Guest Lecture Series of the Office of the Prosecutor

"RULE-BASED DECISION-MAKING IN THE DEVELOPMENT OF LEGAL INSTITUTIONS IN POLITICAL ENVIRONMENTS"

Professor Frederick Schauer[•]

18 May 2005

The Hague

[•] Professor Frederick Schauer (USA) is Frank Stanton Professor of the First Amendment at the John F. Kennedy School of Government, Harvard University, where he served as Academic Dean from 1997 to 2002 and as the School's Acting Dean in the spring of 2001. His extensive expertise lies in the area of the philosophy of law, legal reasoning, the theory of rights, freedom of speech, and constitutional law. Professor Schauer has written many significant books on these issues as well as more than 150 articles in various legal and philosophical journals. He has been Chair of the Association of American Law Schools Section on Constitutional Law and Vice-President of the American Society for Political and Legal Philosophy. Professor Schauer is a Fellow of the American Academy of Arts and Sciences, and has been awarded a Guggenheim Fellowship. In addition to appearing before many congressional committees on issues of freedom of speech and constitutional law, he has lectured on legal theory and constitutional law in various countries.

I Introduction

Rules are an omnipresent feature of our lives. Whether they be the rules of municipal or international law, the rules of the sports and games we play, the rules that tell us how fast we may drive or where we may park, or the rules that structure and govern our workplaces and our families, rule-guided behavior is a central feature of the human condition.

Yet although we all know that there are many rules we follow, and more than a few that we break, we rarely think about just what rules are, how they operate, and what kinds of choices they represent. Indeed, the last may be the most important of all. We see a sign that says "100 kilometers per hour" and we take a quick glance at the speedometer (usually to make sure that we are going no faster than 110), but we rarely think about how our behavior would have been different were the sign simply to have said, "Drive Reasonably," or "Drive Safely." Article 10 of the European Convention on Human Rights protects freedom of expression in an elaborate provision enumerating various qualifications, limitations, and exceptions, but Section 2 of the Canadian Charter of Rights and freedoms contains no such list of exceptions or permissible overrides, depending solely on a general limitations clause whose language is largely indeterminate. And although the Constitution of the United States relies largely on the simple phrase "due process of law" to protect the right of a defendant in a criminal case to be informed in open court of the charges against him, the parallel provisions of the Constitution of the Republic of South Africa delineate that same right with stunning detail, mandating to the hour how long a suspect may be detained without being informed in open court of the charges, and even specifying what shall happen should that 48 hour period expire on a day when the courts are not in session.

These distinctions are not simply the peculiarities of legislative, regulatory, and constitutional drafting. Rather, they reflect important decisions about the appropriate balance between rules and discretion. For although we normally think of rules as good things, we think

the same of discretion. Yet because discretion is largely a rule-free phenomenon, and because rules are largely constraints on the discretion of some array of decision-makers, the two are intrinsically in tension. When we design not only our laws but also our legal institutions, we must make decisions at the level of institutional design about how much discretion we wish to establish, and how much we wish to limit. And when such decisions are made in contexts in which there is considerable political disagreement, the stakes are even larger. My goal here is to explain these choices, and to explain the ways in which different choices in the design of rules reflect deeper choices about internal efficiency and external legitimacy.

II Rules and Rule-Based Decision-Making: The Basics

In order to get the analysis off the ground, we need some conception of just what a rule is.[1] And for these purposes, it is best to understand a rule as an entrenched general specification of some background justification. And thus I need to say more about these ideas of "background justification," "specification," "general," and "entrenched." And to do this, I will employ the mundane example of the typical motorway speed limit.

Speed limits on the motorway are of course designed not as ends in themselves, but rather to serve certain goals, the most common of those being safety. And because the speed limit is designed to serve the goal of safety, we can call safety the background justification for the speed limit rule. But it is important to understanding why we have rules that we do not normally see traffic rules in terms of something like "all drivers must drive safely," which would be a rule exactly restating the background justification or basic goal. Instead the background justification is specified – made more specific, or more precise, or more concrete – with respect to certain roads. When the speed limit on the A1 motorway between Rome and Naples, for

[1] What follows is based on, but updates and embellishes, an analysis initially offered in Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and In Life (Oxford: Clarendon Press, 1991).

example, is specified as 120 kilometers per hour, the assumption is that 120 kilometers per hour is the speed above which average Italian drivers in average European automobiles under average southern Italian road and weather conditions should not drive.

