

Why has the Rule of Law become so fragile?

Theory-in-Context:

*Russia-Ukraine; EU Rule of Law Crisis; Kashmir; Pandemic; Rule
of Machines*

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Table of Contents



Part A - Introduction

Indefinability of Rule of Law

Balancing competing interests

Contextuality

Exceptionality

Part B - Putting the Canon in Context

Thin vs Thick Rule of Law

Part C - THEORY: A Relational Theory of Rule of Law

Private & Public Relations

International & National Relations

Part D - PRACTICE: Examples of Relational Contexts

International & National

- International (intergovernmental) - Russian Invasion of Ukraine
- International (Supranational) & National - The EU Rule of Law Crisis
- International & National - India's de-operationalization of Article 370

Global

- The quintessential emergency: Pandemic
- Rule of Machines
 - Predictive algorithms in judicial reasoning
 - Smart contracts in finance

A stack of three books with white pages and dark covers is placed on a light-colored wooden surface. A yellow pencil lies diagonally across the top book. The background is softly blurred, showing more of the wooden surface and the books.

Part A – Introduction

Arc of Argument

1. Rule of Law has not merely become fragile; it is fragile to begin with
2. RoL = Finely balanced rope-dancer, not a robust Themis-like statue
3. Amended question: Why has it become fragile now to a breakable extent?
4. Indefinable by Definition
5. Balance of Competing interests
6. Contextuality
7. Exceptionality
8. Thin vs Thick Rule of Law

Exceptional Contexts require Thick Rule of Law

Rule of Law
(RoL) has not
merely
become
fragile, it is
fragile to
begin with...



RoL invoked by both sides in a debate
in the way that both opponents in a
holy war declare god is on their side



But, if god is on everyone's side, how
do we make sense of god?



So, to begin with, RoL is delicate &
fragile (not robust). It has not merely
become fragile.

Rule of Law: Indefinable, by Definition



A bundle
of
competing
interests
inheres
within it,
rendering
it in flux
and, by
definition,
indefinable

Though rule of law poses as the Delphic antidote to the unedifying corruptive 'rule of man.'

It is created and interpreted *by and for* mere mortals.

Time is of the essence for 'justice delayed is justice denied', yet procedures of justice must be painstakingly observed, often in a time and resource-intensive manner, sometimes even to the extent of pedantry.

To have teeth, there must be a top-down system of command, but legitimacy demands that citizens are treated as participating subjects with dignity rather than acted-upon objects.

To accommodate the balancing of these competing interests, some minimum level of fragility necessarily subsists.





Why must RoL
accommodate balance?

RoL is applicable in such wide-ranging circumstances that each and every tenet can not be equally germane in each context (*contextuality*).



Consequently, at its optimum, the Rule of Law can aspire to be a finely-balanced rope-dancer navigating a web of ropes, rather than a robust Themis-like statue.

Contextuality



The fact that contextual particularities give definition to the indefinable RoL is as perilous as it is illuminating, because it implies RoL has no intrinsic essence of its own.



In other words, subjected to the vagaries of contextuality, RoL could become so fragile that it breaks.



But, can we locate a line in the sands of contextual relativity between a minimum tolerable fragility, which accommodates a delicate balancing act, and an undesirable fragility?

The question then
becomes:

*Why, in our current
age, has the Rule of
Law become even
more fragile to a
breakable extent?*



Thin vs Thick Rule of Law

Formal *versus* Procedural *versus* Substantive

Rule-book *versus* Rights conception

Positive law *versus* Natural justice

Breakable Fragility: Thin RoL in Exceptional Times



Recently, RoL has become especially fragile to a breakable extent because, repeatedly, in 'states of exception', an unduly thin rule of law has been observed.



The state of exception (/emergency/*Ausnahmezustand*) was touted by the likes of Carl Schmitt as the situation that justifies suspension of rule of law.



I argue the opposite: the exceptional state is the situation that requires a thicker, more exacting RoL.

Exceptional Situations (some examples)

Russia's invasion of
Ukraine and ensuing war

The European Union (EU)
rule of law crisis as
regards Poland and
Hungary

An amendment of
constitutional importance
such as India's de-
operationalisation of
Article 370

An emergency like the
global pandemic

Technologically ground-
breaking trends like
predictive algorithms in
courts or smart contracts
in finance

Exceptional situations mandate thicker rule of law because:

- they alter public and/or private relations
- between and/or amongst nation-states and/or individuals.

