International Journal of Law in Context (2021), **17**, 154–159
doi:10.1017/S1744552321000100

REVIEWS SYMPOSIUM

Googling the equivalence of private arbitrary power and state arbitrary power: why the Rule of Law does not relate to private relationships

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1 Introduction

The contributions to this Special Issue, and the books to which they relate, are premised on the idea that the Rule of Law relates to private relationships. I challenge that idea. By exploring solely theoretical ideas, I argue that the Rule of Law – as it is usually defined – does not relate to private relationships and, in consequence, the nexus necessary to invoke a Rule of Law-solution in the circumstances outlined in the books is absent.

The Rule of Law applies to the application of arbitrary power by states over its subjects. Whilst the precise terms of the concept of the Rule of Law have been frequently contested, this anti-arbitrariness function is widely accepted (Burgess, 2017b). A more recent contention is the idea that the Rule of Law relates to the relationship between private entities.[1] The broadly stated question is therefore whether the Rule of Law protects either against the application of arbitrary *state* power or simply against the application of arbitrary power.

The books by Bhatt and Lander explore instances of a reorientation of national law in terms that impact the nature and form of the relationship between a state and its citizens, and illustrate a shift in the locus of power. They suggest that a Rule of Law-solution is appropriate. I argue that the Rule of Law – as normally conceived – cannot, however, operate in relation to a private entity's actions. On this basis, whilst there is clearly a problem regarding the power shift described in the books, I suggest that the Rule of Law does not provide a solution.

By using Google as an example, I argue that, in circumstances in which Google is a private entity and where Google can be seen to be state-like in many ways, if the Rule of Law does not relate to Google, then the Rule of Law does not relate to any private relationships. The purpose for adopting this structure and example is because: only a relatively small expansion of the accepted conceptual boundaries of the concept of the Rule of Law is required (due to Google's state-like status); and, should this small expansion be inappropriate (as I argue it is), any larger expansion necessary to encompass less state-like private entities cannot be appropriate. As a consequence, influence by a private entity on a state – whilst problematic – cannot stimulate a Rule of Law-solution.

The structure of the paper, and the titles of its parts, reflect the terms of the argument. In the next part, I provide a reason why Google is relevantly considered a private entity and why it is state-like. After that, in the part that comprises the bulk of the paper, I argue that the Rule of Law does not relate to Google (notwithstanding its state-like status). In the final part, I conclude that the Rule of Law does not relate to private relationships and why this poses a challenge to the two books' projects before, by way of reconciliation with the broader project, suggesting a way in which my criticism can be avoided.

[1]For an early exploration of this idea, see Selznick (1969). See also Austin and Klimchuk (2014).

2 Google is a private entity and it is state-like

It is first useful to state what is meant by 'private'. Here, I rely on a broad definition that sees any non-state entity as being a private entity. This allows both for-profit and not-for-profit entities to be included as well as real or corporate entities. Google is, by this definition, a private entity.

If Google shares core characteristics of a state, then we can say that Google is state-like. A myriad of state characteristics could be cited in this respect. I highlight only a few that I hope will be relatively uncontroversial: within their territorial spheres, states exercise monopolistic control and coercive force over their population.[2]

Google exercises monopolistic control and coercive force over its (user) population within its (virtual) territorial sphere. Whilst Google does not have a complete monopoly on Internet search, e-mail use, navigation or video consumption, its endemic domination in each of these technological spheres means that it is very difficult to navigate the online world without Google. Its domination does not mean that it controls all of the Internet, but it does mean that, realistically, our access to and interaction with the Internet – a necessity for many of us – mean that we must situate ourselves within Google's (virtual) territory. Within this territory, Google dictates the terms of use to its user population; terms can be changed and, if a user wishes to continue using the services – and one must to realistically access the Internet – the terms must be accepted. This imposition of terms, and the terms themselves, can be conceived of as involving a form of coercion (Kelsen, 1941). In these senses, Google shares the core characteristics of a state and, accordingly, can be considered to be state-like.

3 The Rule of Law does not relate to Google

To demonstrate that the Rule of Law does not relate to Google, I argue that the solution to the problem that Google creates is different to the solution that the Rule of Law provides. To do this, I adopt a view of problems and solutions that has previously been applied to the Rule of Law: that a solution can be differentiated from a superficially similar solution if the problems to which they respond are different (Burgess, 2019).[3] To show that the Google-solution is different to the Rule of Law-solution (even if the solutions are superficially similar), I will show that the problem that Google creates ('the Google-problem') is different to the problem to which the Rule of Law responds ('the Rule of Law-problem'). I deal with these aspects individually. In the – short – section immediately below, I illustrate the nature of the Google-problem before, in the following – longer – section, I detail the Rule of Law-problem.

