The Rule of Law, Core Texts and Liberal Education

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In 1991, I was in Poland at the request of those involved in forming a new, democratic government. My assignment on that trip was to present a paper regarding equality. I prepared what I believed to be an excellent paper that delved deeply into the wide variety of contemporary theories of equality being discussed in the law school world in the United States. To my surprise, my paper was largely disregarded as all the attention of the nation builders in attendance was directed to papers focusing on the rule of law.

I had an opportunity later to ask my friend Professor Lech Garlicki, who subsequently served on the Constitutional Tribunal of the Republic of Poland and currently serves on the European Court of Human Rights, why papers elucidating the basic rule of law, and its origins, were trumping, in terms of interest, papers like my own discussing robust theories of equality. He paused and then kindly but emphatically stated, "Rod, you would not ask such a foolish question if you lived, as we have, for a generation without the rule of law."

With time, I have come to better understand the wisdom of Judge Garlicki's remark. Indeed, I have come to fear that our penchant for rich theories of equality and other titillating topics may distract us from full adherence to and appreciation of the essence of equality – the rule of law. This distraction, which ignores core texts and thinking regarding the rule of law in favor of contemporary theories, is fraught with risk. It is the rule of law, not substantive contemporary theories of equality, which ultimately ensures basic equality and rights. The rule of law, the very essence of equality and rights, has its root in core texts, a rich historical tradition, and it ought to be a part of the learning of all who claim to be educated. At the American Academy for Liberal Education, where I serve as a member of the Board, core content still matters in the curriculum offered by member institutions and in our evaluative processes. Certainly, we encourage the teaching of contemporary theories, but we insist that students be exposed to core texts that they may have a context for such theories.

As I address the importance of the rule of law, I will skip Rome and Runnymede, and jump directly to John Locke, who, in his discussion of slavery, the very antithesis of equality, stated:

> Freedom is not what Sir R. F. tells us [when he asserts that*] A liberty for everyone to do what he lists, to live as he pleases, and not to be tyed by any Laws:* But Freedom of Men under Government, is, to have a standing Rule to live by, common to every one of that Society, and

> made by the Legislative Power erected in it; A Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man. As Freedom of Nature is to be under no other restraint but the Law of Nature.[i]

Locke also believed that, "Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another: but those who have no such common Appeal, I mean on Earth, are still in the State of Nature, each being, where there is no other, Judge for himself, and Executioner; which is, as I have before shew'd it, the perfect state of Nature."[ii]

In yet another core text, Alexander Hamilton, writing in Federalist 78, penned words that have historically been widely read and which delineate the special role of the judiciary in securing the rule of law:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

Locke and the framers of our constitutional form of government all recognized that in upholding the Rule of Law the judiciary ensures equality – laws entered into democratically and applied equally and judicially to all are the bulwark of Civil Society. Locke, and those who followed him, however, recognized that there were rights that were largely beyond the reach of government – the rights of life, liberty and property secured by a constitutional form of government.

In his proposed version of a right of religious freedom in the Virginia Declaration of Rights, James Madison, who is often referred to as the father of our Constitution and Bill of Rights, the rights of life, liberty and property, could only be limited in order to "preserve equal liberty" and if "the existence of the State be manifestly endangered." A right could not subvert an equal right and the existence of the

government could not be manifestly endangered by the exercise of a right, such that all rights would be placed in jeopardy. In all other instances rights were to be beyond the reach of government.

Interestingly, Madison also echoed Locke in some measure when he asserted that, "As a man is said to have a right to his property, he may equally be said to have a property in his rights."[iii] Those words were written in 1792 in an essay regarding property. Madison's essay regarding property which was contemporaneous with our Constitution contains this additional wisdom:

> Government is instituted to protect property of every sort; as well as that which lies in the various rights of individuals, as that term particularly expresses. This being the end of government, that is alone a just government, which impartially secures to every man, whatever is his own.
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> According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government, which however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions in which they have an equal, and in the estimation of some, a more valuable property.
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> More sparingly should this praise be allowed to a government, where a man's religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. To guard a man's house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man's conscience which is more sacred than his castle . . .
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> That is not a just government, nor is property secure under it, where the property a man has in his personal safety and personal liberty, is violated by the arbitrary seizures of one class of citizens for the service of the rest.[iv]

The words contained in these texts ought to be read and reflected upon by those who profess to be liberally educated. Another wise and liberally educated man, Spencer W. Kimball, once taught that perhaps the most important of all words is "remember." Had I remembered the words that I had learned in the wonderful liberal education I received at a public liberal arts university, I would not have asked Judge Garlicki such a foolish question.

Years after my experience with Judge Garlicki, in the summer of 2009, I had another experience that reminded me of the force of the words of Locke, Hamilton and Madison. I was in Pakistan, visiting with a friend, Justice Tassaduq Jillani, a member of the Pakistani Supreme Court. Justice Jillani like Judge Garlicki before him had been taught and understood well the ideas contained in the core texts I have quoted today.

In its anthem, which was sung at its 50th anniversary, the Court had recently given utterance to the following inspiring words written by Justice Jillani:

Of Democracy, Faith, Tolerance, and Compassion,
Discriminate the State shall not
Thou may belong to any religion, creed or caste.
Oh! The vision is distorted, the march is thwarted,
Castles in the sand, babes in the woods,
Recipes of fall abound in the books.
A nation is bled when the vision is lost.
A die is cast,
The wages are loud,
Beware of the clouds.[v]

My visit with Justice Jillani came at a time when the Court was hearing what may well have been the most significant constitutional case in the history of that young nation – they were determining whether the powerful executive branch, at the urging of a despotic leader, could remove the Chief Justice and deprive the Court of its special prerogative in securing the rule of law, democracy and human rights. With great courage, the Court stood firm. My friend and others were removed from their offices as a result, but the people understood the importance of the rule of law and raised a hue and cry that even a despot could not fail to heed. That same hue and cry is being raised throughout the world today.

I sat in awe as I observed that act of judicial courage in Pakistan. Once again, I could sense how the paper I delivered years before in Poland, regarding substantive theories of equality, theories with little founding in liberal texts and in some measure antithetical to the rule of law, was indeed foolish. As a consequence, and as one devoted to liberal education, I fear that the rising generation is not being taught the very texts that were so important to my liberally educated and courageous friends in Poland and Pakistan.

One cannot remember what one is not taught and to fail to be taught and remember the rule of law and the rights and democratic form of government it secures is a failure of the highest order. I close therefore with a reminder to all [readers]: the teaching of core texts is not merely good pedagogy, it is also necessary lest we forget the very moorings of a free society that so many have given so much to secure.

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[i] John Locke, Two Treatises of Government, The Second Treatise, An Essay Concerning The True Original Extent, and End of Civil Government, Chap. IV, Of Slavery, cited in Neil H. Cogan, Contexts of the Constitution at 576 (1999).

[ii] Id. at 125 (Chap. VII, Of Political or Civil Society).

[iii] James Madison Papers, 14: 266-68, 29 Mar. 1792.

[iv] Id.

[v] Mr. Justice Tassaduq Hussain Jillani, "Justice for All," which was sung resolutely at the 50th Anniversary of the Supreme Court of Pakistan.

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