

The Rule of Law: Challenges in a Global Economy

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We in Canada tend to be somewhat smug about the centrality of the rule of law to our legal and political identity. It is, after all, one of those identifying features that make us a liberal democracy. The phenomenon of globalization, however, may require us to take a far more critical look at how deeply rooted the rule of law in fact is in our constitutional structure and whether it will be forced to adapt to developments transcending our domestic boundaries. Indeed, one might say that the issue is not “whether” but *how* our understanding of the rule of law will be required to adapt. As the guardians of the rule of law, the judiciary needs to be aware of challenges to the continued applicability of our rule of law and its capacity to support democratic values.

In any system which claims to be based on laws—at least laws that fulfil certain prescriptions in form—rather than being governed by an all powerful sovereign, by the divine right of kings or by some other arrangement contingent on arbitrary decision-making by individuals, the rule of law will be a fundamental constitutional principle. The rule of law has been one of Canada’s most significant constitutional principles since the country’s inception, inherited by implication under the Preamble to the then *British North America Act, 1867*. It has been described as “a fundamental postulate of our constitutional structure.”¹ Although it has since been explicitly acknowledged in the Preamble to the *Canadian Charter of Rights and Freedoms*,² that recognition alone has given it neither any greater importance since 1982—its status rests predominantly in its role as an unwritten principle—nor has its meaning in the jurisprudence changed fundamentally since the Court first acknowledged its importance.³ The capacity of the rule

¹ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (U.K.) 1982*, c. 11. The Preamble reads: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

³ There is a view that the principle has acquired a more powerful capacity to invalidate legislation since its explicit inclusion in the Constitution: P.J. Monahan, “Is the Pearson

of law to ground an independent basis for action is, however, currently at issue in the British Columbia tobacco litigation where the Philip Morris Company has argued that several components of a procedural rule of law have been contravened.⁴

While the Supreme Court has emphasized different aspects of the principle, it has generally seen it as comprised of three elements: equality before the law; the existence of a system of positive laws; and the need to ground all government action in law. It has also articulated a clear and direct association between the rule of law and democracy. Thus while in many respects our Canadian version of the rule of law is hardly unique, it is one that is closely identified with the democratic form of government characterizing that cluster of countries of which Canada is a part, the “liberal-democratic western democracies.” Finally, the Court’s opportunities to interpret and apply the principle in any detail have occurred in a domestic, as opposed to international, context.

The question, then, for the rule of law as it has been defined in Canada is how it is likely to fare in its interaction with the current and future phenomenon of globalization. Canadian domestic courts increasingly rely on or at least consider international norms or rules in their jurisprudence. At the same time, the growth of international decision-making has in some respects displaced the domestic judicial system. Discussions about globalization have included consideration of the development of a more universal rule of law, one that could be accepted by countries—China is often mentioned here, but there are many possibilities—which currently do not abide by the same notion of the rule of law held by the western liberal democracies⁵ or which

Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government” (1995) 33 Osgoode Hall L.J. 411.

⁴ These arguments are set out in D.R. Clark & C.A. Millar, “British Columbia Tobacco Litigation and the Rule of Law” in this volume. The position that the rule of law does not ground a distinct basis of action is developed in R. Elliott in his contribution under the same title.

⁵ I would argue that there is a “liberal-democratic” form of the rule of law. Peerenboom suggests, however, that we should be wary of assuming that “rule of law discourse has evolved in a uniform way in Western countries,” citing France as a country where the development has been different from that in many other western countries. One reason he identifies for saying that France has developed differently is that constitutionalism has not taken root there largely because of the principle of legislative supremacy. For Canadians, this distinction is not of much import since it is only in the past twenty years that we have developed constitutional supremacy rather than legislative supremacy. Peerenboom appears to use the United States as the “model” or norm for the rule of law

are not enamoured of the virtues of democracy. Some observers have argued for a “global citizenship” which will transcend national citizenship. All these developments, related to the growth of globalization, have implications for the rule of law. What challenges do the ramifications of globalization pose to our courts in applying the rule of law and to our reliance on the rule of law as a major element in our constitutional framework?

After exploring the meaning, scope and significance of the rule of law and more briefly, the meaning and ramifications of globalization, I will explore the issues raised above.

I. SETTING THE PARAMETERS

In order to consider the relationship between the rule of law and globalization, it is necessary to establish the parameters of the discussion: the assumptions on which the analysis is based and the meaning of and major issues arising from the rule of law and from globalization. With respect to the latter, globalization, I restrict my discussion to identifying which of the many aspects and consequences of globalization have particular relevance for the rule of law.

A. The Rule of Law

As a starting point, it is relatively simple to identify the components of the rule of law as understood by the Supreme Court of Canada. This will not exhaust the values associated with the principle, however, and these values have as much significance to this discussion as a bare assertion of the components has.

In the *Manitoba Language Reference*, the Supreme Court identified two (non-exhaustive) aspects: “that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power;” and that it “requires the creation and maintenance of an actual order of positive laws which preserves and

in western countries. See R. Peerenboom, “Varieties of Rule of Law: An Introduction and Provisional Conclusion”, University of California, Los Angeles School of Law Research Paper Series, Research Paper No. 03-16): <http://ssrn.com/abstract=445821> [hereinafter “Varieties of Rule of Law”]. “Varieties of Rule of Law” is an introduction to *Asian Discourses of Rule of Law*, Routledge Curzon, January 2004.

embodies the more general principle of normative order.”⁶ Indeed, the principle is more than one constitutional principle among many; rather, it is

“clearly implicit in the very nature of a Constitution. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law.”⁷

In its more recent pronouncement on the subject, the Court identified three components of the rule of law which “[t]aken together... make up a principle of profound constitutional and political significance.”⁸ They are that “[t]here is... one law for all” and that there must be an actual system of positive laws, the elements set out in the *Manitoba Language Reference*; and that “the relationship between the state and the individual must be regulated by law,” that is, that the exercise of government power must be grounded in law.⁹

In some respects, the Court’s consideration of the principle has not strayed far from the Diceyan articulation of the British principle in the late nineteenth century.¹⁰ For Dicey, the rule of law was a term which comprises three characteristics of the legal and political system: that no one is above the law which is enforced by the “ordinary courts;” that government must act according to law and not in an arbitrary or highly discretionary manner; and that citizens’ rights evolve through judicial decisions, that is, he championed the superiority of the unwritten or common law constitution.¹¹ In fact,

⁶ *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at paras. 59-60.

⁷ *Ibid.* at para. 64.

⁸ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

⁹ *Ibid.* at para. 71.

¹⁰ A.V. Dicey, *Introduction to the Study of Law of the Constitution* (London: MacMillan, 1885).

¹¹ Dicey’s view has been called “a rather minimalist conception of the Rule of Law” D. Rhéaume “Language Rights, Remedies, and the Rule of Law” (1988) 1 Can. J. of L. & Juris. 35 at 36. It should be noted that Dicey’s third component, the unwritten constitution, does not form part of the Supreme Court’s statements about the components of the rule of law in either the *Manitoba Language Reference* or the *Quebec Secession Reference*.

Dicey's conception was not without its contemporary critics, given his opposition to administrative decision-making. In Canada today, the expansive nature of administrative law and since 1982, the existence of a primarily written constitution mean that Dicey's articulation might be thought of little import except as part of the historical development of the principle in Canadian constitutional law.¹² Yet it would, I believe, be incorrect to assume that Dicey's views have not influenced the Supreme Court's understanding of the concept which has remained relatively static. The basic principle of legal equality and the grounding of government action in law remain crucial characteristics of democratic systems governed by the rule of law. It is not that these are no longer important, for they decidedly are. The issue is whether they are sufficient to define the rule of law in a contemporary democracy; I will return later to this question.