3.1 The Google-problem

Google is state-like in the digital territory that it controls, but this does not necessarily mean that the problem that arises through the relationship between Google and its users – to which a Rule of Law-type solution (of anti-arbitrariness) *may* be thought to apply – is the same as that between a state and its population.

There are, clearly, problems that can be seen within the Google–user relationship. Google has access to vast amounts of individually generated data (from Internet browsing, video searching, locations visited and e-mail content). The nature of Google's relationship with its consumers, and its practical monopoly on many facets of digital life, place it in a position from which it can exercise broad coercive power over its users. Changes to terms and conditions of use can be implemented with little or no concern for or with its users; access to services and the degree of use can be controlled centrally. Accordingly, the problem that is created with the Google relationship is the potential for the application of its power in its private relations with users in broadly arbitrary ways. In this respect, that nature of the Google-problem and Google's state-like status can, superficially at least, be seen to attract a Rule

[2]This idea is, recognisably, derived from that provided by Weber (1921/2013). Whilst it is accepted that there is no single definition of 'the state', Weber's idea remains a useful guide.

[3]For the broad idea regarding the problem/solution approach, see Collingwood (1939, p. 29).

https://doi.org/10.1017/S1744552321000100 Published online by Cambridge University Press

of Law – anti-arbitrariness – solution. However, as we will see, the Google-problem can be differentiated from the state-centric Rule of Law-problem.

3.2 The Rule of Law-problem

In circumstances in which the content of the concept of the Rule of Law is contested, and where popularly cited conceptions of the concept range across two millennia, identification of the Rule of Law-problem is not easy, nor can it be definitive; for example, individuals that hold a thin view of the Rule of Law will have a different view of the Rule of Law-problem to those that hold a thick view (Craig, 1997).[4] This makes determination of the concept's content – and any problem to which the concept can be applied by way of a solution – difficult (Burgess, 2020). As hinted at above, to identify the Rule of Law-problem, I consider accounts that are frequently relied upon in identifying the meaning and content of the Rule of Law as being solutions to Rule of Law-problems (that existed at the time at which the conceptions were authored).

In adopting this approach, the selection of relevant conceptions is made for me. The most frequently relied-upon accounts – that are used to determine the scope and shape of the Rule of Law – have been described as the *usual suspects* of the Rule of Law: Aristotle, Locke, Dicey, Hayek and Fuller.[5] Space precludes a detailed examination of any of these. However, what is clear – even from the cursory examination below – is that the Rule of Law-problem that each author sought to address with his Rule of Law-solution was specifically the imposition of *state* arbitrary power. In this sense, and where these authors' Rule of Law conceptions are frequently used to define what the Rule of Law *is*, the Rule of Law-problem can be clearly differentiated and distinguished from the Google-problem. To illustrate this, I briefly consider each thinker's solution before taking a more general view.

3.2.1 Aristotle

Aristotle considers it is more expedient to be ruled by the best laws and not the best man [sic] (Aristotle, 1981, 1286A7). He seeks to avoid emotion-fuelled decisions (what would now be deemed legislative due process) (Aristotle, 2004, p. 1, chapter 1), requiring laws – expressed generally – that provide for predictability and stability (Aristotle, 1981, 1286A7). Aristotle's Rule of Law ideas are steeped in the idea of legislative creation and the potential for the powers of the state – even if controlled by the mob – to be used against an individual. The potential for a private individual to act tyrannically was not unknown in the period (even if the institution of slavery is put to one side). However, this does fit within the problem that Aristotle addressed with his Rule of Law-solution.

3.2.2 Locke

Locke's Rule of Law terminology is often indistinguishable from contemporary theory: he mentions 'absolute arbitrary power', 'established and promulgated laws', 'declared and received laws', 'stated rules' and 'settled standing laws' (Locke, 1689/1988, II, p. 137).[6] Locke outlines the move from a state of nature to a civil society as being one taken by rational humans eager to preserve their – pre-political and naturally accruing – property. To protect property, and in order to be legitimate, Locke suggests that the supreme authority must 'decide the rights of the subject by *promulgated standing laws, and known authoris'd* judges' (Locke, 1689/1988, II, p. 136, emphasis in original).

Whilst aspects of Locke's work undeniably relate to the private relations between individual actors (e.g. his ideas related to property), the Rule of Law-relevant aspects of his work relate to the imposition of a control over the legislature's supreme power.[7] In short, the Rule of Law-problem that is created by

[4]There does seem to be a connection between thick views and those that may take a view that is contrary to the argument I make here. However, expansion of that intuition must await another day.

