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## A Clarion Call for Strengthening the Rule of Law

Penelope Andrews<sup>1</sup>

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Rick Abel is one of the most prolific law and society scholars, whose research and scholarship on the legal profession, the rule of law, legal ethics and related topics has been admired in the United States and abroad.<sup>1</sup> His research and scholarship have focused not just on the American legal tradition, but also comparative global legal projects which he has analyzed in thoughtful and captivating ways. For example, his book on the rule of law under apartheid, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980–1994*, is one of the most compelling of the literature on law under apartheid.

In his latest ambitious scholarship project, *Law's Trials and Law's Wars*, Abel grapples with the meaning, status, capacity and sustainability of the rule of law in the so-called war against terrorism. In essence, these two volumes are a clarion call for the increased protection of human rights and the overall strengthening of the rule of law.

*Law's Trials and Law's Wars* are a reminder of the rule of law as the foundation of the modern liberal democratic state, often encompassing a fairly detailed constitution and Bill of Rights. Indeed, the end of the 20th century, in the wake of the collapse of the Berlin Wall and the end of the cold war, seemed to signal the triumphant ascendancy of liberal democracies globally.<sup>2</sup> The drafting of South Africa's Constitution and extensive Bill of Rights in the last decade of the 20th century was arguably the high-water mark for the rule of law, and a bookend to a century afflicted by armed conflict, political and social upheaval, and monumental

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<sup>1</sup> Professor Abel's books include *Lawyers in the dock: learning from attorney disciplinary proceedings* (2008); *English lawyers between market and state: the politics of professionalism* (2003); *Speaking respect, respecting speech* (1998); *Lawyers: a critical reader* (1997); *Politics by other means: law in the struggle against apartheid, 1980–1994* (1995); *The Law & Society reader* (1995); *Speech and respect* (1994); *American lawyers* (1989); *The legal profession in England and Wales* (1988); *The politics of informal justice* (editor, 1982); and *Lawyers in society* (co-editor, 1988–1989).

<sup>2</sup> See, for example, Ewan Harrison et al. *The triumph of democracy and the eclipse of the west* (2014); Jan Werner-Muller, *Contesting democracy: political ideas in twentieth-century Europe* (2017).

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economic challenges. As Abel points out, at the dawn of the 21st century, the events of 9/11 in the United States and laws and policies promulgated in its wake were to put the rule of law under considerable strain, which Abel grapples with in these two volumes.

Several well-known South African authors and critics of apartheid have nodded to the significance of the rule of law in their work. For example, noted author Alan Paton observed that the rule of law was “one of the noblest achievements of sinful man...protecting himself against his own cruelty and selfishness,”<sup>3</sup> while Nadine Gordimer extolled the Universal Declaration as “the essential document, the touchstone, the creed of humanity.”<sup>4</sup> John Dugard, in his important book, *Human Rights and the South African Legal Order*, written in 1978 at the height of apartheid, was a searing critique of apartheid and its ongoing violations of the rule of law.<sup>5</sup>

Globally the rule of law has been seen as the yardstick by which societies measure democracy and legitimacy. For much of the latter half of the 20th century the rule of law was the lingua franca of progressive politics and in many ways displaced all political discourses regarding political transitions, including transitional justice. In countries that have emerged from authoritarian or repressive histories of governance, and for whom new legal and constitutional arrangements were seen as transformative, the rule of law has been central to this goal.<sup>6</sup>

But of course, critics of the rule of law point out how the powerful can use it as a weapon to preserve their privilege and prerogatives. This critique is particularly acute now in South Africa against the constitutional arrangement—especially in relation to property and land rights.<sup>7</sup> And the rule of law can also be distorted—as Professor Kim Scheppele pointed out in her Presidential address to the Law and Society Association at their meeting in Washington in June 2019, where she highlighted the distortion of the rule of law in Hungary.

Another critique of the rule of law is that it is too constrained, because it limits proscribed harms to state power. This is so in the knowledge that significant harms are caused by private actors including private employers, manufacturers, financiers, polluters, landowners and even intimate partners.

In *Law's Trials and Law's Wars* Abel confronts this critique squarely, by arguing that even if the rule of law has some unfortunate consequences, he remains convinced by E.P. Thompson's “eloquent” assertions that the “transcendent values of the rule of law must be defended”.

