

## The Reason of the Law

Timothy Endicott

**Abstract:** Moral premises are required in sound reasoning to the conclusion that a community does or does not (more or less) attain the rule of law. Those moral premises include, for example, the principle that judges should act with comity toward executive agencies. A failure in that moral requirement of comity is a failure to attain the rule of law. Because the ideal of the rule of law necessarily has a moral content, there is a necessary connection between law and morality- albeit a modest connection that is compatible with deep moral defects in the law.

### Law has Moral Foundations

There are various sorts of foundations. I will talk about what we could call a 'rational foundation'. A foundation in this sense is a premise that a sound argument requires. Someone might claim that law has a moral foundation in this sense, on the ground that sound reasoning to a conclusion of law (that there is an income tax in English law, for example, or that Quebec is a province of Canada) requires a moral premise (that an income tax is not necessarily unjust, for example, or that it is for the common good that Quebec should be a province of Canada). I will not make that claim. I will claim that sound reasoning to the conclusion that a community attains the ideal of the rule of law requires moral premises. Those premises include propositions that it is morally valuable to regulate certain aspects of community life and, in particular, certain aspects of the conduct of officials (and to do so in certain ways). Identifying the content of the ideal of the rule of law requires moral judgment. I do not mean by that statement that only good law can attain the ideal of the rule of law, or that law cannot truly rule a community in which people's fundamental rights are flouted. As John Finnis put it, 'the Rule of Law does not guarantee every aspect of the common good, and sometimes it does not secure even the substance of the common good'.<sup>1</sup> But his word 'sometimes' is misleading: when the substance of the common good is secured in a community, it is secured in virtue of other features of the community (and of its law) and only partly in virtue of the attainment of the rule of law.

I think that all sides in the various debates about relations between the rule of law and fundamental rights ought to agree with what I say here: moral premises are required in sound reasoning to the conclusion that a community does or does not (more or less) attain the rule of law. Because the ideal of the rule of law necessarily has a moral content, and a legal system necessarily meets that ideal to some extent (even though it may fail radically to attain the ideal in some respects), law has a moral foundation. Moral premises are required to support the conclusion that a community has a legal system.

Of course, it is the reasoning of the people with power in a community that determines what goes on, and that reasoning may be (to tell you the truth, I think it *tends to be*) more or less

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<sup>1</sup> *Natural Law and Natural Rights* (1980), 274.

misguided. It cannot be altogether misguided: a legal system cannot be based on entirely perverse judgments as to what ought to be controlled by law. When I say 'cannot', I mean that, if we could imagine such altogether perverse judgments, a regime founded on them would not be a legal regime. It would not have the role that law has in human life.

It is the reason *of the law* that determines what the law takes as its own ideal. As a result, the rule of law is a reflexive, dynamic ideal. I'm afraid that makes my conclusion about the moral foundations of law ambivalent: law necessarily stands against anarchy and against the arbitrary use of power. That sounds good, but the law regulates its own conception of anarchy, and its own conception of the arbitrary use of power in a more or less reasonable way- but also in a more or less unreasonable way.

### **What is to be ruled by law?**

To pursue the rule of law, it is necessary to work out what is to be ruled. Suppose that there is in some place a normative system the rules of which are clear, open, general, prospective, coherent, and stable, so that they can be complied with. The persons who have the capacity to ensure that the rules are or are not complied with (let's call them 'officials') are themselves given powers to do so by clear, open, general, prospective, coherent, and stable rules, and their exercise of those powers is regulated by clear, open, general, prospective, coherent, and stable duty-imposing rules. Some of the officials have a special capacity to impose the rules on other officials, and they are independent from the other officials, and their impartiality is protected from influences that would tend to induce other officials to depart from the rules. So the system includes techniques to promote its own integrity and effectiveness in controlling behaviour. What's more, the officials and non-officials *do* conform faithfully to the rules, by and large.

Does that place attain the ideal of the rule of law? Well perhaps, but it only does so if the normative system that I have partly described is a legal system. And I have not yet said anything to make you think that it is.

What would that take? First, it would have to be *the* system of rules *of the whole community in that place* (and not, say, the system of rules of some group). And it would have to claim a general authority to regulate the life of that community. But it would not be enough for it to claim authority. It would actually have to regulate that life in some fundamentally important ways: it would have to control the use of force among members of the community, and the ownership and use of things, and it would have to exert some control over family and commercial relations. If the clear, open, general, prospective, coherent, and stable rules do not control the use of violence between persons, there is no justification for saying that the community attains the rule of law.

What aspects of the life of the community should the law control, and how? To attain the rule of law, the community needs legal control of the use of violence between persons, but it does not need legal control of violent thoughts; it needs legal prohibitions on assault, but not all assaults. It may or may not need a licensing scheme for bouncers in nightclubs.<sup>2</sup>

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<sup>2</sup> Does the rule of law demand building regulations, fire regulations, the licensing of boats? Does it prefer a general vague duty on trustees to invest trust funds carefully, or a list of authorized investments? I do not think there is any general answer to those questions: those forms of social control are not demanded in

But no doubt a community can pursue the rule of law better *without* any form of regulation, such as political censorship, that itself offers the government an arbitrary power (in a pejorative sense of ‘arbitrary’ that I will explain in the next section).

I will not attempt a general explanation of the necessary functions of law, because I want to concentrate on one necessary function, which is to control official action. But already you can see one reason to conclude that law has the moral foundation that I have claimed it has: a complete understanding of what the rule of law requires must be based in part on a judgment as to what should and should not be controlled by law.

You may object that the answer to these questions is that the rule of law simply means control of everything by law—every aspect of the life of the community (including every thought of every person), and all official conduct. Of course, you may add, that would be impossible, undesirable, and absurd, which just shows that the rule of law is not the only ideal, and that we should not pursue it single-mindedly. It is true that the rule of law is not the only ideal. But that approach would make the ideal of the rule of law into an ideal that no one should aim for—which is, of course, no ideal at all. We should aim (at least in a community like Britain or the United States) for a different ideal—something like *control by law of aspects of the life of the community, and forms of official conduct that it is the law’s proper function to control*. I am going to use the phrase ‘the rule of law’ to refer to *that* ideal. It may seem that I am begging the question (in my initial claim that law has a certain sort of moral foundation), simply by using a value-laden understanding of the rule of law (since I use the word ‘proper’ in my explanation of what I mean by ‘the rule of law’). But no: when I say that it is a necessary feature of a legal system that it conforms to some extent to the ideal of the rule of law, I think it is undeniably true that it conforms to that ideal in the value-laden sense in which we ought to understand it. It is not a coincidence that every legal system has rules for the control of violence against the person: those rules are part of what makes a normative system a *legal* system.