[5]For description in these terms, see Burgess (2017a). For a further list including them, see Waldron (2016). Waldron lists each of these thinkers as relating to the Rule of Law's history. (Montesquieu, whilst in Waldron's list, is not included here, as he is not as frequently relied upon as are the others.)

[6]Lest we miss their importance, Locke was kind enough to italicise the phrases quoted here.

[7]For a contrary view, see Sempill (2017; 2018).

https://doi.org/10.1017/S1744552321000100 Published online by Cambridge University Press

his suggested move from a state of nature is the potential for state-based arbitrary rule. Accordingly, the Rule of Law-relevant solution that he proposes does not relate to private relations between individuals.

3.2.3 Dicey

In Dicey's late nineteenth-century account, the Rule of Law is separated into 'three distinct though kindred conceptions' (Dicey, 1885/1979, pp. 187–188). The first is associated with the absence of arbitrary power (Dicey, 1885/1979, p. 188). The second relates to the equal application of the law (Dicey, 1885/1979, pp. 188, 193). The third – that 'the general principles of the Constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts' (Dicey, 1885/1979, p. 195) – is frequently ignored in contemporary Rule of Law formulations. The Rule of Law's decline, and the accompanying rise in the welfare state, motivates Dicey. He sees the Rule of Law as being under threat through the state's imposition of arbitrary or discretionary power (Dicey, 1885/1979, pp. 183–184; see also chapter 4).

Whilst Google could not have been conceived of when Dicey was writing, he was aware of large corporate bodies' existence (Jones and Aiken, 1995). He sees large companies contributing to the increased collectivism that he feared, but there is no attempt to extend the definition of the Rule of Law to account for non-state-based relationships. Instead, he limits the solution that constitutes his conception to relate to the Rule of Law-problem of public institutions' imposition of arbitrary power.

3.2.4 Hayek

Hayek sees his 1940s project as being different to Dicey's (Hayek, 1944/2007, p. 112, fn. 2). Hayek's work can be seen as an attack on socialism. He suggests that state power can be curtailed by allowing individuals to plan around state action and, thereby, avoid coercion. For Hayek, state coercion can be tempered only by the actions of a limited government being predictable (Hayek, 1944/2007, p. 112).

Hayek's Rule of Law-problem relates to the operation of the state. He seeks to ensure that private actors are empowered to combat the state's central power. Hayek's Rule of Law-solution is specifically state-focused. For him, the Rule of Law 'means that *government* in all its actions is bound by rules fixed and announced beforehand' and 'under the Rule of Law the *government* is prevented from stultifying individual efforts by ad hoc action' (Hayek, 1944/2007, p. 112, emphasis added). These ideas are most frequently held out as being reflective of Hayek's Rule of Law.[8] Yet, there is no indication that an extension to non-state actors was conceived by him in responding to the state-centric Rule of Law-problem.

3.2.5 Fuller

Fuller's inner morality of law is famously described through eight desiderata – generality, publicity, prospectivity, intelligibility, consistency, practicability, stability and congruence – in the allegory of King Rex (Fuller, 1964, pp. 33–39).[9] His 1964 work provides a list of features necessary for the Rule of Law. The simplicity of the formulation is, perhaps, why Fuller's conception has been so frequently used as an accepted definition of the Rule of Law.[10] The allegory and the formal requirements make it clear that they reflect the way in which effective law – as legislation – should be made. In this respect, the problem – as one relating to the effective creation of legislation – is a state-centric one.

3.2.6 In general: the Rule of Law-problem

The usual suspects – as the authors of conceptions most frequently relied upon to define what the Rule of Law *is* – sought to solve a problem relating to *state* arbitrary power: whilst private relations were

[8]For examples, see Burgess (2020).

[9]Although Fuller notes the idea of managerial direction, this is something *different* to the ideas considered relevant to the Rule of Law.

[10]For an example of a statement of this conception's popularity, see Waldron (2011, p. 5).

https://doi.org/10.1017/S1744552321000100 Published online by Cambridge University Press

conceivable to them, extension of their Rule of Law ideas to encompass private relations would not reflect the problems that they sought to address.

It could be seen as wildly anachronistic to attempt to find anything like a corporate entity in Aristotle's work – but we can see the clear legislative connection in his Rule of Law comments. The same may apply to Locke. Yet, whilst there is no reason to think that the latter three (Dicey, Hayek and Fuller) would be unable to conceive of corporate entities as well as private transactions of the kind that interested Locke, they do not explicitly conceive of the problem or their solution in this way. The extension of the concept of the Rule of Law to encompass non-state-based exercises of power seems to be beyond the intended meaning of the ideas.