The concept of the average is introduced here because it is characteristic of a rule that it is general and not particular. The military draws a distinction between a command (particular) and a standing order (general) to capture this distinction, and we understand rules such as speed limits as necessarily applying to a class of drivers (usually all of them, although sometimes there are different speed limits for younger drivers, or newer drivers, or coaches, or lorries, but even these apply to all younger drivers, all newer drivers, all coaches, and all lorries) under a class of conditions (again, typically, all conditions). The speed limit thus applies, roughly, to a multiplicity of drivers in a multiplicity of conditions in a multiplicity of vehicles at a multiplicity of times. In this sense the rule is general, and differs from the particularized command. So even though the specification is more precise than the background justification, this is a general and not a particular specification, and embodies the view that for most drivers under most conditions driving in excess of 120 kilometers is not safe. And although the rule is based on the view that 120 kilometers per hour is the maximum safe driving speed for most drivers under most conditions, it is a key feature of a rule that it applies not simply to most drivers under most conditions, but instead to all drivers under all conditions.[2]

Because the rule takes what is true for most drivers under most conditions as being the rule for all drivers under all conditions, there is a strong likelihood that the rule is both under-inclusive and over-inclusive. A rule is under-inclusive when it fails to reach instances that would be reached by direct application of the background justification, and thus the 120 kilometers per

[2]We can thus understand a rule also as a prescriptive generalization. Some generalizations are descriptive – Swiss cheese has holes, German wine is sweet, Volvos are reliable, philosophers are clever – and we often employ such generalizations even as we know that some Swiss cheese has no holes, some German wine is dry, some Volvos are lemons, and some philosophers are dim. A similar generalization forms the basis for a prescriptive rule, but a prescriptive rule takes a descriptive generalization (or descriptive rule) and adds to it a prescriptive or normative voice, converting "you are" to "you should."

hour rule is under-inclusive insofar as it does not punish those inexperienced or simply poor drivers who should not be driving that fast, and insofar as it does not punish anyone for driving at 120 kilometers per hour under road or weather conditions in which even that is excessively fast. And a rule is over-inclusive, the far more common problem, when it punishes or otherwise sanctions those who would not be punished or sanctioned by direct application of the background justification. Thus, skilled drivers driving modern and well-maintained cars on clear dry traffic-free Sunday mornings could likely drive with perfect safety at 130 or 140, but they are nevertheless violating the letter of the rule even though they are driving safely and not violating the background justifications that inspired the rule in the first instance.

What distinguishes rules, therefore, is the way in which the rule is entrenched even in those cases in which the rule ill serves its background justification. When the caribinieri stops me for driving at 140 on a clear dry traffic-free Sunday morning in my almost-new and well-maintained Mercedes, and when I explain that I am a very good driver (they can look it up if they wish) driving safely under safe road and weather conditions, this explanation of the over-inclusiveness of the rule under these circumstances will likely avail me not at all, because I have violated the rule, even if I have not violated its background justification. The rule is thus entrenched against direct applications of its background justifications, and consequently it is this entrenchment of general specifications even under circumstances in which direct application of the background justification would produce a better result in this case that is the characteristic and defining feature of rule-based decision-making.

Rule-based decision-making is not, of course, just about speed limits. It is about the fact that a defendant kept in custody in South Africa for 49 rather than 48 hours before being notified in open court of the charges against him will go free, even though nothing of importance in some case might be lost by the extra hour. It is about the fact that the French producers of unpasteurized epoisse and camembert will shortly be in violation of EU rules even if their

methods of producing cheese create no undue risk of listeria. And it is about the fact that even highly popular American presidents may no longer (after 1948) run for a third term despite the preferences of the electorate. Rule-based decision-making is thus a method of institutional organization and social control that takes typically precise rules as being ends in themselves rather than simply unenforceable guidelines or rule of thumb about what is likely to produce the best result in most cases.[3]