It should be obvious that the mere existence of laws is not sufficient to constitute the rule of law. It is worth emphasizing the distinction between "rule *by* law" and "rule *of* law." The former contemplates that while laws govern, they do not necessarily govern government itself but rather aid in government's exercise of power.¹³ Thus the rule of law may be used to strengthen the authority of the state or to establish limits on the state. The distinction is important as nations characterized as ruled by law seek to join global organizations such as the World Trade Organization. Epstein, writing in the mid-nineteen eighties, while adopting a Diceyan definition of the concept, captures both these apparently opposing functions in defining the rule of law as "a body of general and formal principles that public officials exercising sovereign authority can use both to resolve disputes between citizens and to justify the use of force."¹⁴ Davis associates the rule of law with "constructing a dynamic venue for contestation" and not merely as a

¹² On an example of Dicey's more direct impact on the development of Canadian constitutional law, see D. Schneiderman's discussion of Dicey's opinion about Ontario legislation validating municipal contracts with the Hydro-Electric Power Commission in "Canadian Constitutionalism, the Rule of Law, and Economic Globalization" in this volume.

¹³ T. Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs*: item 397349: <http://80-web20.epnet.com.ezproxy.lib.ucalgary.ca> (June 12, 2003). Also see Peerenboom, *supra* note 5.

¹⁴ R.A. Epstein, "Beyond the Rule of Law: Civic Virtue and Constitutional Structure" (1987-88) 56 *Geo. Wash. L. Rev.* 149 at 150-151. This article was taken from HeinOnLine.

way of limiting government.¹⁵ The difference between “rule by law” and “rule of law” is central to the difficulty of enabling the development of a satisfactory universal definition of the rule of law, as has been proposed as a concomitant of globalization.

While the Supreme Court’s articulation of the meaning of the rule of law might be considered rather sparse, closer to the thin meaning than the thick, the Court has been clear about the significance of that narrowly defined postulate to our constitutional framework and practice. The Court’s treatment of the principle must be viewed in the context of how the Court develops the relationship between the rule of law and other unwritten principles, particularly democracy and judicial independence; in doing so, it surrounds its apparently meager core with a cushion of normative values. In the case of democracy, the rule of law is associated with civil liberties and the capacity of the population to participate in the system. Inherent in the notion of “law” is that they are enforceable, that is, effective. More controversially, it might be argued that the rule of law requires equal capacity to vindicate legal rights.¹⁶ Regardless, it is not realistic to talk about the rule of law without also talking about the role of the courts and why judicial independence is also an important—and interrelated—constitutional principle. Thus Michael Davis, in arguing for a liberal democratic Hong Kong, stresses the need for the rule of law, “notably judicial review of legislation under a constitution or basic law.”¹⁷

Our Canadian understanding has generally stressed the benefit of the rule of law to citizens, seeing it as a restraint or check on government power. One might say that the rule of law is about “the compulsion of accountability.”¹⁸ Accountability requires that it is possible to identify those who are to be accountable, whether individuals or institutions, and to whom they are to be

¹⁵ M.C. Davis, “Constitutionalism in Hong Kong: Politics versus Economics” (1997) 18 U. Pa. J. Int. 157 (HeinOnline) 159.

¹⁶ I explore this in P. Hughes, “A Constitutional Right to Civil Legal Aid” in *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (CBA, February 2002).

¹⁷ Davis, *supra* note 15 at 159. China made a commitment to the continuation of the rule of law in Hong Kong in the *Joint Declaration on the Question of Hong Kong* signed on December 19, 1984: *ibid.* at 157.

¹⁸ M.O. Chibundu, “Globalizing the Rule of Law: Some Thoughts at and on the Periphery” (1999) 7 Ind. J. Global Leg. Stud. 79 at 81, 84 [<http://www.lexis.com>].

accountable. In our system, accountability under the rule of law lies with the courts.

It will be recalled that for Dicey the centrality of the courts is crucial to the operation of the rule of law, a position perhaps outdated even then. The greater bureaucratization of society since then has required us to recognize that administrative tribunals are part of the legal order, although generally, we limit their autonomy by ensuring some form of judicial review by the “ordinary courts,” to use Dicey’s phrase. As far as tribunals are concerned, the important principle which safeguards the judges in fulfilling their role in upholding the rule of law, judicial independence, does not apply.¹⁹ A greater threat in some ways to the role of courts is the significant increase in the use of extrajudicial forms of dispute resolution which privatize the settlement of disputes, taking them out of the courts and thereby often out of the law. This is the case even though judges have become involved in these forms of dispute resolution and even though private settlements may eventually be enforced by the courts. Usually, these disputes arise under law and the legal rules govern their resolution to some (varying) extent.

At the heart of the ramifications of the process of globalization for the rule of law is whether it is primarily a functional concept or a normative

¹⁹ *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, [2001] S.C.J. No. 17, online: QL (SJ), 2001 SCC 52. McLachlin C.J., for the Court, distinguished between courts and tribunals at paras. 22-24:

“Courts engaged in judicial review of administrative decisions must defer to the legislator’s intention in assessing the degree of independence required of the tribunal in question... This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts... Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are in fact created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.” [Citations omitted.]

framework, the thin and thick version to which I referred earlier. A “thin” theory of the rule of law emphasises procedural characteristics: laws must be “general, public, prospective, clear, consistent, capable of being followed, stable and enforced.”²⁰ A “thick” theory adds or “incorporate[s] elements of political morality such as particular economic arrangements..., forms of government ... or conceptions of human rights.”²¹ Bouloukos and Dakin point out that “[w]hat began as a narrow, positivist conception has broadened into a more expansive view that incorporates notions of good governance, democracy, and even human rights in the rule of law.”²²

Scheuerman states that he “follow[s] intellectual convention by defining the rule of law as requiring that state action rests on legal norms (1) general in character, (2) relatively clear, (3) public, (4) prospective, and (5) stable... [O]nly laws of this type can help provide legal equality, assure fair notice, and guarantee the accountability of powerholders.”²³ Carothers defines the rule of law “as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone” and uphold universal human rights and the right of accused to a fair, prompt hearing and the presumption of innocence; the courts and other elements of the legal system “are reasonably fair, competent, and efficient” and “[j]udges are impartial and independent.” He argues that “[p]erhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.”²⁴ The International Commission of Jurists in 1959 viewed the concept as divided into its substantive content, referring to “the conception of society which inspires it,” and the “*procedural* machinery” necessary to give it

²⁰ For one articulation of this commonly used way of differentiating a functional and a normative view of the rule of law, see R. Peerenboom, “Social Networks, Civil Society, Democracy and the Rule of Law: A New Conceptual Framework”, Research Paper No. 03-1 (The Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract_id=372680), 17 [hereinafter “Social Networks”].

²¹ *Ibid.* at 18.

²² A.C. Bouloukos & B. Dakin, “Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development” (2001) 42 *Intern’l J. of Comp. Sociology* (Brill): item 4646586: <http://80-web20.epnet.com.ezproxy.lib.ucalagry.ca> (June 12, 2003).

²³ W.E. Scheuerman, “Economic Globalization and the Rule of Law” (1999) 6 *Constellations* 3, 4.

²⁴ Carothers, *supra* note 13.

reality.²⁵ The rule of law, the Commission said, is “based on the values of a free society, by which is understood a society providing an ordered framework within which the free spirit of all its individual members may find fullest expression.” In this sense, then, the rule of law may be said to combine an emphasis on individual rights such as “freedom of worship, speech and assembly” to be exercised free from interference by government *and* “access to the minimum material means” necessary to enjoy the first type of right.²⁶ In short, it captures the tension of modern liberalism.