The broader philosophies of Locke, Dicey and Hayek also suggest a state-centric approach. Their theories have a strong liberal focus and seek to limit the state's interference in transactions between individuals. If their theories are considered within this ideological context, it seems likely that their intended meaning would be to address the state-based problem of arbitrary power without interfering with the interactions between individuals. This also suggests that the usual suspects' Rule of Law-problem is one that relates to the state-based exercise of power. As long as there is reference placed on the usual suspects' conceptions' definitional relevance, extending the concept's operation beyond the parameters they set is incongruous.

4 The Rule of Law does not relate to private relationships

The problem created in the relationship between Google and individuals that utilise its services can be conceived of as one that relates to the exercise of arbitrary power. However, this problem is of a different kind to that which the Rule of Law – as conceived of by the usual suspects – responds. The usual suspects address arbitrary *state* power; Google introduces arbitrary power in the private realm. There is, of course, a similarity in the forms of solution that can be used to combat *both* exercises of arbitrary power; the idea of predictability that arises – in some form or another – in the usual suspects' accounts may temper the exercise of arbitrary power; however, and as noted above, a superficially similar solution can be differentiated based on the different problem to which it responds. Just because predictability (for example) would assist in solving the problem that arises as a result of the Google–consumer relationship, that does not mean that the solution is relevant to the Rule of Law where the Rule of Law-solution – as given by the usual suspects – relates specifically to state power. Accordingly, the solution to the Google-problem is different to the solution to the Rule of Law-problem. Given this conclusion, it follows that the Rule of Law does not relate to Google.

The above conclusion has important consequences on the wider theoretical basis of Bhatt and Lander's books. Both books illuminate an important and real problem regarding the reorganisation of relations between the state and private actors, but the conclusion that I have reached indicates that the solution to that problem is not a Rule of Law-solution – at least in terms of the way in which the Rule of Law is most frequently defined (I return to this in the final paragraph).

If the locus of power has shifted towards private actors but the Rule of Law does not relate to actions or influence by those actors, then it is not the concern of a Rule of Law-solution. This can be illustrated through one frequently invoked desiderata: predictability. Hayek summarises this best: where the state's actions are predictable, there is no coercion. The books' suggestion is that private actors' influence introduces unpredictability into the state's actions; however, the ultimate action is still the state's and not the private actor's – the state retains some agency, even if impacted by private actors, if arbitrary decisions are ultimately being made by the state. Whilst any solution may be similar, the problem identified in the books severs the conceptual nexus between the private party and the application of an arbitrary idea. (The latter may be subject to a Rule of Law-solution, but this is not necessarily linked to the problems illuminated in the books.) Further, by being able to identify the motivations behind a state's decisions – as Bhatt and Lander do – its actions seem to be, at least in part, *more* predictable. What this means is, in the context of the books, transnational development projects expose a problem that is separate to the remit of the Rule of Law as it is most frequently defined and one that the concept was not intended and never was intended to remedy.

https://doi.org/10.1017/S1744552321000100 Published online by Cambridge University Press

To conclude, I want to provide a comment that may reconcile my argument with the wider project of which it forms a part. My argument hinges on the premise that the context of the usual suspects – as the conceptions most often used to explain the Rule of Law's meaning – relates to the exercise of *state* power. Where the concept of the Rule of Law can, and perhaps should, be seen in our *present* context,[11] the simple solution is to avoid relying on conceptions that are, in some cases, centuries old. If the Rule of Law should reflect contemporary circumstances, and if prior conceptions are no longer relevant to *our* idea of the Rule of Law, then there is no need to rely on those prior ideas. Relying on prior conceptions and avoiding unsupported statements – for us academics – is uncomfortable territory.[12] However, if we were to do this, and if we were clear(er) about the – contemporary – origin and nature of our idea of the Rule of Law, then perhaps the (*present*) Rule of Law would relate to private relationships.

Conflicts of Interest. None

Acknowledgements. None

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[11]This seems to be the accepted position. See Taekema (2021); see also Selznick (1999, p. 31).
[12]There is some precedent for this in terms of the Rule of Law (see Bishop, 1961). See also Burgess (2019, p. 74).

Cite this article: Burgess P (2021). Googling the equivalence of private arbitrary power and state arbitrary power: why the Rule of Law does not relate to private relationships. *International Journal of Law in Context* **17**, 154–159. https://doi.org/10.1017/S1744552321000100