III The Constraints of Rules and the Virtues of Discretion

When rules and rule-based decision-making are understood in this way, it is far from clear that they are good things. Rules bring the advantages of certainty, predictability, reliance, and consistency, at least when they are written in precise, publicly accessible, and largely non-vague and non-ambiguous ways. But rules bring these virtues at the cost of reaching the correct result in the particular case, and thus at the cost of limiting discretion even when the wise exercise of discretion would be valuable. A customs official told to detain people who present certain listed and precisely defined characteristics is deprived of the discretion to detain people who simply look suspicious, no matter how much wisdom and judgment and experience informs that intuitive judgment. An occupational safety inspector tasked to enforce a specific set of written rules – rules written with safety in mind – cannot impose fines for conditions that look unsafe to her if they do not violate the rules, and sometimes cannot refuse to impose fines for violations just because she thinks that this is a generally safe factory. And a judge whose power is limited to the rules of law cannot punish or fine those who look dangerous if they have committed no crime. In limiting discretion in this way, rules prevent those of good judgment and vast experience from ensuring that the background justifications of any rule are applied with the

[3] At times such decision-making is castigated as "formalistic," but formalism, with virtues as well as vices, is precisely what rule-based decision-making is all about. See Frederick Schauer, "Formalism," Yale Law Journal, vol. 87 (1987), pp. 509ff.

greatest accuracy and sensitivity. Rules are thus suboptimal, because by limiting the discretion of wise, sensitive, and accurate decision-makers they doom decision-making to the mistakes that any set of coarse and rigid rules will inevitably make.

Thus, rules can be evaluated in a decision-theoretic way. A strongly rule-based environment is prone to those errors that will be made when a faithful and accurate application of the rules will poorly serve a rule's background justification. And a strongly discretionary environment is prone to the errors that will be made when decision-makers of limited judgment, limited experience, limited wisdom, or simply limited time directly apply background justifications, but apply them incorrectly. Thus, one type of error -- the error that comes when rules are avoided -- is the error of empowering poor decision-makers to exercise too much discretion. And the other type of error – the error that comes when rules are the dominant form of decision-making -- is the error that is the consequence of hampering and constraining wise and experienced decision-makers by rigid rules.

There is no acontextual answer to the question whether rule-based decision-making, understood in this way, is a good thing. Under some circumstances the errors of excess discretion will be especially likely, and rule-based decision-making will be advisable. And under others the errors of excess rigidity will be the problem, and thus discretion will be the wise course. But there can be no avoiding the trade-off, and no avoiding the fact that the allowance of discretion will come at the expense of certainty, predictability, reliability, consistency, and the constraint of less-than-optimal decision-makers, and that denying discretion comes at the expense of allowing – in an uncertain, unpredictable, and rapidly changing world – the best decision-makers to make the optimal decisions under all of the circumstances as they are then able to perceive them.

IV Rules, Disagreement, and Political Environments

As we think about the virtues and vices of rules, it should be apparent that rules are likely

to look desirable to those who impose them and less so to those who are constrained by them. Rules are for other people, it might be said. And thus in any institutional environment, those who wish to make rules for their subordinates, and who easily see the virtues of rules in constraining the discretion of others, are less likely to see the virtues of the rules that would hamper their own discretion rather than the discretion of others.

Yet however common such a view is, it suffers from a series of related defects. First, it is well-known, and now even more that we have the benefits of learning from modern social psychology and behavioral economics,[4] that decision-makers are systematically likely to over-estimate their own decision-making abilities and relatedly to over-estimate their power to assess accurately the realities and the equities of the particular issue before them. Research on clinical versus actuarial predictions of dangerousness, for example, strongly suggests that predicting the future dangerousness of past offenders, or those confined for reasons of mental illness, is more accurately done on the basis of observable and actuarially assessed characteristics than on the basis of face-to-face interviews by even the best trained of professional clinicians.[5] And in numerous other domains of decision and judgment, those who are asked, implicitly, to evaluate their own decision-making skills will systematically err on the high side, accordingly over-estimating their judgment about particular cases and just as much under-estimating the importance of rules that might limit the number and effect of their errors of judgment and errors of factual assessment.

This feature of decision-making becomes especially important in the context of politically controversial and politically sensitive decision-making environments.[6] In such

[4]Many of the classics are collected in Daniel Kahneman, Paul Slovic, and Amos Tversky, Judgment Under Uncertainty: Heuristics and Biases (Cambridge: Cambridge University Press, 1982); Thomas Gilovich, Dale Griffin, and Daniel Kahneman, Heuristics and Biases: The Psychology of Intuitive Judgment (Cambridge: Cambridge University Press, 2002); Scott Plous, The Psychology of Judgment and Decision (New York: Macmillan, 1993).