In this useful sense of ‘the rule of law’, *more legal control* of official action, and *more legal regulation* of the life of the community, do not necessarily bring the community closer to the ideal. An understanding of the ideal requires an understanding of what ought to be controlled by law. The reason of the law gives an answer *for the community* to that moral question.

I say that some forms of official conduct must be *controlled* by law in case you think that everything is ruled by law anyway. You might say that everything is regulated either by a prescriptive rule, or by a principle of law (presupposed by the form of rules of law, and given effect in legal practice) that everything that is not prohibited is permitted. So everything is regulated by law in the sense that it is either prohibited or permitted by law. But that is a trivial sense of regulation, and the aspects of life that need regulating (such as violence between people) need regulating in the important sense that specific prohibitions and specific forms of protection of persons (and not mere permissions) are required if a community is to be ruled by law.

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general to attain the rule of law; they may or may not promote that ideal depending on the principles of the particular legal system.

I use the word 'control' as a reminder that the rule of law depends on certain aspects of official conduct and the life of the community being ruled in a way that distinguishes the rule of law from its two antitheses: anarchy, and government by arbitrary use of power. A general permission does not control official conduct in a way that distinguishes it from raw arbitrary use of power; and a community that permitted violence by any person against any person would be a lawless community.

The content of the ideal of the rule of law depends generally on what aspects of life ought to be controlled by law, and in particular it depends on what forms of official conduct ought to be controlled by law (and what forms of official conduct ought to be uncontrolled). My point is simple, really: some forms of official conduct, such as determinations of criminal guilt, and also sentencing determinations, must be controlled by law if a community is to attain the ideal. Others, such as who should serve as head of government or as ministers, or what position to take in foreign relations, need not be controlled by law in a community that attains the ideal. The differences between those two sorts of power are based on reasons of political morality for subjecting official conduct to clear, open, general, prospective, coherent, and stable rules. To make it more interesting I will address some frontiers of legal control of executive action, in order to ask what moral judgments need to be made in order to decide which actions ought to be controlled by law. I want to point out that that issue is not only one that every legal system must face; it is one that we must have an answer to if we are to understand what a legal system *is*.

### **Frontiers of the rule of law: Control of official conduct**

Executive functions are the primary functions of government. Public lawyers (including judges) are apt to exaggerate the extent to which law can or should control executive functions. The wrong of doing so, of course, is nothing to the wrong of leaving the executive free to act lawlessly. For the same features that make the executive branch of government effective in its functions also give it the opportunity to use power arbitrarily.

By 'executive functions' I mean the role of taking action for the community when the available choices are multiple (like the choices facing Britain in reforming its House of Lords, or the choice to appoint a particular person to an office), and the considerations at stake are more-or-less open-ended and particular. The choice to convict a person of a criminal offence is a judicial decision, but the decision to prosecute is an executive decision. The judicial function of passing judgment on the validity of claims of right, and the legislative function of passing judgment on legislative proposals are much more limited functions of government: they tend to be binary and general rather than open-ended and particular.

There are good reasons for all three branches of government to carry out all three sorts of functions. The legislature may have very important executive functions if it has responsibility for formulating bills; in any case it needs executive functions to control its own proceedings. The judiciary has executive functions in controlling its proceedings, and in deciding on discretionary remedies (including many criminal sentences, interlocutory injunctions, and some civil remedies).

Every act to establish a legislature or a court or to constitute a whole system of government is an executive act. The appointment of a judge (by its particularity and the partly open-ended

nature of the relevant considerations) is an executive act. Litigation is an executive function: if the people are to prosecute anyone or to take any position in any legal proceedings, they need someone to decide to do it, and to decide how to do it.

The executive functions of the executive branch are so wide-ranging as to include a special responsibility for deciding whether to abide by or to depart from or suspend the rule of law. Adherence to the rule of law is a virtue primarily of the executive. It is not just that the rule of law will be abandoned if the executive does not abide by court orders and legislative enactments. It is only the executive branch that can pursue the rule-of-law virtues of openness, clarity and stability in matters of policy that cannot be regulated by rules (for example, in expenditure decisions, military decisions, decisions about government personnel).

Should we abandon the rule of law in an emergency, such as an attack on the community, or a natural disaster? The answer depends substantially on whether the ordinary process of law is inadequate to cope with the demands of the emergency and whether there are extralegal ways of dealing with the situation that will improve things without abusing people—and the executive branch is well placed to make those decisions. And decisions about how far to pursue the rule of law are subject to much more mundane considerations than a decision to abandon it. It costs money, and it can be reasonable to decline to pursue the ideal when, for example, paying for really effective policing would mean closing the libraries and swimming pools.<sup>3</sup>

The features that make executive functions primary (the need for effective, open-ended, particular action) are the features that make it essential to have an executive branch of government. They are reasons why that branch of government should be able to *act*, and should be trusted to the extent that its judgment is not generally to be replaced by the wisdom of others. But those same features make it essential for the actions of the executive branch to be controlled. Emergency powers should be subject to control by a legislature, and so should decisions on expenditure on policing.

But when the considerations that ought to guide governmental decisions are open-ended and particular, those decisions resist effective guidance by general standards. That is why sentencing and many forms of remedy are in the discretion of the court. The specificity of a standard is opposed to the open-endedness of such decisions, and the generality of a standard is opposed to their particularity. What measures, if any, are to be put before a legislature? Which persons are to hold executive office? Should the community wage war? If so, how? How should money be spent? How are relations with other communities to be conducted? The answers to these questions cannot be determined by clear, open, general, prospective, coherent, and stable rules.

So here is a seeming paradox about the rule of law: it seems to require legal control of public decisions, yet it would be a mistake to say that all executive discretion is contrary to the rule of

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<sup>3</sup> So in *R. v. Chief Constable of Sussex, ex Parte International Trader's Ferry Ltd* [1999] 2 AC 418, the House of Lords held that the police had a wide discretion in carrying out their duty to enforce the law, and upheld the policy of restricting to two days a week the expensive policing needed to protect lawful live animal exports from angry animal rights protesters. Cf. *R. v. Coventry City Council, ex parte Phoenix Aviation* [1995] 3 All ER 37, holding that it would be an unlawful abandonment of the rule of law for a local authority to ban live animal exporters from using an airport on the ground that doing so would provoke unlawful protests.

law.<sup>4</sup> That is impossible because all responsible government leaves certain discretions uncontrolled by law, and the rule of law cannot be an ideal that conflicts with the ideal of responsible government—it is a requirement of responsible government.