These propositions are not without controversy. Even the most apparently obvious characteristics—such as generality, clarity, no retroactivity or stability—may be more complicated than they first seem.²⁷ Uncritical lip service to the postulates which govern us may make us complacent about other implications. For example, the principle that everyone is equally subject to the law addresses the fact that the powerful and the rich—and specifically the sovereign—were above the law; it was meant to ensure that the sovereign would be as equally subject to the law as the “ordinary person” and it referred to the power of the courts to govern the sovereign. It does not apply as easily to the notion that the same law may disadvantage those who are poor or otherwise “out of step” with the norm on which the law is based. Thus one might ask whether the rule of law requires us to recognize that law affects different communities differently.

The more complex its scope becomes, the more the content of the rule of law will be almost certainly inferred from a country’s legal culture, respecting the rights which are “part of the backbone of the legal culture, part of its fundamental traditions.”²⁸ In that sense, the values of the political system are implicit in the rule of law, which will assume different forms in different countries. On one view, they do not, however, necessarily become part of the principle itself which, it is argued, is best left as a procedural principle. To require it to carry substantive content is to require too much, on this view. One must look elsewhere for the substantive elements of the legal

²⁵ International Commission of Jurists; *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India* (Geneva, 1959) 191 (italics in original).

²⁶ *Ibid.* at 193.

²⁷ A. Marmor, “The Rule of Law and its Limits” USC Public Policy Research Paper No. 03-16: Social Science Research Network: <http://ssrn.com/abstract=424613>, 11ff.

²⁸ J. Raz, “The Politics of the Rule of Law” (1990) 3 *Ratio Juris* 331 at 337.

order. Epstein, for example, says that the rule of law is a necessary but not sufficient condition for a just social state and that the “justice” must be found in “the foundations of political theory and modern constitutionalism.”²⁹ The objective of this process or formal rule of law is that law-making and enforcement are carried out in a manner which permits citizens to organize their lives without running afoul of the law and to seek redress for perceived grievances.³⁰ Thus “[a] commitment to the rule of law ... requires knowable and known law, applied retrospectively and consistently, and promulgated and reviewed by individuals other than those charged with applying it.”³¹

The characteristics identified by the formalists are not insignificant requirements and the application of the same law to everyone, the placing of the governed on the same plain as the governors, was a crucial step in the development of modern forms of democracy. The question, however, is not whether these should be characteristics of a regime of law—they should be—but whether alone they provide an adequate measure for whether government has complied with law. Is process, important as it is, sufficient to constitute legitimacy?

²⁹ Epstein, *supra* note 14 at 154.

³⁰ Lon Fuller, for example, argued that the internal morality of law requires that it be general, publicly promulgated, clear, not retroactive, consistent over time, capable of being followed and that there be a congruence between official action and the rule stated in the law: *The Morality of Law* (New Haven: Yale University Press, 1964). Joseph Raz added to these the independence of the judiciary, judicial review and easy accessibility to the courts: “The Rule of Law and Its Virtue” in *The Authority of Law* (Oxford: Clarendon Press, 1979). See also L.B. Solum, “Equity and the Rule of Law” in I. Shapiro, ed., *The Rule of Law* (New York: New York University Press, 1994) 120 at 122. A number of definitions are summarized by S.J. Burton in “Particularism, Discretion, and the Rule of Law” in Shapiro, *ibid.* 178 at 180.

³¹ K.D. Hine, “The Rule of Law is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and the Debate over Judicial Discretion” (1997) 50 SMU Law Rev. 1769, 1772. Hine’s argument is that equity has displaced law, but that the rule of law is necessary “to ensure the continued integrity and efficacy of our system of justice.” Accordingly, the best approach is a positivist/formalist law approach permitting occasional excursions into moralist/realist equity, in a sense a return to a system of law mellowed by equity.

The fact of law is not the same as the fact—or at least the objective—of fair or just law. Nor is it the fact that the authorities abide by the law or respect the form of the law. It is notorious that the National Socialists carried out their genocide, white South African governments their apartheid, the Canadian government the oppression of native peoples and the American and Canadian governments the internment of Japanese citizens during World War II according to law. A purely formal rule of law has nothing to say about these actions; a Diceyan interpretation which includes a bow in the direction of civil liberties could raise its voice; but only a rule of law which entertains the legitimacy of only certain kinds of moral precepts has the substance to challenge them. For the incorporation of *any* kind of normative content—and not only certain kinds—is equivalent to the incorporation of none. On the other hand, a rule of law aligned with democracy of necessity must acknowledge particular moral or political values.

Nor is a “formal” rule of law neutral in its application, as some would have it. To be devoid of *explicit* content or substance is not to be devoid of *any* substance.³² The veiling of the substance has its own dangers. Even with respect to the very core of the principle—that rule not be arbitrary—Beehler has argued that the procedural rule of law (or rule by due process) conveys a different understanding of arbitrary rule from that of a substantive rule of law (or rule by right reason):³³ with a procedural rule of law, arbitrary rule is merely unregulated rule, while on a substantive rule of law conception, arbitrary rule is non-legitimated rule.³⁴ Radin views the formalist version

³² R.S. Summers, “A Formal Theory of the Rule of Law” (1993) 6 *Ratio Juris* 127 at 128. Summers maintains that the formal approach is preferable because it is more “focused” and can lead to a fuller realization of the principle if it is not hampered by substantive content; because it is “more or less politically neutral”, its components are less controversial and more likely to obtain support from disparate groups: *ibid.* at 136. Ernest Weinrib cautions that treating the rule of law as if it is by definition ideological “implies not only that law is an instrument available for exploitation by hierarchically entrenched groups, but that it can be nothing else”: E.J. Weinrib, “The Intelligibility of The Rule of Law” in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) 59 at 61. But ideology does not have to be supportive of hierarchically entrenched groups, it can also be supportive of egalitarianism. The point is, it cannot be neutral or without consequence for the ordering of society and the treatment of its citizens. The real questions concern who decides what the consequences are, the nature of the consequences, the reconciling of apparently antagonistic consequences and the limits of adverse consequences.

³³ R. Beehler, “Waiting for the Rule of Law” (1988) 38 *U.T.L.J.* 298 at 298.

³⁴ *Ibid.* at 300.

(“instrumentalist” in her nomenclature) as “a model of government by rules to achieve the government's ends,” while the substantive version is “a model of government by rules to achieve the goals of the social contract: liberty and justice.”³⁵

In this respect, although the Supreme Court's definition of the concept may seem narrow, it satisfies the indicia of rule *of* law rather than rule *by* law. It might be considered at least a “quasi-thick” definition given the Court's view of the close association of the rule of law and democratic government. (It is not a “thick” definition because the Court does not find these values in the rule of law itself, but in the importance of the rule of law for the realization of other principles.)

“The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the sovereign will is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the sovereign will or majority rule alone, to the exclusion of other constitutional values.”³⁶

³⁵ M.J. Radin, “Reconsidering the Rule of Law” (1989) 69 Boston U. L. Rev. 781 at 792. In another typology, the formalists would also conform to the “legal process type”: R.H. Fallon, Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse” (1997) 97 Col. L. Rev. 1, 18-21. Also see A.C. Hutchinson & P. Monahan, “Democracy and the Rule of Law” in Hutchinson & Monahan, eds., *supra* note 32 at 97, on the question of the non-neutrality of a formalist rule of law.

³⁶ *Reference re Quebec Secession*, *supra* note 8 at para. 67.

In the end, then, it is not as easy as it might have seemed to provide a simple statement about the meaning of the rule of law. Even that ostensibly useful dichotomy between a “thin” and “thick” version is less useful in practice than it should be.