In doing so, they bear a relational risk as ripe contexts for short-sighted abuses of power that erode relationality.





Consider that the *raison d'être* of the rule of law is to secure relations and so the rule of law's normative worth lies in what 'it does' for relationality, rather than what 'it is.'



RoL risks breakage when, within the context of an exception *or* on the pretext of an emergency, the short-term self-interest is pursued without proper regard to formalities and procedures in (1) decision-making and/or (2) redress, creating an unfairness (actual or reasonably perceived), that existentially impairs the longevity of a relationship, namely the long-term mutual or collective interest.

Relationality



Since proper regard to procedures falls under thicker rule of law, when thin rule of law subsists in an exceptional situation, not only do relations break, but the rule of law breaks, for the rule of law's *raison d'être* no longer remains.



Afterall, without the ropes, the dancer falls.

The Ropes break, the Dancer falls...

Part B – Putting the Canon in ‘Context’



Arc of Argument

- Thin vs Thick Rule of Law
- Rule *of* Law vs Rule *by* Law
- Formal vs Procedural vs Substantive
- Positive vs Natural Justice

In reality, these are 'spectral' sides on a spectrum, rather than hard-and-fast categories.

To ground my analysis, I first define two sets of categories:



THIN *VERSUS* THICK
RULE OF LAW;



RULE OF LAW *VERSUS*
RULE *BY* LAW;

Then show how
the cross-
categorical
borders are
porous

Through Thick & Thin

Thin	Thick
<p>Formal:</p> <p>Lon Fuller's eight principles:</p> <ol style="list-style-type: none"> 1. Generality: laws addressed to all 2. Publicity: citizens are aware of laws 3. Non-retroactivity: foreseeable laws 4. Intelligibility: understandable laws 5. Consistency: coherent, non-contradictory laws 6. Practicability: realistic to enforce 7. Stability: laws not changed easily 8. Enforceability: proportional remedies 	<p>Procedural and Institutional:</p> <ol style="list-style-type: none"> 1. Separation of powers between the executive, legislature, and judiciary 2. Independent Judiciary 3. Access to justice 4. Courtroom procedures with: <ol style="list-style-type: none"> a. Evidence-based argumentation b. Inter partes representation c. Appealability 1. Equality-before-the-law 2. Flexibility
<p>Positive Law: Lon Fuller's list of formal precepts is one that positivists would have agreed with too. According to Joseph Raz's view, the rule of law signifies that officials apply rules as they are set out.</p>	<p>Natural Justice: Jeremy Waldron has suggested that, rather than mere application of positive laws, rule of law requires application of rules with all the care and attention to fairness as signalled by natural justice and procedural due process.</p>
<p>'Rule-book' conception suggests that state power should only be exercised according to the rules that are laid out.</p>	<p>'Rights' conception assumes people have moral rights and duties with respect to one another and political rights against the state.</p>

Congruence & Incongruence between Thick & Thin



CONGRUENCE: The thick definition's access to justice relies on the thin version's intelligibility so that the public for whom the law is intended is able to comprehend it.

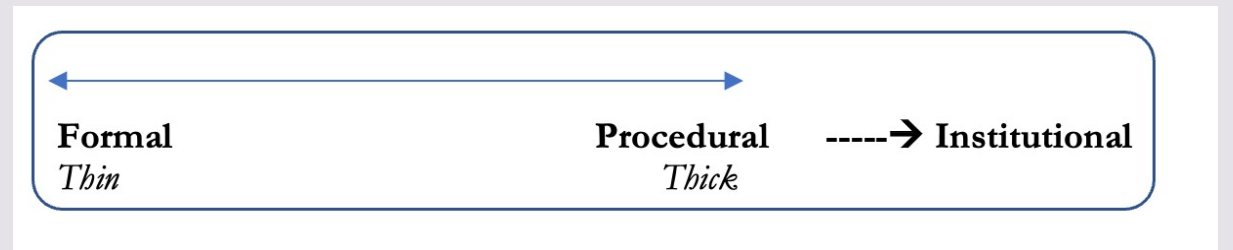


INCONGRUENCE: The thin version's generality, stability, and consistency may be at odds with the incisive attention to particularity and flexibility required when applying law to a novel fact pattern.