Consider a paradigm of an exercise of public power that judges should not control on grounds of reasonableness: an election.<sup>5</sup> Why not? What if the electorate acts on some unreasonable mass whim or is swayed by irrelevant considerations or downright falsehoods in political advertising? An election is still an exercise of power that judges should not control. The reason is that the community will not be better governed if the reasonableness of an election decision is controlled by judges. While every public decision ought to be reasonable, *not* every decision can be made more reasonable by judicial review: sometimes because judges cannot be expected to come up with a better conclusion, and sometimes because there are political reasons for someone else to be responsible for it.

Is a community not ruled by law to the extent that there is no judicial review of the reasonableness of elections? Should we say that the ideal of the rule of law demands it, which simply shows that there are other ideals besides the rule of law and it would be a bad idea to pursue it all the way? I think that would be absurd, and (like the idea that the rule of law requires legal control of every aspect of community life) it would make the rule of law into something that no one should or could aim for.

There can be good reasons to depart from the rule of law: for example, wherever it is right to use an army (an institution with a more or less sophisticated structure that is carefully organized to act not on the basis of clear, open, general, prospective, coherent, and stable rules, but on the mere say-so of the Generals). The situations in which there are such good reasons may include the breakdown of civil order, or the waging of war, or natural disasters or terrorist atrocities. *No such reasons* are present in the case of elections. An election is not a departure from the rule of law, even though its outcome is not controlled by law. It is not that we should depart from the rule of law in order to select a president or a prime minister. It is that the ideal does not require legal control of the decision as to which person or party should lead a government.

But executive discretion certainly *can* amount to a derogation from the rule of law (or even an abandonment of the rule of law). Some executive decisions should be controlled by law, and some should not. *Which* forms of uncontrolled discretion run contrary to the ideal of the rule of law? Perhaps the general answer is that legal control is needed when it can help to prevent *arbitrary* use of public power.

### **Arbitrary government**

By an 'arbitrary act' we could simply mean, what the actor willingly does, justified (if at all) by the fact that the actor so wills, without any (other) justification of reason. Elections are a paradigm of arbitrary government, in *that* sense- they give political power to people to make a

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<sup>4</sup> This puzzle about the content of the ideal of the rule of law belongs to the same family as the puzzles that I discuss in *Vagueness in Law* (2000), Chapter 9.

<sup>5</sup> Any decent election is tightly regulated by law, but I mean here that the outcome should not be 'controlled' by law, i.e. regulated in a way designed to make the outcome non-arbitrary.

vital governmental decision in just whichever way they choose (within the often drastically limited range offered by the candidates). All government decisionmaking is arbitrary in *that* sense. But I want to keep the word in its ordinary pejorative sense, so let's use it to refer to an unjustified act, a capricious or despotic act that calls for –and lacks– some justification other than the fact that the actor willed it and did it (and potentially calls for control by another authority than the actor). To sustain this pejorative sense it is essential to have criteria for which acts do and do not call for the imposition of a justification other than the mere will of the actor. Acts that do not meet those criteria are 'arbitrary' in the pejorative sense (in which I will use the word from here on). Awarding the election to the person with the most votes means giving it to him or her *just because most of the voters voted for him* –is that arbitrary? Only if there is a reason to demand further justification, the lack of which could justify someone else *in disregarding the expression of the voters' will*.

Both an election and a murder trial need to be regulated by law, but in very different ways, and the differences justify the simple claim that the outcome of a murder trial should be ruled by law, and the outcome of the election should not. The difference between an election and a murder trial as forms of public decision making is so obvious that it may seem trivial; so we should consider some problems that focus the reasons for legal control. Those problems arise at the frontiers of judicial control of executive decision making.

English judges in the past fifty years have extended judicial control of the executive in some important ways. I have in mind not the lavish things that some judges say in after-dinner speeches (to the effect that there is a common law bill of rights, and so on), but some remarkable things that they have *done* in the exercise of the jurisdiction of the High Court. The most dramatic (but not the most important) development has been the emergence of a doctrine that any administrative decision based on an error of law will be quashed.<sup>6</sup> There have been many other developments:

- The courts have replaced a Crown privilege against disclosure of documents in litigation with a doctrine that documents can be immune from disclosure on the ground of a public interest which it is the court's responsibility to identify.<sup>7</sup>
- They have refused to give effect to enactments ousting the jurisdiction they have assumed to control other authorities' interpretations of statutes and regulations.<sup>8</sup>
- In 1985 they decided that they would be prepared in principle to apply all the intrusive standards of judicial control of statutory powers in judicial review of the exercise of

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<sup>6</sup> See *R. v. Lord President of the Privy Council, ex parte Page* [1993] AC 682. It is not the most important because it is tempered by the sensible proviso that the judges will allow an administrative agency to apply a statutory provision one way or another, if the judges' interpretation of the statute is vague enough to allow different reasonable decisions as to its application in the case: *R. v. Monopolies and Mergers Commission ex parte South Yorkshire Transport* [1993] 1 WLR 23. It is only that proviso that leaves executive agencies discretion in the application of the standards over which they are given jurisdiction.

<sup>7</sup> *Conway v. Rimmer* [1968] AC 910.

<sup>8</sup> *Anisimic v. Foreign Compensation Commission* [1969] 2 AC 147. Lord Wilberforce expressed the judges' contempt for such clauses by saying, 'What would be the purpose of defining by statute the limit of a tribunal's powers if, by means of a clause inserted in the instrument of definition, those limits could safely be passed?' (208) –as if the 'clause inserted' define by statute a limit on the powers of the High Court.

prerogative power,<sup>9</sup> and since then they have extended the range of exercises of prerogative power to which they apply those standards.<sup>10</sup>

- They have developed a doctrine of legitimate expectation that to some degree protects substantive interests (and not only interests in consultation or a hearing) against changes to or deviations from government policy.<sup>11</sup>
- They have given an unprecedented legal effect to the signing of a treaty, by holding that it can create a legitimate expectation.<sup>12</sup>
- They have decided that they can award injunctions against ministers of the Crown, and declare them to have acted in contempt of court.<sup>13</sup>

Some of these developments, like many of the older doctrines of English administrative law, promote the rule of law. But it would be optimistic to think that they all do. Respect for the rule of law justifies judges in imposing fair procedures on other public authorities in their decision making. Because the rule of law is opposed to the arbitrary use of power, the ideal also justifies judges in developing a doctrine of review of exercises of discretion for irrationality. Respect for the rule of law also justifies quashing unlawful action. But it does *not* justify judges in replacing the view of another public authority with the judges' view of what the law requires. So it does not justify the doctrine of review for error of law (that would take something more, such as the proposition that judges are wiser than executive authorities, or that executive authorities' interpretations of statutes generally suffer from corrupting influences).

