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THEORETICAL BACKGROUNDS AND CULTURAL SENSITIVITY OF PROFESSOR POSTEMA'S LAW'S RULE

I would like to focus firstly on Chapter 6 ('Realizing Law's Rule') of Law's Rule, where Professor Postema argues that the rule of law is 'by its nature an institutionally realized ideal ' (113). Arguments particularly related to this thesis are developed, in Chapter 9 ('A Dialectic of Deference and Dissent'), where he shows that '[l]aw must provide opportunities for and protection of challenges to law and legal authority that are essential parts of accountability-holding' (179).[1] In Sections I and II, I will explore whether we can find some theoretical grounding for these two chapters of *Law's Rule*.

One of the other striking features of Professor Postema's project on the rule of law is the argument put forward in Chapter 7 ('Conditions and Limits'), where it is emphasised that 'the rule of law's institutional design must take into account the local circumstances, conditions, and resources of the political community in which it is to be realized' (131). As I will discuss in Section III, this illustrates the culture-sensitive perspective of Postema's ideas developed in *Law's Rule*. Finally, I would like to make some related comments in Section IV.

I. FIDELITY AND ACCOUNTABILITY

The concept of the rule of law in jurisprudence has primarily been debated in terms of whether it should be understood in a formalistic or a substantive manner. In the formalistic perspective, the rule of law is associated with principles such as generality, clarity, prospectivity, and consistency. Conversely, the substantive perspective connects the rule of law to essential values like constitutional rights, freedom, and human dignity. However, Postema offers a different and more practical interpretation of the rule of law. According to him, at its core, the rule of law 'promises protection and recourse against the arbitrary exercise of power using the distinctive tools of the law'. And 'fidelity', which, along

[1] The numbers in brackets indicate the corresponding page numbers in *Law's Rule*.

with 'sovereignty of law' and 'equality in the eyes of the law', immediately follows from this core idea of the rule of law, 'requires that all of its members, and not merely the legal or ruling elite, take responsibility for holding each other, and especially law's officials, accountable under the law' (xi). In other words, fidelity demands that all members of society 'submit to and participate in a network of mutual accountability'. And this mutual accountability necessitates 'a robust institutional infrastructure—multiple layers of permanently constituted institutions and practices of civil society' (124).

According to Professor Postema's argument in Chapter 6 of *Law's Rule* ('Realizing Law's Rule'), one of the critical components of mutual accountability is 'a structure of mandates and processes to ensure that government activities are fully transparent, supplemented by a legally protected, vigorous free press' (123). Postema refers to Bentham's scheme of 'securities against misrule', provided by his institution of the 'Public Opinion Tribunal' (123). With the help of the freedom of press, Bentham's Public Opinion Tribunal would scrutinise the conduct of officials and hold them accountable to the law, for if officials fail to account, they would face 'withdrawal of obedience and even collective opposition'.[2] In his *Utility, Publicity, and Law: Essays on Bentham's Moral and Legal Philosophy* (2019), Postema rightly observes that:

> *Other theorists have contributed greatly to our understanding of the formal and procedural elements of the rule of law, but to my knowledge no major legal theorist has contributed more to our understanding of its informal infrastructure. He [Bentham] analyzed the background conditions and engineered the supporting institutions needed for a comprehensive and effective architecture of accountability.* [3]

Discussions of Bentham's legal theory from a perspective of the rule of law had previously been very rare. It is possible to say that Professor Postema found an essential element of the rule of law in Bentham.

On the other hand, as I understand it, Bentham did not explicitly develop any infrastructure to ensure mutual accountability between private individuals. In his article, 'Fidelity in Law's Commonwealth' (2014), Postema shed light on this aspect of mutual accountability:

> *The responsibilities of fidelity concern not only, or even most fundamentally, relations between individual citizens and government officials (or the people and the government), but also concern mutual relations among members of law's*

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[2] Gerald J. Postema, Utility, Publicity, and Law: Essays on Bentham's Moral and Legal Philosophy (Oxford University Press 2019) 274.

[3] ibid 277.

commonwealth. [4]

This is because, 'if interpersonal (and in that sense private) relations among its members are carried on irrespective of that formal [private law] regime and legal resources for recourse against violations of its norms cannot be utilized, … the rule of law has failed to take root'.[5] And Postema emphasises the importance of lawyers who are 'uniquely situated to sustain … law's rule' (127).