Once we move beyond identifying the component elements of the Canadian rule of law, we generally accept three propositions about the purposes of or functions fulfilled by the rule of law. One is that it is necessary for justice and for the realization of the civil liberties which mark our understanding of democracy. The second is that the rule of law aids in establishing the legitimacy of law, that is, the acceptance of law, because part of its meaning is that no one is above the law, all are supposed to be treated equally under the law. Legal equality is a *sine qua non* of a regime purporting to operate in accordance with the rule of law. The third function (not one we often see in the jurisprudence) is that it is necessary for a functioning economy, that a viable economic system relies on an ordered system of rules. Davis considers the rule of law a necessary condition for a “world city” (by which he means Hong Kong) which “may have a global role in bringing information and financing to an entire region and beyond.”³⁷ From this perspective, the rule of law provides the freedom to realize the potential of economic circumstances. Peerenboom comments that the “[r]ule of law, with its fundamental tenet that government officials obey generally applicable laws, promised the predictability and certainty required to do business ...”³⁸

What does it mean to say that political action or judicial decision-making is legitimate because it has complied with the rule of law? In essence: what are the *indicia* of legitimate law? Equally, it is likely that globally there can be greater agreement reached on a formalistic understanding of the rule of law than on the substantive content. The rule of law *has* evolved; it has been static neither in time nor place.³⁹ Yet it is almost certain that globally there can be greater agreement reached on a formalist understanding of the rule of law than on any substantive content and only if one steers clear of normative judgements about particular systems of government. The formalist conception is an important beginning, but is it really enough and more

³⁷ Davis, *supra* note 15 at 191.

³⁸ Peerenboom, “Social Networks” *supra* note 20 at 19.

³⁹ F. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986); H.W. Arndt, “Origins of Dicey’s Concept of the Rule of Law” (1957-58) 31 *Australian L. J.* 117.

importantly, does it pose a threat to the thicker version which helps sustain and advance other aspects of Canadian constitutionalism and the relations between government and citizen? Yet as Peerenboom indicates, concurrence even in the West on the components of a “thick” rule of law is difficult to achieve “in this age of postmodern, postmetaphysical multiculturalism and identity politics.”⁴⁰ How much more difficult to reach agreement on an “enriched” rule of law at the global level.

B. Globalization

To understand the rule of law in the context of globalization requires that we establish what we mean by “globalization” and identify some of its ramifications. I do not intend to debate the issues associated with globalization, but merely to explain how I see it as a background to the discussion of the rule of law.

Firstly, it has now become trite—but nonetheless necessary—to point out that globalization is not new. Indeed, Canada itself is in some ways the result of an earlier stage of globalization, not only because of the impact of British and French colonization, but also because of the migration of those whom domestic economies could not adequately absorb. Yet even that occurred rather late in the globalization process. It is the *speed* which differentiates earlier experiences with globalization from our experience today,⁴¹ so much so that speed may be sufficient to make today’s globalization a distinct phenomenon, one qualitatively different from apparently similar developments in the past. The Internet is not merely a faster telegraph or fax machine, it is fundamentally different and revolutionary. Secondly, globalization encompasses the movement of people, capital, goods and information across borders and certainly in our own time, the use of high speed technology to move capital and information, as well as faster transportation of goods, across borders. Together these major *indicia* of globalization distinguish the breadth and unintended impact of globalization compared to more primitive and earlier versions and suggest the difficulty in

⁴⁰ Peerenboom, “Social Networks” *supra* note 20 at 26.

⁴¹ A concise history of “globalization” since the sixteenth century can be found in M.R. Brawley, *The Politics of Globalization: Gaining Perspective, Assessing Consequences* (Peterborough, Ont.: Broadview Press, 2003), ch. 8. Also see D. Held, “The Transformation of Political Community: Rethinking Democracy in the Context of Globalization” in N. Dower & J. Williams, eds., *Global Citizenship: A Critical Introduction* (New York: Routledge, 2002) 92 at 94-95.

a nation's extricating itself from the integrated web of contemporary and likely future globalization. Although globalization today seems to have its own momentum, however, it is neither neutral nor abstract nor without dominant actors or agents which influence its direction.

Globalization is generally associated with economic developments or financial transactions. Thus Scheuerman identifies globalization with

“(1) internationalization of capital and financial markets, (2) increases in the volume of trade in semi-manufactured and manufactured goods between the industrialized economies, (3) growing importance of MNCs [multinational corporations] in the world economy ... (4) near universal movement towards regional economic and political blocs (NAFTA [North American Free Trade Agreement], ASEAN [Association of Southeast Asian Nations], EU [European Community]) [and] (5) the acceptance by almost all states that they should ‘do all they possibly can to attract and support both national and international capital,’ a development which has been called the ‘new pragmatism.’”⁴²

Scheuerman points out, however, that while multinational corporations do business across the globe and appear to have a transnational character, they are based in certain countries;⁴³ on the other hand, “many MNCs possess economic muscle far superior to that of small and medium-sized states” and it is tempting in some circles to consider granting them legal autonomy within the meaning of international law.⁴⁴ In short, globalization as we now think of it is less characterized by the movement of people, information, goods and capital than by the speed with which these can occur, particularly capital and information and, at least on paper, goods and by the size and corresponding impact of corporations.

Brawley discusses a range of definitions of globalization developed in different disciplines, but a number of different economic criteria stand out: these include the interdependence of markets and production in different countries, the volume of international trade and the nature of the goods being

⁴² Scheuerman, *supra* note 23 at 5. The phrase “new pragmatism” is cited by Scheuerman from J. Stopford & S. Strange, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991) 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.* at 10.

traded, the mobility of production and greater integration of financial markets.⁴⁵ While there is a great emphasis on economic changes, and on the political decisions that interact with (but may neither determine nor be unaffected by) economic changes, there are also psychological and sociological implications or characteristics of globalization. Thus the processes of globalization have changed the way many people think about their place in the world. It has compressed space and time.⁴⁶ Furthermore, while we may talk about the decline of the nation-state, the role of cities may be increasing;⁴⁷ in Canada, for example, a debate has begun about constitutionalizing the status of the city. The technological transfer of capital and information is difficult to track should those transferring it wish that to be the case and as a result high speed crime is as much a characteristic of globalization as is information transfer.

Globalization is a complex subject, mixing “territorial diffusion of things, people and ideas” with interdependence,⁴⁸ with apparently conflicting consequences, including the contemporaneous decline in the efficacy of the nation-state with the rise in importance of local and regional bodies.

It is common to name the decline of domestic sovereignty as one of the consequences of globalization, along with the dominance of stronger countries, the growth of international norms transcending or incorporated into domestic laws and practices and the rise in the authority of transnational corporations, even to the extent of supplanting political authorities. Because of our proximity to the United States and the relative sizes of our populations, Canada has long been experienced in the impact strong external forces—economic, political and cultural—may have. Issues of sovereignty and cultural nationalism are far from new issues for us. Even so, these effects were (and are) more obvious and unidimensional than are the effects of globalization. Globalization today transcends or moves above the modern

⁴⁵ Brawley, *supra* note 41 at 13-16; see citations therein.

⁴⁶ *Ibid.* at 17. On “ways of thinking,” see E. Kofman & G. Youngs, “Introduction: Globalization—the Second Wave” in E. Kofman & G. Youngs, eds., *Globalization: Theory and Practice*, 117, cited in Brawley, *ibid.*

⁴⁷ *Ibid.* at 18, citing A. Harding & P. Le Galè, “Globalization, Urban Change and Urban Politics in Britain and France” in A. Harding & P. Le Galè, eds., *The Limits of Globalization: Cases and Arguments* (London: Routledge, 1977) 189-192.

