure against Austria and its traditional view of Europe. The concept of mutual prosperity through a consolidated market mediated by England promised mutual prosperity with the Europeans as a set of players against the rest of the world.

The Pacific and European theatre of the Second World War dissolved the Congress system for good, with a new threat to the competitive equilibrium established over decades. Two events shape and mark the emergence, proliferation, and importance of neoliberalism: postwar reconstruction of Germany as a stage for the Cold War and the subsequent development of a détente, and the political economy of reunification after the fall of the Berlin Wall. The Marshall Plan and the Potsdam Agreement under an ideological tussle between the United States of America and the Soviet Union effectively divided the war-torn nation into Eastern and Western halves. The West was shared by the Allies except the USSR, which soon indirectly assumed control of the East under its Iron Curtain. The German Democratic Republic in the West emerged as a polar opposite of the East which was under a



state controlled economy. In an environment where Keynesian state interventionism looks like an imperative, Ludwig Erhard in his discourses espoused an abolition of price controls. The advent of market liberalism and capitalism led to prosperity and decades of economic miracles. Contemporary politics in the sunset years of the Soviet Union found a diplomatically strong but domestically problematic doctrine authored by Mikhail Gorbachev. The principles of Perestroika (restructuring) and Glasnost (openness) led to a slow thaw of Communism in East-West economic relations. A compromise and diversion from core Marxist-Leninist values into the arena of decentralization and necessary freedoms to ensure the prosperity of undisturbed trade ushered in a new era of diplomatic imperialism as the West emerged as the victor and primary mediator in a globalized market.

Traditional Enlightenment era views of the rule of law describe it as an inexplicable and indescribable general environment of principles and values that not even the Legislator or the Sovereign can transgress. The notion of the aforementioned juridico-deductive reasoning against the Ruler's independence from positive law and decrees is a landmark of such normative literature and theories. The features of generality and equality in Hayekian derivatives of a theory of legal discourse prides itself on the exaltation of individual liberty that also justifies socio-economic inequality in a *laissez faire* system of individualism^[2]. Arbitrary liberty in a presupposed acceptance of a Hobbesian state of nature does not create a positive state where agents economize on their happiness. It inadvertently defines a negative state which has monotonic functions of preventing social entropy and upholding a contract of protection and obedience. It also runs parallel to Categorical Imperatives, where a set of universal morality remains static against a backdrop of social values soon to be made incompatible with legal positivism. It is not God who prohibits murder, it is the creation of a social contract analogous to a wolf pack which does not find it productive to kill its own members for food. For democratic participation in policymaking, a Post-Enlightenment idea of the rule of law accords it a stature with changing cultural values in a social organization, where public interest rides supreme, not just posited laws of compliance. Such a flexible definition divorces the amalgamation of institutionalized legal obedience and a fixed moral tenet of natural justice.

Hence, a dynamic rule of law can establish itself in compliance with principle actions that lead to a Spontaneous Order^[2]. Chemical compounds cannot be formed by forcing atoms to make bonds. Instead, certain conditions are made and complied with to stimulate compound formation. That is to say, the conditions with which the Order forms around arbitrary will of individuals needs respect as the original value of natural justice. Social interactions and customary laws that thus evolve in this society are the basis of posited law, and the explicit involvement of natural justice becomes the limit of the government's competence and also as a *de facto* internal regulation of the Sovereign's actions. The Ruler may attempt to transgress the law and establish a coercive penetration into private property. Decentralized authority in such a society becomes an important factor to run a system of checks and balances^[3]. Decentralized interaction against the Ruler becomes a sequential game with imperfect or asymmetric information. There is a certain cost imposition on the Ruler to determine the strategy set of the populace. The Ruler would find it difficult to identify agents with whom he can collude to transgress the law. Here, concerted action against the Ruler has heterogeneous interests, satisfying the conditions of decentralization. Such actions lead to micro-level efficiency of civil society along with the median voter as a better representation of social values to evolve and uphold the rule of law.

Concerted action, however, also assumes that agents are politically active. The politically indifferent are then, by definition, easily distinguishable by the Sovereign. If the indifferent are in a relative majority, collusion by the Ruler becomes simple, where they can be isolated from the mainstream. This vacuum of decentralized power can be used to form a totalitarian regime which is an extreme case not explained by conventional legal positivism. However, a refined definition of natural justice



aforementioned can accommodate such regimes as here a different social order takes form where rather theological notions of (political) evil become banal and ordinary to human experience. Heterogeneous collective interests in a diverse society can be defined as communities with their own cultural values that need acceptance and recognition under the broad ambit of the State's constitutional philosophy. Legal pluralism, thus, becomes an important consideration and feature of diverse and liberal societies.

How far pluralistic legal institutions uphold their integrity is a matter of assessing the stem of a national constitutional philosophy and the degree with which it accommodates such systems or coerces and neglects them into submission. For example, regions with colonial experience witness the introduction of a legal system exterior to already existing and indigenous institutions of cultural and social importance. The colonialists can hence, accommodate extant institutions and social values or deem them inferior and suppress the same. The former option is seldom witnessed in a historical and empirical context. Western capitalist systems of influence, as a result, directly lead to social clashes instead of it being a side effect^[5]. Cultural Hegemony becomes a prized conclusion that normalizes itself over generations of compliance with an external legal system.

Certain proponents of decentralized and independent authority often go to extremes where they describe a fragmented and privatized judicial system^[4], where organizations of legal adjudication form a free market of judicial inquiry and relief. Coupled with legal pluralism, such a system is often drawn as analogous to a competitive market, where all excesses and deficits will be resolved and insolvencies are natural features of competition. This thought experiment is theoretically flawed, as it assumes perfect information to function with optimized welfare for all. The prior presupposition of decentralized cost imposition implies asymmetric information. Added with heterogeneous stems of legal and moral reasoning, imperfect information shall induce nasty market failures and a sticky disequilibrium where Keynesian state interventions become a much desired antidote, nullifying the existence of liberal free market regimes.

The current question of the rule of law posited against arbitrary will stems from Bentham – what was termed in England as Radical - and the Utility of the government's limit of competence. It is the determination of this self-limitation of governmental intervention that needs attention under liberalism, subject to the maximization of social welfare. Attempts to clearly define the rule of law requires a renewed look, given the authority of the government to enumerate property rights and wealth endowments. Said rights shall also avoid the emergence of market externalities due to the prevalence of a thin line between personal Vice and public Crime, explained by Lysander Spooner. The recognition of the limitations of governance result in de facto limits, which seem to poorly explain, or present a polarized opinion of the notions of freedom; either in the form of an original, fundamental right, or as an axiomatic notion of the independence of the governed from those who govern them.

Disapproval of individual actions by others without prosecution should imply the lack of destruction of public goods. But under extreme circumstances of totalitarian governance, the rule of law needs a proper resolution. The dynamic system of veridiction under the regime of an imperishable state interacts with jurisdiction and positive law, analogous to a Walrasian, Pareto efficient equilibrium, which generates the discourse of truth that maximizes utility. This presupposes perfect information of the nature of the state's objectives. Liberalism does not require freedom as a universal first principle. Instead, freedom is a commodity consumed and produced by the State. The rule of law should be valid insofar as this nature is known when determining the nullification of arbitrary will from the concept of freedom.



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