So judicial review may or may not give effect to the requirements of the rule of law. We can find the best examples of innovations that really do so in the courts' claims to have imposed the rule of law on the Home Secretary's statutory powers to decide the fate of murderers. Parliament gave power by statute to the Home Secretary—a politician—to decide the term of detention for under-age murderers (detained 'at Her Majesty's pleasure'<sup>14</sup>), and in the case of adults the power to decide the 'tariff', or period to be served for the purposes of retribution and deterrence before consideration for parole.<sup>15</sup> In the 1990s the English judges, who openly opposed the exercise of what amounted to a sentencing power by a politician, imposed a variety of restrictions on its exercise. Each of them promotes the rule of law. They held that:

- the Home Secretary could not impose a secret tariff<sup>16</sup>
- the prisoner has a right to make representations<sup>17</sup>

<sup>9</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374, discussed below.

<sup>10</sup> *R. v. Foreign Secretary ex parte Everett* [1989] AC 1014, *R. v. Home Secretary ex parte Bentley* [1994] QB 349.

<sup>11</sup> *R. v. Ministry of Agriculture, Food and Fisheries, ex parte Hamble Fisheries* 1995 2 All ER 714, *R. v. North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, *R. v. Newham LBC, ex parte Bibi* [2002] 1 WLR 237.

<sup>12</sup> *R v. Home Secretary ex p. Ahmed and Patel* [1998] INLR 570. The effect is limited because a minister can lawfully adopt and act on a contrary policy.

<sup>13</sup> *M v. Home Office* [1993] 3 WLR 433.

<sup>14</sup> Children and Young Persons Act 1933, section 53(1).

<sup>15</sup> The Crime (Sentences) Act 1997, section 29, gives the Home Secretary power to release a mandatory life prisoner on recommendation of the Parole Board, which can make a recommendation only after the Home Secretary has referred the case to it; the setting of a tariff is a way in which the Home Secretary (with judicial approval) exercises the discretion to refer a case to the Parole Board.

<sup>16</sup> *R v. Home Secretary ex parte Doody* [1994] 1 AC 531.

<sup>17</sup> *Ib.*

- the prisoner has a right to be given reasons for the decision<sup>18</sup>
- the tariff cannot ordinarily be increased retrospectively<sup>19</sup>
- it is unlawful (because discretions must be exercised on the 'relevant considerations') for the Home Secretary to base his decision on public clamour (including petitions in favour of a long tariff for two child murderers, and 20,000 coupons that readers had clipped out of a newspaper that had said that two under-age murderers 'must rot in jail').<sup>20</sup>

It is not only the English judges who have imposed the rule of law on the Home Secretary. First, the European Court of Human Rights declared that detention of child murderers at Her Majesty's pleasure is contrary to the guarantee of an independent tribunal in Art.6 European Convention on Human Rights.<sup>21</sup> Then, in the Human Rights Act, 1998, the British Parliament gave legal effect to much of the European Convention, including Article 6. In *Anderson*, the House of Lords held that it is incompatible with Article 6 for the Home Secretary to decide the tariff for an adult murderer.<sup>22</sup>

Why say that these developments in English law promote the rule of law, rather than merely the rule of judges? Because each of them, in varying ways, stands in the way of arbitrary sentencing decisions. Each development subjects the sentencing decision to clear, open, general, prospective, coherent, and stable standards. The result is that what happens to a murderer is ruled by some process of reasoning that can be distinguished from a whim of the Home Secretary, and is insulated from politics in the form of the pressure that the Home Secretary feels from a newspaper campaign. It is at least potentially (but only potentially, and only incompletely, because of the open-ended and particular nature of sentencing decisions) ruled by clear, open, general, prospective, coherent, and stable standards.

The rule against secret tariffs and the prohibition on retrospective increases patently promote the rule of law; the right to make representations promotes it by requiring the decision maker to face up to the factual claims and the arguments of the offender. The right to reasons supports that function of representations, by enabling the offender to make representations (and to seek

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<sup>18</sup> *Ib.*

<sup>19</sup> So said the House of Lords in *R. v. Home Secretary ex parte Pierson* [1998] AC 539. The Home Secretary had set a fairly high tariff of twenty years on the basis that Pierson had committed two premeditated murders; after Pierson's lawyers pointed out that the murders had been part of a single incident and had been unpremeditated, the Home Secretary decided that the appropriate tariff was twenty years. The House of Lords held that the decision amounted to a retrospective increase in the sentence; I think with respect that it would have been more accurate to say that the decision was arbitrary in a related but different way: once he learned that the reasons for his decision were mistaken, the Home Secretary had no reason to offer for a twenty-year tariff that could be distinguished from a mere whim. In any case, the decision vindicates the requirement of reasons imposed in the earlier case of *Doody* (in which Pierson himself had been one of four applicants).

<sup>20</sup> *R v. Home Secretary ex p Venables and Thompson* [1998] AC 407.

<sup>21</sup> *V v. United Kingdom* (1999) 30 EHRR 121. To carry out the United Kingdom's treaty obligation to comply with declarations of the European Court of Human Rights, the Home Secretary announced that he would exercise his statutory power in Venables' and Thompson's cases and in future cases on the basis of the recommendation of the Lord Chief Justice.

<sup>22</sup> *R. v. Home Secretary ex p Anderson* [2002] 3 WLR 1800. The court's declaration of the incompatibility does not affect the validity of the statutory power, but gives the government a power to amend the legislation by a special fast-track procedure.

judicial review) effectively. A requirement of reasons also (though weakly) opposes arbitrary decisions, by embarrassing the decision maker who has no rationale to offer. And the control on the considerations on which the Home Secretary may act promotes the rule of law by insulating the decision to some extent from political influence. But the simple abolition of the politician's decision-making role after the cases of *V v. United Kingdom* and *Anderson* promotes the rule of law more effectively by assigning the decision to a judge, who is insulated from the political pressures that move the Home Secretary.

