

Immigration & the Rule of Law

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Brief Description:

Meanings of the “Rule of Law” and A Brief Analysis of Whether the U.S. Immigration System Honors this Concept

Topical Outline:

I. Formal Theories of Rule of Law (Brian Tamanaha, *On the Rule of Law, History Politics Theory* (Cambridge University Press, 2004.)

a. Rule *by* law

Whatever the government does, it should do through the law.

This does not necessarily limit government power, but can make the law subservient to and a tool for the government. For this reason, this meaning can be seen as antithetical to the rule of law.

Plato: “Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if the law is the master of the government and the government is its slave then the situation is full of promise and men enjoy all the blessings that the gods shower on the state.” Tamanaha, at 8.

Aristotle: “[T]he rule of law, it is argued, is preferable to that of any individual.” Tamanaha, at 9.

b. Formal legality

The laws must be public, prospective, general, equally applied, stable, and predictable.

John Locke: “[F]or all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds ...” Tamanaha, at 49.

Retroactive laws violate formal legality because they cannot be followed.

“[Restraints on the sovereign] have been understood in terms of the dictates of natural or divine law, or a timeless customary law, which were the dominant views in the Middle Ages, or in terms of human or civil rights, which is the common phraseology today.” Tamanaha, at 115.

c. Formal legality, combined with democracy

“Formal legality” is content-neutral and could provide legitimacy to an evil government.

Democracy gives the laws legitimacy (because they are developed by legitimate means) and formal legality ensures enforcement of democratically-passed laws. Tamanaha, at 99.

d. Rights-based conception of the rule of law

Formal legality must be combined with human rights content, either recognized by law (natural law) or created by law (positive law).

U.S. Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable Rights ...”

Art. 1, para. 2 of The Basic Law, Germany’s post-war constitution, views rule of law as synonymous with recognition of “inviolable and inalienable” human rights. It acknowledges the “universal and extralegal character of these rights which exist prior to and irrespective of their official recognition by the state.” Tamanaha, at 108-109.

e. Formal legality, human rights, and democracy.

In liberal democracies, formal legality, human rights and democracy “cluster together ... as a unified complementary package.” Tamanaha, at 110.

However, these concepts do not necessarily cohere and tensions exist between them.

In U.S. tradition, a written constitution, democratic elections, separation of powers, individual rights, and judicial review define “rule of law.”
Tamanaha, at 55.

Marbury v. Madison, 5 U.S. 137 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”)

II. Rule of Law Defined by “Institutional Attributes” or Ends/Goods (Rachel Belton, “Competing Definitions of the Rule of Law.” *Carnegie Papers, Rule of Law Series, No. 55* (Carnegie Endowment for International Peace, Jan. 2005.))

a. Society that honors “rule of law” possesses the following “institutional attributes”:

Laws are public, known, and stable

Judiciary is competent, efficient, and independent

Police effectively enforce the law and maintain public safety

b. Society that honors the “rule of law” serves “goods” or “ends” like:

Government is subordinate to and bound by laws

Legal system treats and judges citizens equally

Law and order – protection of lives, property and rights.

Predictable and efficient justice.

Protection of human rights.

III. Criteria Used to Evaluate Rule of Law (Daniel Kaufman, Aart Kraay, and Massimo Mastruzzi, “Governance Matters V: Aggregate and Individual Governance Indicators for 1996-2005” (World Bank, Sept. 2006)).

a. Independence of judiciary, primacy of law in civil and criminal matters, accountability of security forces and military to civilian authorities, protection of property rights, equal treatment under the law (Freedom House).

b. Protection of financial assets, protection of intellectual property, enforcement of commercial contracts, ability to challenge legality of government actions (World Economic Forum).

IV. Immigration Policy and the Rule of Law (Commission on Immigration, American Justice Through Immigrants' Eyes" (American Bar Association, 2004); American Bar Association. "Reports with Recommendations to the House of Delegates," ABA Midyear Meeting (Feb. 13, 2006.))

a. U.S. Immigration Laws Are Incoherent and Unpredictable

"Our immigration laws today are extremely complex, disjointed and often counterintuitive, particularly for people who often are just becoming familiar with our language, culture, and legal system. Moreover, despite the fact that immigration matters routinely involve issues of life and liberty, the administrative system of justice that exists for immigration matters lacks some of the most basic due process protections and checks and balances that we take for granted in our American system of justice." "2006 Mid-Year Reports to House of Delegates," at 107A.