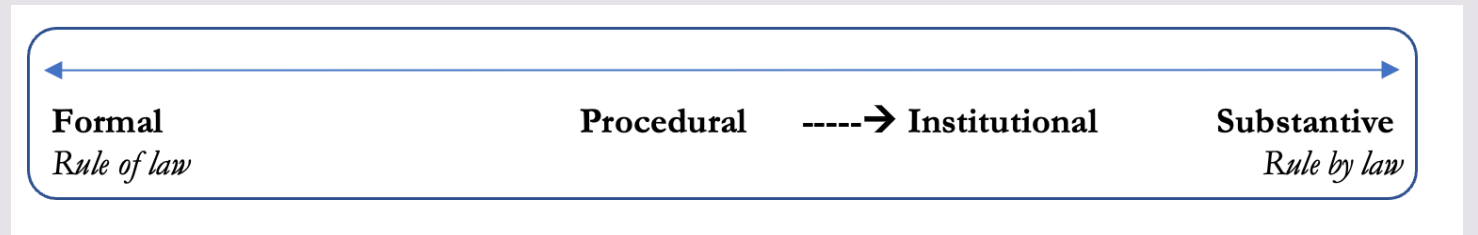
UPSHOT: While useful and necessary categories, contextuality renders the border between thin and thick porous, because there are endless permutations of cross-categorical congruence and incongruence arising in different contexts.

Rather than a 'hard-and-fast' differentiation, the categories can also be expressed on a spectrum:

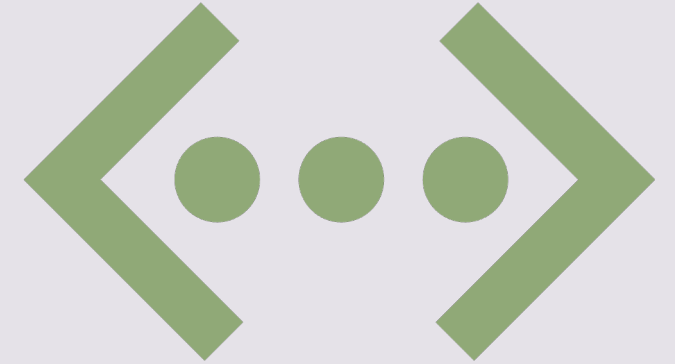


Rule *of* law *versus* Rule *by* law

Distinction between rule *of* law and rule *by* law can be viewed as coterminous with the distinction between formal and substantive law:



Part C – A Relational Theory of Rule of Law



Arc of Argument

- '&' not 'vs'
 - International & National, not International vs National
 - Private & Public, not Private vs Public
- Re-centering RoL as a relational mechanism
 - Short-term individual interests vs long-term mutual/collective interest
- Pre-relationality: The Hermit's state

RoL is a relational mechanism, which should help us uphold long-term mutual/collective interest in the face of myopic short-term individual interest.

Absence of thick RoL in exceptional contexts threatens relationality & causes breakage

I deliberately mentioned examples from wide-ranging contexts:

- international & national
- public & private

because I am re-centering the rule of law as a universally-needed relational mechanism possessing its own normative worth.



Private *versus* Public?



Why mention 'private relations' when discussing RoL, a topic that classically falls within public law?