In these two volumes Abel traces the 800-year pedigree of the rule of law, emerging from the Magna Carta through to the seventeenth century English Petition of

<sup>3</sup> Richard I. Abel, *Law's wars: the fate of the rule of the law in the Us 'war on terror'* (2018) 6.

<sup>4</sup> *Ibid.*

<sup>5</sup> John Dugard, *Human rights and the south african legal order* (1978).

<sup>6</sup> Ruti Teitel, *Transitional justice* (2001).

<sup>7</sup> Rosalind Dixon and Theunis Roux, *Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, 2018 UNSWLRS 64 at: file:///C:/Users/Owner/AppData/Local/Packages/Microsoft.MicrosoftEdge\_8wekyb3d8bbwe/TempState/Downloads/SSRN-id3251131%20(1).pdf.

Right, the eighteenth century French Universal Declaration of Human Rights and the 20th century Universal Declarations of Human Rights and the International Convention on Civil and Political Rights.

What Abel tries to do in *Law's Trials and Law's Wars* is to assess the resilience of the rule of law in the United States in the wake of 9/11 and the new world order that it engendered, particularly the endless "war on terror". This means engaging with the historical record, which Abel does with a thoroughness and clarity of thought that has animated his admirable body of scholarship.

Abel points out the importance of the rule of law in the face of the increasing power and influence of the bureaucratic state, which has spread its tentacles more and more into the lives of citizens. What Abel is grappling with in these two books is the resilience and endurance of the law rule of law, but also how the rule of law really is most endangered at the moment it is most needed. This is especially so when those exercising state power feel threatened, conscripting a range of constitutional devices, including the resort to states of emergency, sometimes in a cavalier manner.

Abel focuses his gaze on United States legal history, notably during armed conflict when state existential threats led to steps to thwart the rule of law. Abel notes the suspension of habeas corpus during the American Civil War, the treatment of German Americans in the First World War and Japanese Americans in the Second, the repression of radicals after both wars, especially communists during the Cold War, and campaigns against the Vietnam War and for civil rights. In the United Kingdom it included 20th century labor strife and campaigns against the Irish Republican Army. In South Africa it extended across the four decades of white minority rule under apartheid.

In the two volumes Abel explores when the rule of law had been weakest and when it was most effective—and particularly since 9/11. He examines the role of courts, the legislatures, the executive, the media and civil society and their particular contributions to and engagements with the rule of law. Abel analyzes the way that these actors serve as a kind of countervailing power or influence to oppose state measures that threaten or violate the rule of law.

Both volumes are comprehensive, with "Law's Trials" exploring the judiciary, criminal prosecutions, habeas corpus, military commissions, courts martial, civil damage actions, and civil liberties.

"Law's Wars" is organized around various sites of rule of law contestation, including Abu Ghraib and Guantánamo Bay, responses to media and NGO disclosures of harsh interrogation, electronic surveillance, extraordinary renditions, secret prisons, and targeted killings, and reactions to civilian casualties on the battlefield.

My brief remarks are focused of some of the chapters in *Law's Trials*, namely on Judging the Judges, Defending the Rule of Law, Civil Liberties and Reversible Error. In *Law's Wars* I pay special attention to the chapter on the Resilience of the Rule of Law.

Abel points to the significance of the rule of law, even for governments that are not democratic. This significance is currently being explored by a range of scholars under the moniker of authoritarian constitutionalism. So, for example, as Martin Chanock has pointed out, it was the processes of law and legalism that kept

apartheid in place, far more than extra-legal measures, even though those measures were used.<sup>8</sup> It was important for the apartheid state to have legitimacy. As Abel points out, quoting E.P. Thompson:

The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just....<sup>9</sup>

with rulers who become,

prisoners of their own rhetoric: they played the games of power according to the rules which suited them, but they could not break those rules or the whole game would be thrown away.<sup>10</sup>

This creates a legal paradox: Having this edifice of the rule of law gives law the possibility of appearing to be just, and in order to uphold its own logic, it sometimes is just. This paradox is explored with compelling insights in Abel's earlier work on South Africa. In *Politics by Other Means: Law in the Struggle Against Apartheid*, Abel examines how, despite a hugely racist and repressive system without constitutional protections, public interest lawyers were able to carve out some legal victories.<sup>11</sup>