b. Consequential determinations made by low-level officials, not a judge

"The 1996 laws allow immigration officers to make decisions without a formal hearing or appeal in at least three situations: (1) 'expedited removal' when aliens arrive at a port of entry or have been unlawfully present in the United States for up to two years; (2) 'expedited administrative removal' of individuals with criminal convictions; and (3) 'reinstatement of removal' orders for previously deported aliens who return to the United States without permission (citations omitted.)" "American Justice Through Immigrants' Eyes," at 7.

c. Lack of counsel

"Although viewed as 'civil' in nature, removal proceedings largely mirror criminal trials. Attorneys must identify, corroborate, and argue complex cases before a presiding judge. They must master a complex area of the law. They must develop and argue factually and legally complex claims for relief. They must contest the government's charge, introduce evidence, and put on witnesses. They must compete against opposing counsel, knowing that an adverse decision will result in their client's banishment and, in some cases, significant peril (citations omitted.)" "2006 Mid-Year Reports to House of Delegates," at 107A.

"The government's detention practices make it exceedingly difficult for detained persons to secure and communicate with counsel and pursue relief. Immigration authorities frequently transfer detainees to distant locations, often without notifying their lawyers and without regard for their need to prepare for a hearing or to be close to their families and support systems ... Without representation, detained persons often cannot access the extensive documentation and other information necessary to meet their burden of proof and apply for most forms of relief, including

asylum (citations omitted.)” “American Justice Through Immigrants’ Eyes,” at 68.

d. System Characterized by Illegality

“Few would argue that a growing population of second-class non-citizens – without rights, status, security, or stability – furthers the rule of law. The undocumented live largely outside the law’s protections; due to their lack of status, they face crime, exploitation, and abuse. Furthermore, the deaths of so many migrants – persons who are typically trying only to support themselves and to reunite with their families – should offend anybody concerned with basic human rights. Paradoxically, U.S. laws governing legal immigration contribute significantly to the ‘illegality’ that characterizes our immigration system.” “2006 Mid-Year Reports to House of Delegates,” at 107B.

e. Retroactivity of Laws and Lack of Judicial Review

“Among other features, the [1996 immigration and welfare reform laws]:

- eliminated judicial review of certain types of deportation (removal) orders
- dramatically changed many grounds of exclusion and deportation,
- retroactively expanded criminal grounds of deportation, and
- eliminated and limited discretionary waivers of deportability (citations omitted.)” “2006 Mid-Year Reports to House of Delegates,” at 107 C.

“[The ‘REAL ID Act’] has established a system of judicial review that seeks to insulate discretionary determinations from all judicial oversight.” “2006 Mid-Year Reports to House of Delegates,” at 107C.

f. Denial of Protection to Forced Migrants

“Simple lack of access to the immigration system is one of today’s major barriers for forced migrants attempting to flee their home countries to a place of refuge.” “2006 Mid-Year Reports to House of Delegates,” at 107F.

Notes:

Bibliography & Website Links:

1. Brian Tamanaha, *On the Rule of Law, History Politics Theory* (Cambridge University Press, 2004.))
2. Rachel Belton, "Competing Definitions of the Rule of Law." *Carnegie Papers, Rule of Law Series, No. 55* (Carnegie Endowment for International Peace, Jan. 2005.)
3. Daniel Kaufman, Aart Kraay, and Massimo Mastruzzi, "Governance Matters V: Aggregate and Individual Governance Indicators for 1996-2005" (World Bank, Sept. 2006).
4. Commission on Immigration, *American Justice Through Immigrants' Eyes*" (American Bar Association, 2004).
5. American Bar Association. "Reports with Recommendations to the House of Delegates," ABA Midyear Meeting (Feb. 13, 2006.)

Immigration & the Rule of Law

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Brief Description:

Presenter will discuss US obligations under international law, specifically with regard to asylum-seekers and refugees. Presenter will give a brief overview of why international law is relevant in the asylum context, how the US is not living up to its international obligations, and the bleak reality facing many asylum-seekers in the United States.