⁴⁸ H. Teune & Z. Mlinar, “The Development Logic of Globalization” in J.V. Cipur, ed., *The Art of the Feud* (Westport, CT: Praeger, 2000) 106, cited in Brawley, *ibid.* at 18.

creation of the state and makes location of activity less significant, yet location has been fundamental in enforcing law. This has enormous ramifications for public domestic law enforcement bodies such as courts and for the increase in centres of rule-making authority. Others will discuss this kind of thing at greater length but I want to raise these topics because they have great importance for the future of the rule of law. This phenomenon may be attributed to an impersonal “market” as in, “[t]he market is a more preferred institution for organizing and regulating economic transactions,”⁴⁹ but the market requires actors; the reference to the market really means that the economic actors which comprise the market have an autonomy greater than in the immediate past, although the political autonomy of the British East India Company or the Hudson’s Bay Company should not be forgotten when we talk about the impact of corporations today. It also means, however, that the elements of the market are sufficiently interrelated to transcend a single state.⁵⁰

The modern state is characterized by a single centre of authority; this is the case even in a federal state, where power is divided. As has been observed, “the development of internal sovereignty allowed the state to clearly distinguish itself from both civil society and the market.”⁵¹ In one way, globalization sees a return to the pre-modern state when there were different *loci* of competing authority (for example, religious authority and secular authority both competing for control of what we would now identify as matters within the authority of the state). David Held suggests that globalization has had the following impact on “the evolving character of the democratic political community:”

“... [T]he locus of effective power can no longer be assumed to be national governments—effective power is shared, bartered and struggled over by divers forces and agencies at national, regional and international levels... [T]he idea of a political community of fate—of a self-determining collectivity—can no longer meaningfully be

⁴⁹ Chibundu, *supra* note 18.

⁵⁰ While they may transcend a single state, they are subject to the laws of each state in which they operate. But the decision to operate in a particular state may be influenced by how friendly the laws there would be to this industry or that and the benefit of attracting an industry may be sufficient to affect what the law will be.

⁵¹ K. Jayasuriya, “Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?” (2001) 8 *Constellations* 442 at 449.

located within the boundaries of a single nation-state alone... [T]here is a growing set of disjunctures between the formal authority of the state—that is, the formal domain of political authority that states claim for themselves—and the actual practices and structures of the state and economic system at the regional and global levels.”⁵²

There is an important difference in the fact that today “trans-governmental networks of regulatory agencies ... rather than supranational institutions, are increasingly preferred as a form of governance of the global political economy.”⁵³ “Governance” is a term which applies not only to traditional government structures, but also to non-governmental or extra-governmental bodies. Some of these bodies gain authority because of the agreement of the member states (such as the World Trade Organization) and some of which do not possess formal authority, that is “a variety of emerging international decision making structures whose relationship to the formal authority of existing nation-states remains ambivalent.”⁵⁴

In summary, the characteristics and consequences of globalization of particular relevance to its relationship to the rule of law, especially for Canada and Canadian courts, are the following: the transnational political significance of major economic actors; non-judicial—privatized—decision-making; and the domestic implementation of international norms.

II. THE RELATIONSHIP BETWEEN THE RULE OF LAW AND GLOBALIZATION

Two basic questions help frame an exploration of the relationship between the rule of law and globalization: is globalization likely to be accompanied by a “thinning” of currently “thicker” version of the rule of law or by a shift in its constitutional function? Indeed, does globalization have the potential to make the rule of law obsolete? Even if such a dramatic development is unlikely, if only for instrumentalist reasons, to what extent does globalization diminish the domestic (here Canadian) understanding of the rule of law and its compatriot principles of democracy and judicial independence?

⁵² Held, *supra* note 41 at 97.

⁵³ Jayasuriya, *supra* note 51 at 450, citing A.-M. Slaughter, “The Real New World Order” (1997) 76 *Foreign Affairs* 183 at 196.

⁵⁴ Scheuerman, *supra* note 23 at 5.

Globalization has the effect of “unsettling the settled boundaries between domestic and international domains.”⁵⁵ In other words, it unsettles the sovereign order. We may view the concept of sovereignty for this purpose both in the usual sense of national sovereignty and in a somewhat different but related sense of institutional sovereignty: to what extent do our decision-making institutions have the authority we believe them or intended them to have? This is obviously related to the more common question about the impact of globalization—the shifting scope of the economy—on territorial sovereignty. Thus just as Canada has been coming to terms with a new constitutional order, one premised on constitutional supremacy or sovereignty rather than legislative supremacy or sovereignty, more than one observer has pointed to a “transition from political constitutionalism to a kind of economic constitutionalism ... that gives a juridical cast to economic institutions, placing these institutions beyond politics.”⁵⁶ A global economic constitutionalism may well conflict with a domestic political constitutionalism and how this conflict plays out will be significantly affected by the degree of authority remaining with the domestic government and judiciary.

One might add that the issue is not just the changing nature of economic institutions in this sense, but the location of these institutions and, at least equally significantly, the character of economic transactions. Traditionally, or at least since the development of liberal institutions, the focus has been on identifying the place where sovereignty resides. In Canada, this has meant in part determining whether federal or provincial institutions have authority or sovereignty over particular matters, although we have tended not to use the term “sovereignty” in this context; it is more commonly employed with respect to Canada’s sovereignty vis-à-vis other nations, whether that relates to sovereign claims over northern waters, a legal matter, or the political ability, and not only the legal capacity, to make the decision whether to enter the war in Iraq. Nevertheless, it is a form of international autonomy or sovereignty. In brief, the question is which government makes the decision to engage in particular kinds of activity. But this modern notion of sovereignty as residing in government (or in the source of government) fails to take into account the “fragmentation” of “powers of governance” and their “diffus[ion]

⁵⁵ Jayasuriya, *supra* note 51 at 442.

⁵⁶ *Ibid.* at 443. By “economic constitutionalism”, Jayasuriya means “the attempt to treat the market as a constitutional order with its own rules, procedures, and institutions that operate to protect the market order from political interference.” *ibid.* at 452.

with the market and civil society.”⁵⁷ Again, this may be briefly stated as determining whose decisions matter, whether they have been given legal or political authority. The behaviour of economic institutions and processes may undermine the duly constituted authority of elected governments or may have a considerable impact on how those duly elected governments make decisions within *their* authority.

A. The Impact of International Law on Domestic Decision-Making

It is only recently that international law has widely been recognized as a form of law, yet today international norms and regulatory law in the trade area play a major role in domestic law; similarly, domestic labour, environmental law and human rights may be affected by transnational rules, all areas which were the subject of discussion at the conference of which this volume constitutes the proceedings. Most significantly, perhaps, this is an ongoing process. The rule of law has meaning only when there are mechanisms for its enforcement and therefore when some body at some level has the accepted or recognized capacity to enforce it. In the domestic context, this is a condition of an effective rule of law. The subject of the international rule of law may be the state or the individual. Under the dualist model, “[v]alid and binding international norms, while universal, are at the same time barred from trans-gressing the rigid border of a sovereign state and affecting individuals within that state, unless transformed into the domestic legal system through the legislative instrumentality of the state.”⁵⁸

Under monism, the relationship between international law and the individual is direct without the intermediary of the state and thus “international law will be automatically incorporated and available as a domestic law instrument before domestic courts.”⁵⁹

Hainsworth suggests that there is a third model in which the state is “a full-fledged participant in an integrated international community, ‘both forming and complying with law.’”⁶⁰ Increasingly, the approach to international norms which sees them in effect as the subject of continual

⁵⁷ *Ibid.* at 445.

⁵⁸ S. Hainsworth, “Sovereignty, Economic Integration, and the World Trade Organization” (1995) 33 *Oh.L.J.* 583.

⁵⁹ *Ibid.* at para. 15.

⁶⁰ *Ibid.* at para. 16.

negotiation is being replaced by a “rule-oriented” approach which have been most developed in the trade area.