[5]I discuss this and related issues and research in Frederick Schauer, Profiles, Probabilities, and Stereotypes (Cambridge, Massachusetts: Harvard University Press, 2003).

[6]In the context of this immediate lecture, I recognize, of course, that the view of the International Criminal Court as either controversial or politically sensitive is itself not a view widely shared by liberal democracies other than the United States. Thus, it could very plausibly be argued that the only controversy about the International Criminal Court among liberal democracies is a controversy created largely by only one

contexts the degree of distrust by an external environment is likely to be large, and it is a virtue of rules that they are transparent in ways that discretion is not. And insofar as secrecy fosters distrust and the exacerbation of political conflict while transparency can foster the view that no one side or faction is doing things that cannot be accounted for, rules can be the path to greater external legitimacy. When there is widespread agreement among decision-makers, and when decision-makers have the same values and the same background and the same skills, discretion is likely to seem most desirable. And that is perhaps why the common law, a far more discretionary approach to legal decision-making than the civil law,[7] arose at a time when it was widely believed that English judges, by virtue of their training and background, could be trusted to perceive the best solution to a legal problem even when they were not constrained by rigid written rules. But although in some sense the method of the common law still flourishes in common law countries, it is still not without interest that even in such countries the system of equity is now a system of rules, that detailed legislation is as common as it is in civil law countries, and that judges are much more rarely entrusted with the major responsibility of making law.

Some of this change in common law systems has come from the progressive realization that common law judges were unlikely all to reach the same answer, that common law judges were not representative of all factions and segments of a population, and that common law decision-making often involved the selection of one segment of society over another, but in a largely non-transparent way. And thus once it was recognized that a largely discretionary institution was ill-suited to an environment of competing political factions, and ill-suited to an

international actor. I acknowledge the issue, but will leave to others to explore the relevance of what I say to this particular controversy, and thus even to the question whether the ICC should be considered, or consider itself, as engaged in a politically controversial or politically sensitive enterprise.

[7]There are, of course, other important aspects of the differences between common law and civil law systems, but here I focus only on the distinction between the common law's tolerance for (and occasional celebration of) judicial law-making as compared to the civil law's at best grudging acceptance of the same phenomenon, coupled with its desire to limit its scope. See Richard A. Posner, "Common Law versus Statute Law," in The Problems of Jurisprudence (Cambridge, Massachusetts: Harvard University Press, 1990), pp. 247 ff.; Katharina Pistor and Chenggang Xu, "Incomplete Law," New York University Journal of International Law and Politics, vol. 35 (2003), pp. 931ff.; Paul Rubin, "Common Law and Statute Law," Journal of Legal Studies, vol. 11 (1982), pp. 205 ff.

environment in which its very legitimacy was under attack, some of the discretionary aspects of the common law gave way to the virtues of explicit and precise rules.

There has, of course, been movement in the other direction as well. Civil law systems now take precedent more seriously than they did in the past, and civil law systems recognize, as Jeremy Bentham (who was, ironically, more of an enthusiast for a civil law approach than virtually anyone who lived in a civil law country) did not,[8] that no system of rules can be so precise and so gap-free as to render the exercise of wisdom, judgment, and discretion unnecessary. As a result, we have seen some movement by the civil law towards some of the methods of the common law, but it is not without interest that this movement has been rather less than the movement in the opposite direction. There has been some convergence,[9] but that convergence, in a world of political conflict, in a world of diversity in every sense of that word, and in a world of distrust, is a convergence at an equilibrium point that is closer to the civil law than to the common law end of the spectrum.

There is a lesson in this, perhaps, for the organization approach of institutions that operate in an environment of political conflict, that draw their members and employees from diverse cultures and perspectives, and that have a need to legitimate their efforts to the outside world. Because rules are general, they dampen differences, and can serve as focal points of agreement among otherwise disagreeing parties. Those disagreements may not go away, but at least everyone will know what the rules are, and that they are applied according to their plain terms to all who are subject to them. In that sense, rules can create domains of agreement among those who would otherwise disagree, and domains of transparency when otherwise discretion would be distrusted. And because rules are transparent to the larger world as well, institutions that are organized according to publicly accessible and faithfully enforced rules are likely to

[8] See Gerald J. Postema, Bentham and the Common Law Tradition (Oxford: Clarendon Press, 1986); Gerald J. Postema, "Classical Common Law Jurisprudence," Oxford University Commonwealth Law Journal, vol. 2 (2003), pp. 155 ff.
[9] See Frederick Schauer, "The Convergence of Rules and Standards," [2003] New Zealand Law Review, pp. 303 ff.

inspire confidence from otherwise distrustful external constituencies.