Note that there are much more effective ways in which the rule of law could be imposed: a simple minimum tariff, like the minimum of 25 years before parole in Canada for first-degree murder,<sup>23</sup> would impose the rule of law much more simply and effectively than all the subtle judicial developments in the English cases.<sup>24</sup>

For present purposes, there is one very important point to note about my claims that the English judicial and legislative developments and the Canadian legislative tariffs promote the rule of law: those claims depend on an assumption. The assumption is that the period an offender spends in prison is the sort of decision that ought to be controlled by law. There are many sorts of decisions which the judges will not review on the grounds they used in the life sentence cases, and to which Article 6 of the European Convention has no application: decisions about government expenditure, the appointment of ministers, and the disposition of the armed forces are the obvious examples.

Why should the time that life prisoners spend in prison be ruled by law, in a way that decisions about government expenditure, or the appointment of a minister, or whether to lay a bill before Parliament to raise the income tax, or concerning the disposition of the armed forces are not? As Lord Steyn put it in *Anderson*, 'In our system of law the sentencing of persons convicted of crimes is classically regarded as a judicial rather than executive task.'<sup>25</sup> The reason of the law regards an uncontrolled sentencing decision by the executive as arbitrary, but does not regard an uncontrolled executive decision to appoint a minister as arbitrary. That reason is sound insofar as the time that life prisoners spend in prison *ought* to be controlled by clear, open, general, prospective, coherent, and stable standards. And the reason of the law is also sound insofar as the Prime Minister *ought* to be able to advise the Queen on the appointment of her ministers without giving reasons, without being required by law to consider representations from affected persons, and without acting on considerations that the judges determine to be relevant. The appointment of a minister on the mere say-so of the Prime Minister is not arbitrary in our pejorative sense. Not that it is all right for him to make his decision on irrelevant considerations! But legal control of his decision cannot help make his decision more reasonable.

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<sup>23</sup> Criminal Code, s.745. The tariff before parole is ten years for second-degree murder. The support for rule of law virtues that the standards provide is diminished by the fact that the difference between them influences the discretionary decision of the prosecution to proceed on one charge or the other.

<sup>24</sup> That sort of regime brings with it a different sort of arbitrariness- a kind that is consistent with the rule of law and is never castigated by judges as 'arbitrary': the arbitrariness of precision that distinguishes a limitation period from a doctrine of laches, and a precise blood alcohol limit from a vague standard of drunkenness. It is a *form* of arbitrariness because the law offers opposed outcomes in cases that are not materially different, but it is not necessarily arbitrary in the pejorative sense.

<sup>25</sup> *R. v. Home Secretary ex p Anderson* [2002] 3 WLR 1800, 1817.

So it seems that the developments in the English law of life sentences take steps toward the rule of law; similar controls on decisions as to the appointment of ministers would not take steps toward the rule of law, but would only give Britain the rule of judges. Where is the boundary between imposing the rule of law and imposing the rule of judges? I think that the limit is determined in this way: if we keep in mind that all executive decisions ought to be reasonable, but that they cannot necessarily be made more reasonable by legal controls, we will see that legal control of an executive decision is not *generally* valuable. Executive action uncontrolled by law is not *generally* arbitrary. Legal control always needs the justification that it can help the executive to act with justice and in the public interest. We can explore that limit by looking at *Abbasi*, a case in which, I think, the English judges went just as far as it is possible for them to go in imposing the rule of law.

### ***Abbasi***

In their military campaign against the Taliban and al Qaeda in Afghanistan, United States forces captured Feroz Ali Abbasi, a British national. They took him to Guantanamo Bay in January, 2002. He had been held captive for eight months, without access to a court or to a lawyer, when the English Court of Appeal heard his mother's claim for judicial review.<sup>26</sup> She asked the Court to order the Foreign Secretary to make representations to the United States government on Abbasi's behalf, or at least to give reasons for not doing so. She lost, but like many losing litigants she had the consolation prize of seeing the law advanced in her direction.

That law concerns judicial control of prerogative power. In a landmark case on Margaret Thatcher's ban on union membership at Government Communication Headquarters ('GCHQ'),<sup>27</sup> the House of Lords had held that an exercise of prerogative power could be reviewed in broadly the same way as an exercise of statutory power. Here as elsewhere, Lord Denning anticipated the House of Lords. In *Laker Airways Ltd. v. Department of Trade* [1977] Q.B. 643, 705, he had said that: 'The law... can intervene if the discretion is exercised improperly or mistakenly.... Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive.' In the GCHQ case Lord Roskill was the only Law Lord to mention Lord Denning's remark, and he rejected it as 'far too wide'.<sup>28</sup> Yet in *Abbasi*, the Court of Appeal seems to have extended the doctrine of the GCHQ case to accord with Lord Denning's view.

On that view, it is not for the judges to dictate a particular exercise of a discretionary power, but it *is* their responsibility to require the holder of the power to exercise it genuinely and not to close his mind to it. And an exercise of discretion is unlawful if it is based on irrelevant considerations, or is made in disregard of relevant considerations. *Abbasi* shows the potential of those vague and flexible standards of review: in their joint reasons the judges found no general legal duty to provide diplomatic assistance, but they held that his discretion to do so gave the Foreign Secretary a legal duty to consider Abbasi's mother's request for diplomatic assistance.

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<sup>26</sup> *R. (Abbasi) v. Foreign Secretary and Home Secretary* [2002] EWCA Civ 1598, (2003) UKHRR 76.

<sup>27</sup> *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

<sup>28</sup> *GCHQ* at 417.

For the first time, general public statements of government policy on diplomatic assistance were held to give rise to a legitimate expectation.<sup>29</sup>

The Court also held that Abbasi was being detained arbitrarily in Guantanamo Bay, and that that consideration was relevant to the proper exercise of the discretion. Judicial review would be available if the Foreign Secretary refused to consider a request that he approach the Americans (para.104; the relief would be an order to the Foreign Secretary to give consideration to the case). And by implication, if the Foreign Secretary said that he was dealing with it on the basis that the men were *not* being arbitrarily detained, he would be acting unlawfully, and the court would give relief (presumably in the form of an order to him to reconsider the request on the correct basis). But in the actual case, the court could not find that he was acting unlawfully because he did consider the case, and his discretionary decision whether to approach the Americans involved considerations on which the Court could not pass judgment. ‘The Secretary of State must be free,’ said the judges, ‘to give full weight to foreign policy considerations, which are not justiciable.’ (para.99). I will argue that this criterion of justiciability is one of the moral principles that determine the content of the ideal of the rule of law.