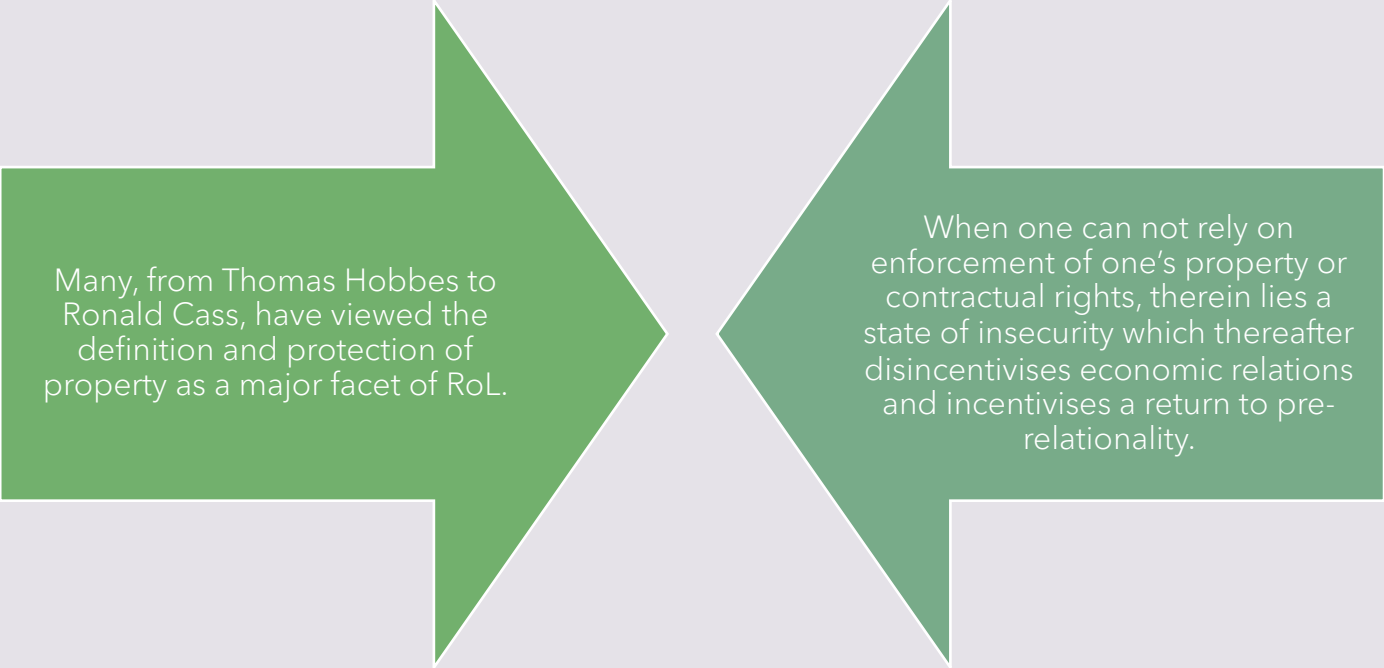


Why question the borders between public & private law and political & economic history?



In the real-world, private actors in financial sectors consider RoL when deciding whether investments/commercial activities should be pursued in a given jurisdiction.

Private & Public...



Many, from Thomas Hobbes to Ronald Cass, have viewed the definition and protection of property as a major facet of RoL.

When one can not rely on enforcement of one's property or contractual rights, therein lies a state of insecurity which thereafter disincentivises economic relations and incentivises a return to pre-relationship.

What is Pre-relationality? The Hermit's State



But, what, if anything, is pre-relationality? A pre-relational state is the hermit's state.



Social thinkers: Some might say that one is better off relating with one's neighbours than living like an isolationist hermit.



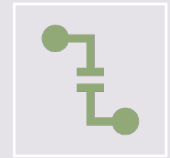
Philosophers: Aristotelean philosophers may consider the pre-relational state fictive and relationality a fact of life. Philosophers who consider humans 'social animals' would view relationality as human nature



Economists: Scarcity would make relationality inevitable for economists.



Whatever it is that leads to relationality, the moment one starts relating to another, there emerges an insecurity - that competing short-term individual interests will some day erode the interaction's long-term mutual interest.



As a result, relational security (and hence the RoL) is needed in private relations inasmuch as public relations.

Symbiotic Relationality & RoL

Notably, RoL's universal need does not mean that it has a single universal thickness across far-flung exceptional situations.

A corollary of contextuality is that different exceptional contexts necessitate different 'thicknesses' of the thick rule of law, which can only be substantiated in a longform work that allows for a properly-historicised legal analysis of these subtleties.

The key conclusion for summary purposes: the exceptional situation creates a relational risk, which triggers the need for thick rule of law, in the absence of which, both relationality and rule of law are symbiotically eroded.

And, now I provide broad silhouettes of illustrative relational contexts.

Part D – Examples of Relational Contexts



Arc of Argument



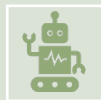
Russia-Ukraine



EU Rule of Law Crisis



Kashmir Article 370



Rule of Machines

Predictive Algorithm COMPAS
Smart Contracts in DAO VC fund

I. International Relations: 'Treaty' as a Contract



The Vienna Convention on the Law of Treaties defines a treaty as 'an international agreement concluded between States in written form and governed by international law.'



The treaty establishes a horizontal relationship between state actors on an international stage.



Like a contract, a treaty is a voluntary agreement, with terms and potential remedies for breaches, between parties that have privity with each other.

International: Supranational & Intergovernmental

Russia relates with Ukraine, bilaterally through agreements with Ukraine, and multilaterally through its membership of the United Nations.

These 'inter-governmental' relations - which involve two or more countries working together but not ceding sovereignty - are distinguishable from 'supranational' relations, in which sovereignty is ceded in certain matters.

EU RoL crisis arises in a supranational backdrop, because Poland and Hungary have signed onto a stickier relationship as EU members, whose citizens benefit from freedom of movement (of goods, services, capital, and people) within the European single market.