All these international rules and norms may restrict the domestic capacity to act in accordance with existing domestic expectations, a point which has significance for government and judiciary. These international rules have all the *indicia* of positive law: for example, they are set out, knowable and enforceable. In fact, under the international rule of law, formal equality applies. Thus as one national leader said, the World Trade Organization “enshrin[ed] the rule of law in international economic and trade relations” with the result that “[r]egardless of the size of our economies, from now on we shall all enjoy the same rights and be subject to the same obligations.”⁶¹ The rule of law evens the playing field and contains the power of those who are bigger and stronger, as was meant to be the case on the smaller playing field of the nation-state. Unlike domestic rule of law, however, these international rules apply only to those who have agreed to have them apply to themselves. In the domestic context, those who do not abide by the rules are outlaws; in the international context, they may be the player who refuses to play but still is able to dictate the rules of the game. Like the domestic context, even when the “big guys play,” does formal equality rebound in practice to the disadvantage of smaller, less powerful countries? In his paper in this volume, William Neilson points out that at the recent WTO negotiations in Cancun, the developing nations resisted the pressure of the dominant western nations; even so, it is far too early to conclude that the western nations cannot exert considerable impact on future developments.

From another angle, however, to what extent do we demand the presence of the rule of law before we engage in economic or political relations with other countries? And making the question more difficult to answer is whether we export our understanding of the rule of law to other countries, making their acceptance of it a condition of our engaging with them. Do we apply the rule of law to other standards or measures which are not themselves “law” or “rules” but norms and moral expectations which may well be reflected in our own law but not in the law of others? For example, it could be argued that a formalist rule of law would permit conduct which we would define as human rights abuses and thus be incompatible with a domestic thick rule of law. Is globalization likely to transform the rule by law into rule of law; or it is more

⁶¹ King Hassan II of Morocco, April 15, 1994, cited in Hainsworth, *ibid.*

likely to diminish the thick or quasi-thick version to accord with one more globally acceptable or convenient?

Developments in the scope, meaning and role or function of the rule of law have significance for Canadian jurisprudence because of the importance of the concept in the Canadian constitutional framework. The Supreme Court of Canada's conception of the rule of law is, of course, a domestic conception used in a domestic context. Is it vulnerable to a narrowing of its scope—a neutralizing—in order to reflect the development of a global functional or managerial rule of law? Will it be necessary to apply two visions of the rule of law: one quasi-thick for domestic consumption and one—thin—in order to be able to play in global markets and enforce international norms. Which applies when international norms have been incorporated into domestic legislation? If the domestic version is no longer “privileged,” will there be a menu of “rules of law,” one suitable for international trade, one for human rights, one for criminal law?

For judicial decision-makers, this has enormous impact. Domestic decision-makers, including judges, may consider international norms in their decisions and international conventions may be incorporated into domestic law; France Houle, for example, will consider this question in relation to human rights law. As one observer has pointed out, one consequence of these developments—at the global level—has been “the tremendous growth of private international authority” and “the increasingly important role played by domestic regulatory agencies such as independent central banks that operate relatively autonomously from the structures of political accountability.”⁶² For a country like Canada, with, comparatively speaking, a highly, albeit decreasingly, regulated economic system, the issue is the effectiveness of regulatory regimes in the face of *de facto* governance by non-regulated global economic institutions and transactions. This question of international or global restraint on state authority is addressed by Gilles Trudeau in the labour law context in his paper in this volume.

⁶² Jayasuriya, *supra* note 51 at 445.

B. Private and International Adjudicative Bodies

A more direct challenge to domestic sovereignty is that to domestic judicial systems which are being displaced by private decision-makers, that is, non-state actors, acting outside the realm of publicly enforceable decision-making, a development to which Jonnette Watson Hamilton's paper on international commercial arbitration speaks. In some ways, this resort to private decision-making echoes the Law Merchant which developed to adjudicate mercantile disputes early in the development of international trade.⁶³ But to what extent does the rule of law encompass international private decision-making based on privately developed norms or rules which have not necessarily received approbation by the state? Scheuerman describes international business arbitration as "highly discretionary and probably ad hoc in character ... [and] resembl[ing] a system of private self-regulation."⁶⁴ It is worth noting, perhaps, that one might describe labour arbitration—in place for a half century or so—in only slightly less extreme terms. This raises the question of the significance of a court system to our understanding of the rule of law. For Dicey, the existence of the "ordinary courts" was vital to a regime based on the rule of law; this principle has been broadened—or compromised—in Canada even in the domestic sphere with the growth of administrative tribunals. Yet for some theorists the place of the courts is less imperative for the very reason that "both judicial and enforcement mechanisms remain notoriously underdeveloped in international private and public law."⁶⁵ Scheuerman believes that weak enforcement mechanisms are irrelevant to whether an institution has a "legal character," but one might argue that the significance of an independent judiciary to the concept of the rule of law goes beyond providing a "legal character."

From another perspective transnational decision-making bodies, public rather than private institutions, may have an effect on states and state actors, but only as long as the states accept their authority. An example is the International Criminal Court, also the subject of a presentation in this conference, by Hélène Dumont. Interestingly, Scheuerman compares the lack of enforcement mechanisms for international institutions to the lack of the

⁶³ See W.A.W. Neilson, "Some Legal Badges of Economic Globalization from Rome to the WTO and Regional Trade Agreements" in this volume.

⁶⁴ Scheuerman, *supra* note 23 at 7.

⁶⁵ *Ibid.* at 4.

enforcement mechanisms of the United Nations: it is correct that the United Nations continues to exist as a legal body; the question is its effectiveness and its ability to control powerful states arguably intent on ignoring the rule of law in the international context. The comparison breaks down because the lack of these enforcement mechanisms among global economic forces does not prevent their having a significant impact. The lack of adherence to the rule of law does not pose a challenge to the effectiveness of these global institutions, but rather the success of these institutions poses a challenge to the continued significance of the rule of law.

C. A Universal Rule of Law

Even in the relatively homogenous western nations, there is not agreement on the meaning or scope of the rule of law, particularly between a procedural and normative model. In practice, however, the Canadian version, while sounding like a “thin” version is so closely tied with democratic values that it can be considered at least a quasi-thick version. The same debate occurs at the international level. Some commentators believe that the exact meaning of the rule of law is not particularly important, as long as some basic elements are recognized and applied, primarily for the purpose of establishing stability (the functional view) or of protecting citizens from overarching government (the normative view). Similarly, for some observers, the rule of law can co-exist with different forms of government, while for others, it is more compatible with democracy than with any other form and except in the narrowest sense (more Carothers’ rule *by* law than rule *of* law) is incompatible with authoritarian forms. Rule *by* law characterizes many economically emerging countries which want to encourage trade but the governments of which are not prepared to subordinate their power to that of the law (Carothers suggests that Malaysia, Taiwan, South Korea and “even China” fit into this category, to a greater or lesser degree, as well as many states of the former Soviet Union and the sub-Saharan African countries). We should not assume, however, that the rule of law plays the same role—or lack of role—in all economically emerging countries or in all countries which may lay claim to a particular philosophical heritage.⁶⁶

⁶⁶ Peerenboom briefly outlines the role of the rule of law in many states reflecting “Asian values” or, preferably, “values in Asia,” such as Vietnam (in a category of its own), China, Malaysia, Singapore, Hong Kong (as one group) and the Philippines, South Korea, Taiwan, Thailand, Indonesia and India (a second group) in “Varieties of Rule of Law” *supra* note 5 at 15-31.