### Justiciability

In the GCHQ case, the House of Lords held that it would have been unfair for Thatcher to ban the union without consultation (because it disappointed a legitimate expectation), except that there were national security concerns. Once she offered evidence that she really had decided not to consult the union because she thought that consultation would pose a risk to national security, the House of Lords was not prepared to hold that she had unfairly (and therefore unlawfully) disappointed the union’s legitimate expectation. Some remarks of the Law Lords suggest that they concluded that national security justified her decision.<sup>30</sup> But given the unanimous view that the national security issue was not justiciable, it seems more accurate to say that the Law Lords could not properly determine whether the interests of national security justified disappointing the union’s expectations, so that they were unable to reach the conclusion that the Prime Minister had acted unfairly.

What is a ‘justiciable’ issue? Lord Scarman said that it is ‘a matter upon which the court can adjudicate’<sup>31</sup>—but we need to read that to mean ‘can *properly* adjudicate’. Lord Diplock held that questions as to what would pose a danger to national security are unjusticiable because ‘National security is the responsibility of the executive government; what action is needed to protect its interests is... a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word.’<sup>32</sup> Lord Roskill gave further examples which he took to make the point obvious:

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<sup>29</sup> *Abbasi*, para.s 82, 87-99. But those statements had been sufficiently guarded that the legitimate expectation was ‘very limited’ (para.99): no more than that the Foreign Secretary should consider the request. It seems that the legitimate expectation does not add to the Foreign Secretary’s duty to exercise his discretion genuinely.

<sup>30</sup> ‘considerations of national security, ... outweighed what would otherwise have been the reasonable expectation on the part of the appellants for prior consultation’ Lord Fraser, 403; ‘[The Prime Minister] was justified in the interests of national security in issuing the instructions without prior consultation with the appellants’ Lord Roskill, 423.

<sup>31</sup> Lord Scarman, 407.

<sup>32</sup> Lord Diplock, 412.

The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.<sup>33</sup>

The English judges have offered various aids to understanding the idea of justiciability. Lord Browne-Wilkinson has given examples of unjusticiable questions: a ‘question of the allocation of resources or the determination of general policy’.<sup>34</sup> And Lord Hoffmann wrote as follows in October 2001, at the end of his reasons in a case on the Home Secretary’s decision to deport a man suspected of involvement in terrorism in India:

*Postscript.* I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.<sup>35</sup>

I mention these statements about justiciability not because I want to give a complete explanation of the notion—if such a thing is possible. I only want to point out its complexity, and to support my claim that it is one of the moral principles that determine the content of the rule of law.

Justiciability is complex because it involves an assessment of the *expertise* of judges (and their relative expertise as compared to ministers of the government), but also an assessment of relative *political responsibility*: judges ought to leave the resolution of some questions to politicians because the people’s ability to remove the politicians is a good control on the decision—but also, I think, simply because the politicians should not be able to disclaim responsibility for such decisions on the ground that they are approved by or in the control of judges. In addition to these considerations of expertise and responsibility, an understanding of justiciability involves an understanding of what the judicial *process* is good for, and not simply what judges are good at: an issue is not justiciable if the way in which courts make decisions is not a good way to resolve that issue (potentially for various reasons, but obviously if it does not provide them with useful resources, say to assess political or military risks in other countries). Finally, we should note that we cannot explain justiciability merely by saying that justiciable claims are claims of right (that begs the question as to whether a claim of right should be treated as having legal force), or that judges need a clear standard, or that they cannot assess

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<sup>33</sup> Lord Roskill, 418

<sup>34</sup> *X v. Bedfordshire County Council* [1995] 2 AC 633, 749. Cf. ‘application of Government policy’ GCHQ, Lord Diplock at 411

<sup>35</sup> *Home Secretary v. Rehman* [2001] 3 WLR 877, 897, Lord Hoffmann. Cf.: ‘the interests of national security, for which the executive government bears the responsibility and alone has access to sources of information that qualify it to judge what the necessary action is’ Lord Diplock in GCHQ at 413.

political and military contingencies in general. Judges need to assess damages for chronic back injury without any clear standard, and they need to assess political and military contingencies in most asylum cases, and it would be an abdication of their duty to hold the issues unjusticiable. So the justiciability of an issue can only be determined in light of whether the court needs to resolve it in order to do justice. The decisions in *Abbasi* and *GCHQ* are only supportable if the judges can faithfully say that they were doing no injustice by leaving the fate of the applicants to the mercy of executive assessments of the needs of foreign policy and national security.

*GCHQ*, we might say, represents a failure to attain the rule of law if, instead of leaving it to Margaret Thatcher, the judges could properly have assessed the danger (if any) that would result to national security if the Prime Minister consulted the union at communication headquarters before banning it. The judges certainly *could have* done so; but whether they could have done so legitimately is a complex question about effectiveness of judicial proceedings for providing the necessary information, and the importance (if any) of the judges' lack of experience in dealing with it, the value to the community of the freedom of action the judges accorded to a political official who could be controlled by Parliament and the electorate, the value of holding her solely responsible for the decision, the potential value of protecting the members of the union from ideological purposes irrelevant to the union's actual role in that workplace (and from the motivations the Prime Minister might have to make the prejudicial imputation that unions were untrustworthy in affairs requiring loyalty to the nation)—and so on. To hold that an issue is unjusticiable requires not only technical judgments, but also a variety of judgments of political morality. And it is only on the basis of such judgments that judges, or anyone else, can decide what the rule of law requires.

In *Abbasi*, the issue of justiciability is easier, partly because the suitability of a dispute for judicial resolution depends not only on the nature of a judicial hearing, but also on the availability and suitability of remedies that judges can give. And it was not even easy for counsel for *Abbasi* to say what remedy he sought. He amended and re-amended the claim, and abandoned much of it in the oral argument. The Court commented, 'He had, so it seemed to us, great difficulty in advancing his claim to relief in a form which could readily be transposed into an order of the court.'<sup>36</sup> The problem, of course, was that he wanted some sort of mandatory order, but there was never the least prospect that the Court would order the Foreign Secretary to say this, that, or anything at all to another government.