This topic will be revisited in Section IV, where we will explore Professor Postema's more nuanced perspective on mutual accountability between private individuals in *Law's Rule*.

II. AGAINST FINALITY

In Chapter 9 of Law's Rule ('A Dialectic of Deference and Dissent'), Professor Postema argues that '[a]ccountability involves not only making and publicly expressing judgement that disagree with the decisions of authorities but also demanding the authorities' reasons for their decisions and actions, assessing those reasons, and acting on those assessments. Accountability-holding sometimes takes the form of protest, resistance, or even defiance of authorities'. And he adds that '[l] aw's rule can be effective only when there is wide scope for accountability and, consequently, room for civil dissent' (176). However, Postema rejects unlimited protest which would undermine the rule of law. So, '[t]he legitimacy of dissent in the view of the rule of law depends on dissenters acting on their best judgement of the law (considering both substantive reasons and reasons of authority) and costs to the community' (179).

One of the most interesting discussions in Chapter 9 of *Law's Rule* is Professor Postema's examination of the conflict between fidelity and finality. As he writes, 'the rule of law relies on robust practices of accountability; it encourages protest, resistance, whistle-blowing, even defiance of those who illegitimately speak in the name of law. It appears, then, that fidelity is on a collision course with finality' (171). Certainly, fidelity, that is mutual accountability with reason-giving, may collide with finality. However, it could be helpful here to explore the insights of Postema's Common Law theory, which also critiques the finality thesis.

In his article, 'Philosophy of the Common Law' (2002), Professor

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[4] Gerald J. Postema, 'Fidelity in Law's Commonwealth' in Lisa Austin and Dennis Klimchuk (eds), Private Law and the Rule of Law (Oxford University Press 2014) 39.

[5] ibid.

Postema writes that 'to focus on it [finality] exclusively blinds us to the fact that law not only institutionalizes the execution of deliberation, but also institutionalizes deliberation itself'.[6] And, examining the Common Law tradition, he argues that 'law as such can function only if it is congruent to a substantial degree with the social life of the community it seeks to govern'.[7] Postema calls this 'the congruence thesis' and argues that 'an institutionalized public forum in which the practice is carried on, one that models a form of public, collaborative reasoning and which is open to active and passive participation by citizens'[8] is necessary. This thesis on congruence appears to be relevant to Professor Postema's ideal of the rule of law.

III . CULTURAL VARIABILITY AND THE RULE OF LAW

In Chapter 7 of Law's Rule ('Conditions and Limits'), Professor Postema offers a culturally sensitive perspective. In this chapter, he explores the concept of 'cultural variability' (131-32), which suggests that the implementation of the rule of law can differ based on local social, cultural, moral, and environmental conditions, as well as the resources available for its construction and effective functioning. This perspective provides valuable analytical tools to identify the challenges in achieving the ideal of the rule of law.

According to Professor Postema, one of the dimensions of robustness is that '[t]he machinery can function better or worse. The design might be adequate, but for a variety of reasons, the institution just does not work well' (131).

As we saw in Section I, Postema writes that mutual accountability, which is demanded by fidelity, necessitates 'a robust institutional infrastructure'. And lawyers are essential for mutual accountability, fidelity, and the rule of law ideal. For '[l]aw can function effectively——it can offer normative guidance to those addressed by law, officials and lay people alike—only with the active assistance of lawyers' (127). Although it may not be widely recognised outside of Japan, the Japanese legal system underwent significant reforms at the beginning of this century. These changes included the establishment of law schools modelled after those in the United States, the introduction of a lay judge system inspired

[6] Gerald J. Postema, 'Philosophy of the Common Law' in Jules L. Coleman et al. (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2002) 618.

[7] ibid 616.