Despite the obvious difficulties, Bouloukos and Dakin argue, however, that it is desirable to develop an “Universal Declaration of the Rule of Law,” in part because the notion of universal human rights has been divisive and because a common meaning is necessary to its international application.⁶⁷ They maintain that there has not been a similar division around the notion of the rule of law; however, this is likely because its meaning has been flexible, not only as between emerging nations and western nations, but even within western nations. As we have seen, there is no single or overriding or predominant definition of the “rule of law,” particularly once one moves beyond minimal procedural requirements and does not ascribe a normative value to the content of laws. Since the concept is culturally specific in many ways, it may be difficult to develop a universally accepted meaning. Whatever the difficulties within a nation-state, the challenge to develop a thick version of the rule of law at the international level is far greater and far more significant for the overlay of a global rule of law over the domestic version. Peerenboom, for example, suggests that “[a] thin theory ... facilitates focused and productive discussion of certain legal issues among persons of different political persuasions” and “cross-cultural dialogue,” since “criticisms are more likely to be taken serious and result in actual change given a shared understanding of rule of law”⁶⁸ and suggests that while “[r]ule of law is a protean concept, and rule of law discourses in Asia and elsewhere encompass multiple strands ... the requirements of a thin rule of law are widely shared and provide a certain degree of universalism.”⁶⁹ In the global context, there are two dominant concepts of the rule of law. One view aligns it with democratic systems, the other sees it as a management tool, to ensure economic.⁷⁰ The latter understanding is more or less neutral as to type of government, the former is obviously not. The latter addresses the ordered system of rules which must exist if the economy is to be advanced. How can corporations do business in the emerging capitalist economies if they do not have confidence in the rules governing contract and property law, for example? But it does not require, at least at a sophisticated level, a twinning

⁶⁷ Bouloukos & Dakin, *supra* note 22.

⁶⁸ Peerenboom, “Varieties of Rule of Law” *supra* note 5 at 7-8.

⁶⁹ *Ibid.* at 45.

⁷⁰ The veneer of the rule of law may also serve to legitimate one version of history over another through fault-finding for national wrongs: D.M. Paciocco, “Defending Rwandans Before the ICTR: A Venture Full of Pitfalls and Lessons for International Criminal Law” in A.-M. Boisvert & H. Dumont, eds., “La voie canadienne vers la Cour pénale internationale: tous les chemins mènent à Rome” (Montreal: Éditions Thémis, 2004) 97.

with a particular form of government. As long as they know that they will not be thrown into prison or worse at the arbitrary whim of the authorities, those doing business in an autocratic state need only to be satisfied that those with whom they do business will be compelled to abide by their agreements. To the extent that autocratic governments *might* be more vulnerable in these days of capitalist triumph and Internet export of western culture and expectations, democracy might seem a more stable form of government and in that sense, it is instrumental rather than normative. And, of course, individuals and corporations might have some degree of commitment to human rights and other values which make working in autocracies less appealing, a commitment which is perhaps reinforced by domestic expectations or a global NGO movement. In these cases, corporations will accord with the systems they find in the countries in which they do business, even while attempting to satisfy the values of their countries of origin.⁷¹

The impetus for the development of the rule of law may affect whether it serves only a regulatory function or whether it is intended to advance or reflect other interests and values. One example illustrates this point. The early capitalists in post-*perestroika* Russia benefitted from the breakdown of the existing legal system, not only to engage in clever economic manoeuvring, but also to bolster their positions with criminal activity, the very situation which made it difficult for foreign businesses to do business; now, however, these new capitalists are interested in consolidating their gains and protecting their economic position. Thus Mikhail Khodorkovsky, estimated to have a fortune of \$7.2 billion (U.S.), acquired from early and continued involvement in the Russian privatization process, is said to have established his fortune in a typically Russian manner; he is now quoted as saying that “[t]ransparency and good corporate governance are the rules of the game now ... The more developed our market, the stricter those rules need to be.”⁷²

⁷¹ John McWilliams provided some examples in his discussion of how Nexen, among other corporations, do business in developing countries in his presentation to the CIAJ Conference in Banff.

⁷² C. Wheeler, “Is Russian oil tycoon stepping on the toes of President Putin?” *The Globe and Mail* (July 9, 2003), A9. Khodorkovsky was later arrested and charged with fraud, tax evasion and forgery; on one interpretation, his arrest was Putin’s response to Khodorkovsky’s engagement with the political process and on another interpretation, it was a clear statement of Putin’s determination to push through his economic reforms: J. Strauss, “Billionaire’s arrest raises fears about fate of Russian reforms” *The Globe and Mail* (November 1, 2003) A9.

Some commentators find the linking of the rule of law with economic development counterintuitive. Owen Fiss, for example, suggests that this association “would deny the autonomy of law and ignore the fact that [the] end of law is justice, not economic growth.”⁷³ Yet in some ways the rule of law has always been associated with economic order: the need for rules upon which merchants could rely. Indeed, it has been suggested that there is less need for the rule of law—in the sense of a positive system of rules—in the international context than was the case in the past. Rules were intended to ensure some level of stability between the making of a contract and the fulfillment of the contract which could take months or even longer in a world of slow boats and no electronic communication.⁷⁴ In contrast to the view that the rule of law may be less necessary today, however, at least in the economic arena, the more general view is that it is more necessary than ever. Thus “economic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand.”⁷⁵

As Fiss observes, “neoliberalism” or the emphasis on the market as the main mechanism for ordering economic relations—either a characteristic or consequence of globalization—has been accompanied by an increase in laws in places such as Latin America. Property law and contract law, for example, are necessary to successful or efficient economic relations. This “narrow instrumentalization” of law ignores, Fiss argues, the status of law as “an autonomous institution that serves a rich panoply of values, a good number of which, such as political freedom, individual conscience, and substantive

⁷³ O.M. Fiss, “The Autonomy of Law” (2001) 26 Yale J. Int’l L. 517 [HeinOnline] at 517.

⁷⁴ Scheuerman, *supra* note 23 at 17:

“Legal security is clearly a time-bound concept: legal security is primarily a demand that relevant features of the *future* remain relatively predictable and thus manageable... When economic transactions can take place across continents at a dazzling pace, the perception of the role of legal security and stability is transformed. Of course, capitalism always necessarily requires an indispensable minimum of secure legal institutions (most obviously, certain legal guarantees of private property). But beyond that minimum, the compression of time and space probably reduces the economic actor’s sense of dependence on an extensive set of relatively stable general legal norms.”

Indeed, less stability, that is, greater discretionary decision-making, may be desirable “[i]n a world in which economic success requires speedy reactions to complex, ever-changing movements of vast quantities of goods and services” *ibid.* at 18.

⁷⁵ Carothers, *supra* note 13.

equality, are unrelated to the efficient operation of the market or to economic growth.”⁷⁶ The issue is whether law as an autonomous institution reflecting these values is a consequence of the rule of law or part of the meaning of the rule of law. Again, is the rule of law a procedural or substantive concept; are we confusing rule by law and rule of law? Does it, for example, merely allocate power among government institutions or bodies or does it, in addition, have something to say about the kinds of laws that need to be enacted and implemented, laws that may not be compatible with market efficiency but which advance values which Fiss identifies as “social justice” values?⁷⁷

Some observers have gone so far as to suggest that globalization requires something less than even a functional rule of law, that the rule of law might be incompatible with globalization. Scheuerman argues that “a careful examination of novel forms of legal decision-making most closely connected to economic globalization shows that they exhibit few of the virtues typically associated with the traditional ideal of the rule of law.” In contrast to the rule of law criteria, “[e]conomic globalization relies overwhelmingly on ad hoc, discretionary, closed, and non-transparent legal forms fundamentally inconsistent with a minimally defensible conception of the rule of law.”⁷⁸

Chibundu frames the issue as “whether the consequences of globalization have created an international community that can be subjected to standardized rules,” given that legitimacy relies on community acceptance flowing from shared norms and expectations.⁷⁹ He concludes that what he calls the “two spaces of globalization” appear in the rule of law: one arises from “technocratic elitism” and the other is manifested in “weakened States” replaced by an active civil society comprised not only of state actors but of non-state actors, “notably human rights and charitable groups, that respond to crises without regard to national frontiers.”⁸⁰ The ease of information flow suggests, he says, that “we are all going through the same experiences. In this atmosphere, it is tempting to see law, particularly the rule of law, as simply

⁷⁶ Fiss, *supra* note 73 at 519.

⁷⁷ *Ibid.* at 520.

⁷⁸ Scheuerman, *supra* note 23 at 3.

⁷⁹ Chibundu, *supra* note 18 at 107-108. Also see Peerenboom, “Social Networks” *supra* note 20.