Arguably, this is also the case with the so-called war on terror. The United States government shaped the official justifications that appear to coincide with the rule of law, even though they are then challenged and the courts either disagree or allow certain measures, in line with the justification. Abel gives an example where the Bush administration offered justifications for a range of questionable "legal" tactics, including prisoner detention in Guantánamo Bay, torture, extraordinary rendition, secret prisons, and electronic surveillance—all supposedly conforming to the rule of law. Another example that Abel provides is the Foreign Intelligence Surveillance Court to authorize wiretapping—the veneer of the rule of law devoid of the substance.

During times of emergency, carved out of the constitutional mandate, the key considerations are what rights should be suspended and what procedural protections are relaxed and even dispensed with.

In the chapter, *Judging the Judges*, Abel outlines the conflicting ideologies and shifts in early struggles around the rule of law, with surprising bedfellows on either side. He mentions, for example, how the ACLU, the National Lawyers Guild and the Nation remained silent during the Japanese internment during the Second World War. Abel also finds unlikely heroes in judges who refused to tolerate the repressive strategies of prior administrations, particularly during the two "great" wars (the first

<sup>8</sup> Martin Chanock, *The making of South African legal culture 1902-1936: fear, favour and prejudice* by Martin Chanock (2001).

<sup>9</sup> Richard L. Abel, *Law's wars*, supra Note 3 at 6.

<sup>10</sup> *Ibid.*

<sup>11</sup> Richard L. Abel, *Politics by other means: law in the struggle against apartheid*, supra Note 2.

and second world wars) of the 20th century, the Vietnam war, the McCarthy era and other such ignoble episodes of American history.

Abel cites for notable mention Justice Jackson's Dissent in *Korematsu v*—one of the Supreme Court's most dishonorable judgements:

[O]nce a judicial opinion rationalizes [a military order] to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.<sup>12</sup>

Justice Jackson's words are prescient especially if one observes the push back on immigration and the rights of asylum seekers, as well as such odious practices as the Muslim travel ban and other contemporary policies of the Trump administration.

In *Law's Trials* and *Law's Wars* Abel reminds us of the need for vigilance in upholding the rule of law—and the need for civil society, the legal community and the media to attempt to expose secretive government activities that violate the rule of law. As Abel so colorfully notes, “sunshine is the best disinfectant”.<sup>13</sup> It is only when the public sees the extent of the violations of the rule of law, can lawyers, as well as the wider society, respond in the most effective manner.

As Abel argues, after the events of 9/11, in the prevailing atmosphere of fear and anxiety, it seemed that most Americans gave significant deference to the Bush administration to pursue so-called terrorists. There were limited, but not widespread, protests and opposition to the operation of the prison at Guantanamo Bay and Abu Ghraib, although large sections of the American public were horrified at the reports and images that were released by the media. In the final analysis, the majority of Americans seemed to brush off violations of the rule of law, seemingly surrendering their rights to advance their safety and security.

Abel grapples with the several ways that the legislature, during the Bush Presidency, failed in their tasks to constrain executive power, with partisan politics the reigning currency. Subterfuge and secrecy course were features of the war on terror during the Bush years. Abel questions whether and how secrecy thwarted the oversight powers of the legislature. President Obama attempted to be more transparent—but only to a limited extent.

Abel points out how in the immediate aftermath of the 9/11 attacks, the US detained, abused, and deported hundreds of Muslims without documents, and forced tens of thousands of legal residents to register. He points out how non-citizens were subjected to various rendition programs and tortured, detained in Guantánamo and secret prisons, and subjected to widespread surveillance.

<sup>12</sup> Richard L. Abel, *Law's trials: the performance of Us Institutions in the Us "War on Terror"* (2018) at 598.

<sup>13</sup> Richard L. Abel, *Law's wars*, supra Note 3 at 657.