Refugee Protection: The Intersection of Domestic and International Law

Topical Outline:

- I. Overview of International Obligations
 - a. The Convention relating to the Status of Refugees was approved by the United Nations in 1951. 19 U.S.T. 6577, 189 U.N.T.S. 150 (1951). Its purpose was to protect mainly European refugees in the aftermath of World War II.
 - b. The 1967 Protocol to the Refugee Convention expanded the temporal and geographic scope of the convention to protect refugees around the world. 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).
 - c. The US signed onto the Protocol in 1968.
 - d. The Protocol incorporates Articles 2 to 34 of the Refugee Convention – it's most important provisions are: the definition of refugee, the principle of non-refoulement, and Article 31 – which states that contracting states should not impose penalties on refugees on account of their illegal entry or presence.

- II. US Obligations to Refugees
 - a. Despite the US signing onto the Protocol in 1968, no implementing legislation was passed until the Refugee Act of 1980 - although there were some provisions in the INA to protect individuals fleeing communism and

also individuals from the Middle East – which were repealed with the passage of the 1980 Act. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 103 (1980).

- b. Definition of Refugee – INA §101(a)(42) – mirrors the definition found in the Convention as modified by the Protocol. Some additional protections were added in 1996 to individuals fleeing coercive population control practices. For those of you who might be unfamiliar with the refugee definition – a refugee is any person who is outside his/her country of nationality who is unable or unwilling to return to that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.
- c. Bars to Asylum – a person may be a refugee but not merit protection due to bad acts – bars found in the Convention and Protocol – initially were mirrored in our laws, now the bars have expanded well-beyond what the drafters of the Convention could ever have envisioned.
- d. Cessation Clauses – there are also situations in which a refugee might cease to be a refugee and be found no longer in need of protection. The US law incorporates the cessation clauses found in the Convention and Protocol as well. The most often used cessation clause in US law is a provision allowing an adjudicator not to grant asylum if there has been a “fundamental change in circumstances” in the asylum-seekers home country.

III. Why does international law matter in the adjudication of US asylum law?

- a. Constitution provides treaties are supreme law of land
- b. The Charming Betsy – Supreme Court’s long established rule: “an act of Congress ought never be construed to violate the law of nations, if any other possible construction remains.”
- c. In the asylum field - the Supreme Court noted that the intent of Congress in passing the Refugee Act of 1980 was to bring the US into conformity with its international obligations. *See INS v. Cardoza-Fonseca*, 480 US 421, 436-37 (1987).
- d. It can be useful to cite to international refugee law when arguing a U.S. asylum claim.
- e. Also, it can be useful to cite to refugee case law from other countries which show how other states are implementing their obligations under the Convention and Protocol.
- f. One final point is that other international treaties and even customary international law can be informative to adjudicators when deciding these cases.

IV. Where has the US law fallen below its international obligations?

- a. Sadly, examples of where the US has failed to meet its obligations are all too prevalent – they include criminal bars to asylum, terrorism-related bars, and prosecution of asylum-seekers for illegal entry

- b. Criminal bars: Under international law bar applies to individuals convicted of a particularly serious crime. According to international refugee principles – such a crime should be capital crime or very grave criminal act. Under US law any “aggravated felony” is deemed a particular serious crime. But, aggravated felony is defined broadly under US law to include many misdemeanors under state law and also to include many non-violent offenses.
- c. Terrorism-related bars: U.S. law prohibits the granting of asylum to anyone who provided material support to a terrorist organization. But that law has been interpreted, contrary to international refugee principles, to include individuals who have been forced to give money, food or other supplies under duress to rebel groups operating in their home countries

V. Where has the US been more generous in refugee protection?

- a. Coercive population control measures - protection grounds are broader in US law than under international law

Conclusion – as a nation of laws, it is important that we meet our obligations to the most vulnerable population in our midst – refugees. Many of the individuals who first settled our country fled persecution in the old world. Our Constitution, not surprisingly protects many of the same rights protected by the refugee convention. We need to cherish those roots, restore them and most of all – protect them from further erosion.

Bibliography & Website Links:

- 6. United Nations 1951 Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6577, 189 U.N.T.S. 150 (1951).
- 7. United Nations 1967 Protocol relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967).
- 8. *The Charming Betsy*, 6 U.S. 64 (1804).
- 9. Germain, Regina, **AILA’s Asylum Primer: A Practical Guide to U.S. Asylum Law and Procedure** (American Immigration Lawyers Association, 4th Ed. 2005).
- 10. Immigration and Nationality Act (INA) – Sections 101(a)(42) and 208.
- 11. 8 CFR § 208. 1 *et seq.*
- 12. www.rmssdenver.org
- 13. www.asylumlaw.org