⁸⁰ Chibundu, *ibid.* at 114-115.

another commodity easily manufactured according to well-delineated specifications and readily sold across borders and cultures.”⁸¹ This is a merely a higher level debate of that which concerns the substantive nature of the rule of law at the domestic level.

D. Global Citizenship

While there may be much talk about the universalizing of the rule of law, having it apply in countries not predominantly governed by it (these countries may be highly regulated as a way of the authorities’ maintaining power, but they are not subject to a rule of law that contains authority), the rule of law is heavily determined by national norms and values. Its operationalization, beyond the first level of process, in the Canadian context, relies on a governmental capacity to provide the conditions under which the rule of law can flourish. In Canada, the rule of law is viewed as interrelated with democracy, citizen autonomy and vindication of legal rights through meaningful access, if not to courts, at least to legitimate decision-making bodies the decisions of which can be enforced. Rapid and intensified globalization has raised questions about the government’s capacity—and will—to maintain these conditions and “to promote outcomes more beneficial for society as a whole” than are likely to be achieved by market forces.⁸² Enforceability of rules becomes more difficult when external players are involved and extrajurisdictional issues come into play. Thus globalization may diminish the individual state’s capacity to protect its citizens, on the one hand, while the growth of international standards invokes the notion of shared “rights” or “claims,” on the other hand. For some commentators, these phenomena converge in the notion of global citizenship.

One of the questions raised by global citizenship and the changing nature of international law (to establish standards to which citizens can lay claim) is the relationship between the citizen and the state. It has been suggested that “[t]hese moves towards global normative governance seem like a dramatic encroachment on the sort of sovereignty that allowed the state to dominate the political and moral imagination of individuals and their political communities, lending such powerful credibility to the Westphalian

⁸¹ *Ibid.* at 115.

⁸² Brawley, *supra* note 41 at 61. Brawley argues that corporations might prefer a regulated state because such a state is more likely to protect their investment: *ibid.* at 62-63.

architecture of a statist system of world order.”⁸³ The state, after all, not only asserts authority against other states, but also claims a particular relationship with its citizens based on duties and claims on both state and citizen. The growth of international bodies, including multinational corporations, compels us to examine another component of the rule of law: the relationship between the individual and the state. Recall that one component of the domestic rule of law is that it governs the relationship between the individual and the state. One answer to what may be an ever-growing distance between individual and decision-maker is the notion of global citizenship, a concept which can be defined either as referring to the universalization of human rights or as involving “new structures [that] may allow, or require, individuals to see themselves not only as citizens of their ‘own’ state, but as global citizens whose obligations stretch to all fellow human beings.”⁸⁴

As Axtmann points out, “[t]he success of the nation state in the last two hundred years or so, as well as its universality and legitimacy, were premised on its claim to be able to guarantee the economic well-being, the physical security and the cultural identity of the people who constitute its citizens.”⁸⁵ In fact, not all nations do provide or intend to provide economic well-being or physical security for their populations, and to the extent that other nations interact with them, are nevertheless considered legitimate. But Axtmann’s general point is correct. Equally valid is his point that even for states that either do or purport to accomplish these goals, it is becoming more difficult for them to do so. Because of transcendent organizations and the diffusion of sovereignty, the identification both of “the people” and the entity which can be held accountable will become problematic.⁸⁶ Fiss argues that without some grounding in the support of the population, tribunals intended to support human rights are inconsistent with democracy, thus reflecting what may be a conflict between democracy and justice. At the international level the rule of law does not have that grounding.⁸⁷ Equally interesting is how

⁸³ R. Falk, “An Emergent Matrix of Citizenship: Complex, Uneven, and Fluid” in Dower & Williams, ed., *supra* note 41 at 15, 17-18.

⁸⁴ O. O’Neill, “Foreward” in Dower & Williams, eds., *supra* note 41 at xi-xii. Also see C. van den Anker, “Global Justice, Global Institutions and Global Citizenship” in Dower & Williams, *ibid.* at 158, 167.

⁸⁵ R. Axtmann, “What’s Wrong with Cosmopolitan Democracy?” in Dower & Williams, eds., *ibid.* at 101.

⁸⁶ *Ibid.* at 102.

⁸⁷ Fiss, *supra* note 73 at 523ff.

compatible a rule of law developed with the approval of a relatively homogeneous population in a nation-state will be with a rule of law developed from a widely heterogeneous global population.

Under the Westphalian system, states were subjects and individuals objects of international law. “Transnational redress radically reconfigures our conception of the state [which is] stripped of its sovereign pretension to be above the law and of its insistence that an individual had neither rights nor duties on the international level since all authority derived from the nation-state.”⁸⁸ States still decide the *indicia* of citizenship, including benefits and duties, as well as the process by which non-citizens are entitled to citizenship and the differences that exist between citizens and non-citizens (and between persons born to citizenship and naturalized citizens). Nevertheless, the growth of a more direct relationship between individuals and international norms requires us to think about the rule of law as it applies to Canada as part of an international system and not merely as a sovereign state. It also requires consideration of the role of “citizen groups” in determining the appropriate interpretation of relevant international norms, an issue which Jennifer Koshan’s contribution to this volume addresses.

Held argues that while national sovereignty has not been “wholly subverted,” “there are significant areas and regions marked by criss-crossing loyalties, conflicting interpretations of rights and duties, interconnected legal and authority structures and so on, which displace notions of sovereignty as an illimitable, indivisible and exclusive form of public power;” thus “new types of ‘boundary problem[s]’ will arise.”⁸⁹ For Held, the solution is to develop democratic systems and processes which transcend nation-state boundaries, as well as recognizing local authority with corresponding multiple citizenships.⁹⁰ At the least citizenship involves duties and responsibilities, “loyalty” by citizens to the state of which they are citizens and protection of the citizens by the state. Citizens are granted formal rights but a broader understanding of “citizen” helps to determine the extent to which fundamental principles apply to any given individual. Thus the rule of law applies to everyone, whether legally citizens or not. If our understanding of “citizen” extend to the global citizen, what is the impact on the rule of law?

⁸⁸ Falk, *supra* note 83 at 18.

⁸⁹ Held, *supra* note 41 at 98

⁹⁰ *Ibid.* at 100.

How might a different understanding of our obligations to citizens or residents affect the application of the rule of law to issues arising from immigration and refugee status cases? How would a “global” understanding of the rule of law be incorporated into our constitutional interpretation of this foundational principle? As Scheuerman points out, globalization has resulted in the massive movement of peoples across borders to which countries have responded by enacting “repressive” and discretionary immigration codes and in the growth of international crime which has resulted in the “weakening [of] the legal integrity of criminal codes.”⁹¹ Are the subjects of these codes local citizens, subject to a rule of law enriched by association with democratic values, or global citizens, subject to a managerial rule of law weak enough to gain consensus from the least democratic nations?

CONCLUSION

That most fundamental of Canadian constitutional principles, the rule of law, faces challenge from the development of a parallel transnational rule of law, the form of which will emerge from potentially competing interests, economic development and advancement of human rights. Is it possible to universalize the rule of law and still maintain Canada’s domestic understanding of the concept (or even maintain the ongoing debate about the evolution of the principle to include more substantive measures)? Or will it be necessary to dilute the stronger concepts to accommodate countries with less willingness to accept anything other than the minimum process criteria? These developments may ultimately compel the judiciary to choose between competing rules of law, particularly when applying international norms or standards, one “home-grown” and the other developed in conjunction with the international norms or standards at issue. As for the principle itself, its continued dominance and significance in Canada’s constitutional order may

⁹¹ Scheuerman, *supra* note 23 at 15. In this regard, the globalization of terrorism has led to restrictions of civil liberties which have been considered a fundamental element of the rule of law.

be weakened as decision-making moves offshore, thus reducing even further the significance of the domestic courts.