Abel also points out the contradiction of the USA denying the protection of American laws to non-citizens, while the USA refused to let its own citizens be subjected to foreign law. No American has been tried on foreign soil for crimes committed during American conflicts in the wake of 9/11, including private security companies like Blackwater and CIA contractors. The United States government showed much more diligence in investigating friendly fire incidents against its own citizens and those of the United Kingdom, than mass killings of Afghans, Pakistanis, Yemenis, or Iraqis.

But the story is not entirely a negative one and the procedural aspects of the rule of law often prevailed. For example, the Supreme Court in *Rasul v Bush* and *Boumediene v Bush* granted and reaffirmed for detainees the right to seek habeas corpus.

Abel points out how the majority of those victimized by the US “war on terror” were powerless to resist. But history repeatedly reveals the powers of the weak: Gandhi’s non-violence resistance in India; Martin Luther King Jr. and the Student Non-violent Coordinating Committee in the civil rights struggle; the IRA dirty protest in the Maze Prison and Bobby Sands’s death; cycles of protest, security force killings and funerals in South Africa and parallels with Black Lives Matter in the US; self-immolations by Buddhists in South Vietnam and Tibetans to protest Chinese rule; women’s testimony about sexual abuse and abortion.

Abel notes how prisoners on Guantánamo engaged in a range of activities (throwing feces at prison guards, self-mutilation and hunger strikes)—and even though they were often punished, these tactics sometimes improved conditions of confinement, even though mostly temporarily.

Abel also explains the issue of the “clash of civilizations” and which moral discourse would prevail. Much of the debate centered on tactics for torture, with veterans like Senator John McCain being resolutely opposed to the use of torture. (His 6 years in a North Vietnamese prison endowed him with unique moral authority). He famously declared “it’s about us. It’s about who we were, who we are and who we aspire to be.” Senator Rand Paul offered libertarian arguments against surveillance and targeted killing. Those supporting the use of torture and other illegal methods utilized utilitarian arguments—to great effect.

Abel points out how the utilitarian trump card—the notorious “ticking bomb” hypothetical—is premised on numerous unknowns: that only under torture would the suspect disclose truthful information that was uniquely necessary and sufficient to stop an attack otherwise certain to occur. Proponents offered no evidence for any of these variables and probably could have obtained none. No torture advocate ever produced an actual example.

The most important lesson of these books is a paradox: the fate of the rule of law—whose *raison d’être* is to restrain the state from abusing its power—itself depends on politics. Single party control of the White House and Congress was the single most powerful determinant of responses to Abu Ghraib, Guantánamo Bay, harsh interrogation, electronic surveillance, secret prisons, extraordinary rendition, targeted killing, and civilian battlefield casualties. Decisions by federal judges on electronic surveillance, habeas corpus, civil damage actions, and civil liberties were significantly correlated with the political affiliation of the president who nominated them (which almost all shared). Republican senators blocked many of President

Obama's judicial nominations and eagerly confirmed Trump's. For Abel, the conclusion is clear: defenders of the rule of law must engage in politics, including the electoral process.

Abel's meticulous and comprehensive study in *Law's Trials and Law's Wars* is reminiscent of the questions raised during colonial and apartheid South Africa -and the long struggle for democracy there. The African National Congress was only victorious in governance nearly eight decades after its founding. It took nearly a century to unseat the minority white government. Many of the issues that Abel explores in the two volumes were similarly pertinent to an analysis of colonial and apartheid South Africa.

Abel refers to the Reverend Martin Luther King's statement that "the arc of the moral universe is long, but it bends towards justice". In the current climate, with the administration in Washington determined to erode the rule of law with odious policies on a range of issues, it is hard to be optimistic in the face of the Reverend King's exhortation. I can only touch on the varied and important issues raised in these two weighty and substantial volumes. Their compilation and the range of sources and questions raised will no doubt inspire and encourage a range of new and follow-up research projects.

It feels ungracious to criticize Abel's majestic volumes, almost like complaining about a five-star meal that you have enjoyed. But the only minor critique I have is that the sheer size and volume of *Law's Trials and Law's Wars* may put off some readers—not for the subject matter but for the time it may take to complete. But this is a minor quibble, since Abel writes so clearly and compellingly, that many may digest it like they would a good meal—course by course. And many may in fact recommend it as required reading for a course, especially since Abel throughout raises many helpful and important research questions.

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