The choices are not as stark as just presented. It is common, for example, to describe the distinction between rules and discretion in terms of a distinction between rules and standards, where rules, under this terminology, are highly precise, and standards are broad and open-ended, such as "due process of law," "human dignity," and "equality," terms whose very open-ended-ness produces discretion for those who must interpret, apply, and enforce them.[10] And if we see rules and standards as a spectrum, and institutional designers as facing choices about where to place various directives on this spectrum, the suggestion here is not that all directives need be or could be maximally precise, but only that the circumstances of less than full legitimacy (in the empirical and not the normative sense), considerable political division, diversity of staffing, and internal and external skepticism are ones in which the aggregating and discretion-limiting tendencies of rules might suggest locating many directives more at the rules end than at the standards end of the rules/standards spectrum.

V Rules and International Law

Much of the foregoing is addressed largely to questions about the internal organization of international and multi-national institutions, yet it pertains as well to the external missions of those organizations. Under a discretionary approach, an international or multi-national organization could operate in a largely discretionary fashion, and implicitly to announce to the world and to its various external constituencies that the institution's judgment should be trusted and its wisdom respected. And in an ideal world, such a discretion-seeking approach may well be the most desirable course. But we do not live in an ideal world, and indeed rules themselves can be thought of as second-best solutions in non-ideal decision-making environments. And thus

[10] See Louis Kaplow, "Rules versus Standards: An Economic Analysis," Duke Law Journal, vol. 42 (1992), pp. 557 ff.; Russell B. Korobkin, "Behavioral Analysis and Legal Form," Rules versus Standards Revisited," Oregon Law Review, vol. 79 (2000), pp. 23 ff.

when international institutions – and international law is itself such an institution, as are the institutions that enforce, interpret, and promote international law – operate in an environment in which their authority and their empirical legitimacy may not yet be fully entrenched, and in which their motives may at times be distrusted, there may be virtues in those institutions saying that they will adopt clear precise rules and enforce them faithfully, rather than expecting a skeptical world to trust their discretion.

As I explained above, rules are either actually or potentially both under- and over-inclusive, and thus proceeding by rules externally will leave major problems untouched, and at times non-problems touched too much. But that is the downside of any system of rules. And it is a downside that is hardest to swallow when the stakes are largest. Any system of international law, and especially a system of international humanitarian and criminal law, will deal with the greatest problems and greatest horrors of humanity. In such a context it is tempting to design a system in which the goal is to get every case right, all things considered. But the search for justice and equity in every case is inevitably in tension with the virtues of predictability, reliance, certainty, and consistency that a more precise and more rigid system of rules would bring, as well as being in some tension with the transparency of decision-making methods that rules bring as well. And it is certainly in tension with the importance of persuading a skeptical constituency that international law rests on more than the discretion of the powerful. So although it is at times painful to swallow the mistakes that any rule-based decision-making system will bring, it may be better in the long run to swallow such mistakes in exchange for the advantages of legitimacy and transparency that come from rules far more than from discretion.

International law, ironically, may owe too much to the American constitutional model, insofar as many, arguably too many, of its instruments resemble the manifesto-like language of the Constitution of the United States. Such language, more standard-like than rule-like, is discretion empowering, and also capable of being genuinely inspiring in ways that the new

European Constitution cannot be, nor can the 237 page Constitution of Brazil, or nor can even much of the 114 page Constitution of the Republic of South Africa. But inspiring the public and empowering the discretion of inevitably mortal human beings cannot be the only goals, and it may be that the path of future success for international law and international organizations will not be the path of broad manifestos, but rather the path of precisely drafted law-like documents aggressively but almost mechanically enforced. The more rule-like international law becomes, the more it may resemble municipal law, and the more it resembles municipal law the more it may dramatically increase its legitimacy, its acceptance, and, in the final analysis, its effectiveness.