That is why *Abbasi* pushes the imposition of the rule of law on the executive as far as it can be pushed. The judges clarify a point that was still murky after *GCHQ*: no prerogative power is unreviewable, but judges cannot interfere with an exercise of a prerogative power if the only way to apply the ordinary grounds of review of discretion would require them to base their conclusion on an unjusticiable consideration.<sup>37</sup> Then the result, even though no power is beyond review, is that certain forms of exercise of power will be unreviewable in effect, because they will always involve unjusticiable considerations. It is an inescapable conclusion, implicit in *Abbasi*, that such issues are always at stake in the decision whether to pick a quarrel or even to

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<sup>36</sup> *Abbasi*, para.25.

<sup>37</sup> But *Abbasi* does not make it as clear as it could be, because the judges ask questions like 'Is executive action in the conduct of foreign affairs justiciable?' *Abbasi* para.37. It is not *conduct* that is justiciable or unjusticiable, but *issues* that must be determined in the review of the lawfulness of conduct. I think that the real question is: 'Can the standards of judicial control be applied to *this* action in the conduct of foreign affairs without passing judgment on issues that are unjusticiable?'

make an embarrassing fuss with another country. So perhaps a court will never be able to quash a decision not to make representations to another government. The subtlety of the reasoning in *Abbasi*, you may think, could have been abbreviated by a statement that the court did not need to hear argument on the rights and wrongs of Abbasi's detention (or to hear any argument at all from counsel for the Foreign Secretary) because some important relevant considerations in the exercise of the discretion in question were patently unjusticiable. But the justification of the work of the Court of Appeal lies in the determination it shows to pass judgment on what *is* justiciable: the arbitrariness of Abbasi's detention. His mother lost because even after deciding that his detention was arbitrary, the judges were not in a position to find that the Foreign Secretary's refusal to complain to the Americans was itself an act of arbitrary government.

If we allow that the Court of Appeal could not properly require the Foreign Secretary to complain to the Americans (because the potential disadvantages of doing so are unjusticiable), one question remains about *Abbasi*: why didn't the Court of Appeal require him to give reasons? Here, there is no problem of justiciability: the Court would not have to answer any question it is ill-suited to answer about the disadvantages of complaining to the Americans. It need only impose on the Foreign Secretary a duty to deal fairly with Abbasi's mother by explaining *his* reasons for not doing so. If there is a good answer to this question, it involves questions of comity among the English courts, the British government, and the U.S. authorities.

### Comity

Comity is respect that one authority shows for the work of another. When authorities owe it to each other, it requires them to support each other (to the extent that they can) in carrying out their respective roles, and to do nothing to undermine each other's opportunity and ability to carry out those roles. It requires what makes it possible for them to work together in a way that promotes the doing of justice according to law. It does *not* require one authority to agree with another, but it requires one to recognize the authority of the other within its jurisdiction.

The duty to pursue comity only arises when there are reasons to collaborate with another authority- or at least to be careful not to undermine its work. And the duty is not absolute: reasons not to work with other authorities are reasons not to pursue comity with them. Judges typically do have reasons to work with the executive branch of government, because they are part of the same system of government. The duty of nations to act with comity is much more fragile than the duty of judges, because it is all too common for one nation to have reason not to cooperate with another nation.

The *Abbasi* case raises issues of comity between the Court of Appeal and the Foreign Secretary, and also between the Court of Appeal and the U.S. authorities. The Court of Appeal addressed the latter issue explicitly: the Foreign Secretary argued that comity between nations made the legitimacy of U.S. action in detaining Abbasi unjusticiable. But the Court held that it was 'free to express a view in relation to what it conceives to be a clear breach of international law.' (57) It may seem that the announcement that it saw such a breach, in itself, shows a lack of respect. And the judges also felt free to express themselves as follows:

...we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both

jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'.

That is not to say that his detention as an alleged "enemy combatant" may not be justified. ...What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. The question for us is what attitude should the courts in England take pending review by the appellate courts in the United States, to a detention of a British Citizen the legality of which rests (so the decisions of the United States Courts so far suggest) solely on the dictate of the United States Government, and, unlike that of United States' citizens, is said to be immune from review in any court or independent forum. (para.s 64-67)

The judges evidently meant 'arbitrarily' in its pejorative sense. To reach the conclusion that comity did not forbid it to express these views, the Court addressed the Foreign Secretary's argument by pointing out that there are exceptions to the general principle that courts will not pass judgment on violations of international law by a sovereign nation; the Court illustrated the exceptions by citing *Kuwait Airways Corporation v Iraqi Airways Co (nos 4 and 5)* [2002] 2 WLR 1353 (in which the House of Lords refused to recognize Iraqi decrees purporting to dissolve Kuwait Airways and to transfer its aircraft to Iraqi Airways) and *Oppenheim v. Cattermole* [1976] AC 249 (refusing to recognize a German decree of 1941 purporting to deprive Jews who had emigrated from Germany of their citizenship). Lord Cross had said in the *Cattermole* case,

To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.<sup>38</sup>

That statement is not a jurisprudential manifesto of any kind, but (it seems to me) a good elaboration of the English law of recognition. Recognition of foreign laws is an essential requirement of comity, and whether recognition was appropriate in the *Cattermole* case depends on whether the English authorities had reason in 1976 to support the authority that the Nazi regime claimed in 1941.

It may seem that the decision in *Abbasi* puts the United States administration in the company of Hitler and Saddam Hussein—the company of regimes too vicious for respect. But that would be a mistake. The *Kuwait Airways* and *Cattermole* cases concerned recognition of norms of foreign law that a party sought to rely on in private litigation; the refusals of recognition really were decisions not to act with comity toward the Nazi regime and toward Iraq. When the Court of Appeal held that Abbasi's detention was arbitrary, by contrast, it was not refusing to recognize any norm of U.S. law; it was identifying a consideration relevant in English law to the exercise of a power in English public law.

In fact, the decision in *Abbasi* puts the U.S. in the company of France and the Germany of the 1990s—countries which, the House of Lords has reluctantly and respectfully concluded, do not

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<sup>38</sup> At 277.

act in accordance with the 1951 Geneva Convention on the Status of Refugees.<sup>39</sup> But in that case, the House of Lords was only interpreting and applying a norm of *English law* (a rule requiring it to determine whether a country to which the Home Secretary proposed to send an asylum seeker would itself give effect to the asylum seeker's entitlements under the Geneva Convention). The decision in *Abbasi* was no rejection or breach of the comity that English courts owe to U.S. authorities. It does nothing to detract from the exercise of any American jurisdiction, or from the effect of any norm of American law.