In both sets of international relations, in the exceptional event, thick rule of law is necessary to avoid relational demise.

However, the exact form and thickness of that thick rule of law may differ; it can only be expounded in a legal (particularly constitutional) analysis that sheds light on political economy (especially for the EU), based on historical primary & secondary documents and legal statutes, case-law, and jurisprudence.

A Global South Example – Indian-Administered Kashmir

A lesser-known context, in which there is so much relational insecurity that it is not clear if it is international or national.

The relationship between Jammu & Kashmir (J&K) and the Indian state legally characterised by the Instrument of Accession (IoA) of 1947, in which J&K's Maharaja acceded to the newly de-colonised Indian state.

The IoA assured J&K that it would retain autonomy to legislate for itself, except in defence, communication, and external relations. This international agreement between two sovereigns was latterly codified in the Indian Constitution.

In August 2019, the codifying Article 370 was de-operationalised by the Indian government.

RoL critique is not that Article 370 was de-operationalised. That is a substantive issue and RoL stability does not demand substantive immutability.

Rather, the issue is the way in which Article 370 was de-operationalised – who exercised the power to pursue an exceptional course, how unfettered the power was, and the impracticableness of redress – perfectly exemplifies the absence of thick rule of law in an exceptional situation of extreme relational insecurity.

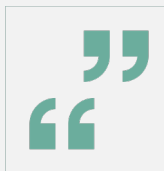
II. National Government–Citizen Relations: the Vertical ‘Social Contract’



Relations between a government and its citizens have been characterised by several Enlightenment-era thinkers as a ‘social contract’ - an actual/hypothetical agreement between a community and its ruler that defines and limits the rights and duties of each to the other.



COMPAS: One contemporary example in which this social contract is endangered is the judicial use of predictive algorithms in adjudicative reasoning.



This is an exceptional situation because it marks a departure from established and trusted modes of adjudication.

Rule of Machines *versus* Rule of Law

COMPAS

In *Loomis v Wisconsin*, a judge gave a defendant a harsher sentence in part due to a higher-than average-recidivism algorithmic score given by COMPAS.

Latterly, a ProPublica study has revealed that this algorithm has higher false negatives for White citizens than African-Americans and higher false positives for African-Americans than White people.

In other words, White citizens are treated more favourably than African-American citizens.

The fact that race is a COMPAS data-input leads to a relational risk that materialises: in the hurried short-term pursuit of adjudicative speed and alleged accuracy, a lapse in proper process, particularly the absence of the thick version's 'equality-before-the-law', leads to unfair treatment of the African-American population with whom the government has a long-term social contract.

The reality is that, unlike terminable commercial contracts, it is much harder, if not impossible, for a community to 'opt-out' of a social contract into a stateless existence.



Another failure of 'equality-before-the-law' arose during the pandemic when members of many national governments got away with lockdown breaches that members of the public paid fines for.



And, finally, another exceptional situation under this heading is the threat to separation of powers and judicial independence in Poland which impacts individual citizens' rights.

From Pandemic to Poland

III. National Citizen–Citizen Relations: the Horizontal Social Contract



Under the government's aegis, a second social contract exists between citizens to respect each others' private and public rights.



This and the other relationships identified above can all be contrasted to a contract perfectly devoid of relationality – the spot contract.



The spot contract is a financial agreement for instantaneous exchange to buy-and-sell an asset at the current market rate, the spot price.



In a spot contract, executional instantaneity is the only thing that matters.



There is no bundle of competing forces, contextuality is perfectly inconsequential, and there is no need to secure the long-term interest. And, so, there is no need for the rule of law.

National Citizen–Citizen Relations: the Horizontal Social Contract – the DAO Hack

However, absence of rule of law becomes a problem when a relational contract is treated like a spot contract as happened in the DAO hack.

The Venture Capital fund DAO used smart contracts to specify bye-laws of its decentralised organisation.

A smart contract is a 'computerised transaction protocol, that performs a particular code base.'

From the outset, it sounds like a spot contract.

However, actually, the VC fund was managing its internal relations through the smart contract, a spot contract.

Lo' and behold, a programmer exploited a loophole in the smart contract's code, created a child DAO, and transferred around £50 million (3,641,694 ether) to himself.

Though this 'sophisticated, incentive compatible (rational) breach' epitomises a perfect pursuit of an individual's short-term commercial self-interest, it turns the VC fund's long-term mutual interest into an utter mockery.



Thank you