So the judges were not lacking in comity toward the Americans. But they also owed a (more exacting) duty of comity to the executive in Britain. The judges' refusal to interfere with the executive on unjusticiable grounds is one of the central requirements of comity. The central idea of comity is the importance of helping another authority, or at least not hindering it, in carrying out a valuable function. If the judges can interfere with the executive only by passing judgment on issues they are not well suited or well placed to resolve, they cannot help the executive to fulfil its functions better than it could without the judges' interference.

It was sensitivity to their duty of comity, we might say, that led the judges to refuse even to require the Foreign Secretary to give reasons for his response to Mrs. Abbasi's request for help. By requiring reasons, the Court would not have been supporting the executive in the good exercise of its functions, in the way that it does when it requires the Home Secretary to give reasons for the tariff for a life prisoner:

...if the Foreign and Commonwealth Office were to make any statement as to its view of the legality of the detention of the British prisoners, or any statement as to the nature of discussions held with United States officials, this might well undermine those discussions. (para.107 (xiv))

No such consideration was at stake in the life prisoner cases. Comity *requires* interference in those cases, and *forbids* interference in *Abbasi*. *Abbasi*, then, goes about as far as it is possible for judges to go toward imposing the rule of law on the executive, and stops.

I am not saying that it would be *impossible* for judges to control foreign affairs by ordering the executive to act one way or another, or by prohibiting the executive from acting unreasonably (and particular judgments of the judges might be more just than decisions of the executive). But by doing so the judges would not be promoting the rule of law. To do so would be to turn the High Court into a sort of executive council, or executive supervisory council. It would work badly if it did not have access to the sources of information, and if it did not have the managerial forms of control of diplomatic personnel that the Foreign Office has. With or without those sources of information and forms of control, it would act undemocratically. The result would not be the rule of law, but the rule of judges.

Why shouldn't English judges decide whether to stand with the United States in the war on terror? Why not, at least, have them decide whether a particular feature of relations with the

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<sup>39</sup> *R v Secretary of State for the Home Department ex parte Adan and Aitseguer* [2001] 1 All E R 593. That decision is discussed in *Abbasi* at para.s54-57. I tried to argue that the decision in *Adan* was not a breach of comity in "'International Meaning": Comity in Fundamental Rights Adjudication' (2002) 13 International Journal of Refugee Studies 280-292.

U.S. is a consideration relevant to the Foreign Secretary's exercise of discretion, just as they held that a newspaper campaign is not a relevant consideration in a decision about how long to detain a murderer? The question is like 'why not have judges review elections on grounds of reasonableness?' and the answer turns on moral principles of responsibility for the exercise of public authority.

The frontiers of the rule of law depend on those principles of responsibility, and in particular on various requirements of comity, and on the requirements of justiciability that comity requires that the courts observe. The rule of law depends on comity between the courts and the executive, but also on comity with other authorities (of the same system but also with authorities of other systems with whom the principles of the law require cooperation). The requirements of justiciability, of comity, and of responsibility in general are moral requirements.

### **Conclusion: Anarchy, arbitrary government, and the reason of the law**

Whether or not you need to make moral judgments to identify the law of England or of the United States, you do need to make moral judgments to identify the content of the ideal of the rule of law.

For a community to attain the rule of law (and thereby to escape anarchy), it is not enough to have clear, open, general, prospective, coherent, and stable rules. The rules must regulate certain aspects of the life of the community. Which aspects need to be controlled by law, and how? There need be no legal control of thoughts; there must be some form of legal control of violence against the person (licensing of bouncers in nightclubs may or may not be needed).

For a community to attain the rule of law (and thereby to escape arbitrary government), the law must control some executive functions of government—but not all. Which functions need to be controlled by law, and how? There need be no legal control of the conduct of foreign relations, but there ought to be some form of legal control of the period of imprisonment for murderers (perhaps some recent English innovations, such as declarations that ministers of the state are in contempt of court, may or may not be needed).

Comity between the courts and the executive is a principle of the rule of law. The requirements of comity partly determine the content of the ideal, because they enable us to distinguish between judicial control of the sentencing of murderers (which promotes the rule of law), and judicial control of decisions to make diplomatic representations to other countries (which would not promote the rule of law).

Not regulating areas of life that ought not to be regulated is part of the content of the rule of law, just as regulating what needs regulating is part of the content of the ideal. Those are considerations of the substance of the law, and of the substance of the values that justify legal systems and particular legal standards. So there is no such thing as a 'formal conception of the rule of law'—even though there has been much academic debate about formal and substantive conceptions of the rule of law.<sup>40</sup> I don't know that anyone has ever said that it is a formal ideal (in the sense that you can explain what it requires without passing judgment on the content of

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<sup>40</sup> See e.g. Paul Craig, "Formal and Substantive Conceptions of the Rule of Law" [1997] *Public Law* 467.

the law). The idea would be incoherent: it would imply that it is of no importance to the rule of law whether homicide is controlled by law, and that the subject matter of judicial control of executive conduct is neither here nor there (so that it is of no importance to the rule of law whether, for example, judges have control over foreign relations or over determinations of criminal guilt).

So the content of the rule of law can only be identified by reference to an assessment of whether it is appropriate that the law should regulate this or that form of executive action, or this or that aspect of the life of the community. That assessment requires an ordinary moral assessment of the interests of people living in a community, and also an assessment of the ways in which law can and cannot help them to live together well, and can and cannot help authorities to govern well. Law is a systematic form of social control that necessarily conforms to the ideal of the rule of law to some extent, and it is more truly law if it conforms more fully to the ideal. So law has a certain sort of moral foundation. There is a necessary connection between law and morality of the kind that H.L.A.Hart was concerned to deny.

But *this* connection is not very far-reaching, you may say. It is consistent with every sort of villainy on the part of the institutions and agents of a legal order, except the villainy of regulating aspects of the community's life that ought not to be regulated, or of judges neglecting comity by interfering with decisions that would be better left to other officials.

*And* the law will (it must) have its own conception of the decisions that are to be left to the officials. If you agree with me that that conception- what I have called the reason of the law- is more or less reasonable but also more or less unreasonable, perhaps you will think that we have also discovered a necessary connection between law and *immorality*? But I do not think so. The various unreasonable judgments on the basis of which people make and develop and apply the law are not *necessarily* unreasonable- their unreasonableness is contingent on the mistakes and ill will of rulers, so that there is no excuse for unreasonable rule.

The ambivalent connection I have drawn between law and morality is, I am sure, not the most important connection. But I hope that it will show that we should be modest enough not to try to conceive of law as separate from morality, and not to try to conceive of law as necessarily achieving the remarkably open-ended and often particular ideal of acting with justice.