[8] ibid 618.

by Germany's, and various modifications to legal procedures. The core issue driving this reform was articulated by the Justice System Reform Council, which was established by the Japanese government, as follows:

> *For the spirit and rule of law to truly become an integral part of our country—essentially, for the law to permeate the nation and society as a whole and become embedded in the daily lives of the people—we must consider how the various components of the judicial system, as well as the legal professionals who work within it, should be reformed. These are the fundamental questions that the Council has posed to itself.*[9]

Echoing Professor Postema's argument, the primary goal of judicial reform in Japan has been establishing the rule of law among private individuals by increasing the number of lawyers. Thanks to the creation of new law schools, the number of lawyers in Japan has nearly tripled, rising from 15,866 in 1997 to 45,808 in 2024. However, it has been repeatedly noted that the number of lawsuits in Japan remains significantly lower than in Europe and the United States.[10]

It has been widely argued that the lower number of lawsuits and court cases in Japan, compared to Europe and the United States, is attributable to Japan's unique legal culture.

The Japanese legal system is influenced by Confucian ideas. In this framework, the law is viewed as a means to maintain order and educate individuals from a position of authority, while civil disputes between private individuals are typically resolved through customary law. This Confucian influence persists today. In civil disputes, the general public tends to avoid trials, favouring instead peaceful resolutions within the community. As a result, Alternative Dispute Resolution methods are widely utilized in Japan.

Although focusing on more traditional methods for resolving disputes, I think Professor Postema's discussion of 'cultural variability' can be applied to these situations. As we saw in Section I, besides 'fidelity' and 'equality', 'sovereignty of law' also directly derives from the core idea of the rule of law. And Postema argues that this idea of sovereignty of law 'comprises three subprinciples: legality, reflexivity [meaning that law applies to ruling power], and exclusivity' (54). However, according

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[9] The Justice System Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century* (2001) para 1.2.

[10] For example, in 2017, Japan had approximately 381 new lawsuits filed per 100,000 people. In comparison, California, USA, saw a much higher rate of 1,958 new lawsuits per 100,000 people, while France recorded even more at 2,172 new lawsuits per 100,000 people. These figures indicate that the number of lawsuits in Japan is generally much lower than in both the USA and France. Y. Murayama and R Hamada, *Sociology of Law* (3rd ed, Tokyo: Yuhikaku) 114.

to Postema, 'although nonstate justice systems may not meet familiar standards of the rule of law, they may satisfy rule of law functions. They serve the aim of more familiar institutions of the rule of law by other means' (133-4).

IV. SOME COMMENTS AS A CONCLUSION

I have focused on Chapters 6, 7, and 9 of Law's Rule and found them very convincing. Now I would like to make some comments, mainly regarding these chapters, for clarification.

A. The Scope for Fidelity

Professor Postema argues that 'any one person's or group's fidelity-responsibility is not limited to securing law's benefits for that person or group, but rather extends to all those who fall within the scope of law's demands and hence law's protection. In this further sense, we are bound for each other and for the whole' (74). As we saw in Section I, fidelity demands that all members of society submit to and participate in a network of mutual accountability. It is a very convincing argument that in the Jim Craw era of US South, the rule of law failed 'not because the government's law failed to take root in the community but rather because members of the white community failed to take their responsibilities with respect to that law seriously, responsibilities they owed to all members of their community' (75).

However, for instance, both from the principle of 'ought implies can' and Bentham's 'duty-and-interest-junction principle',[11] this seems too demanding. As is shown by Postema in his *Utility, Publicity, and Law*, although discussing 'the universal interest', Bentham argues that:

> *The individuals who compose the particular interest always are, or at least may be… a compact, harmonizing body; a chain of iron: the individuals making the universal interest are on every such occasion an unorganized, uncombined body; a rope of sand. Of the partakers in the universal interest, the proportion of interest centred in one individual is too small to afford sufficient inducement to apply his exertions to the support of his trifling share in the common interest.*[12]

Perhaps the same applies to the fidelity-responsibility that each individual owes to all community members for upholding the rule of law.

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[11] Postema (n 2) 50.

[12] Jeremy Bentham, *Colonies, Commerce, and Constitutional Law: Rid Yourselves of Ultramaria and Other Writings on Spain and Spanish America* (Philip Schofield ed, Clarendon Press 1995) 373. Cited in Postema (n 2) 139.

B. The Criteria for Dissent and the Congruence Thesis

In Chapter 9, Professor Postema distinguishes between 'civil dissent' and 'civil disobedience' by arguing that:

> *Civil disobedience involves violation of law in an effort to bring some wrongs or injustice to public attention. Civil dissent is law-focused protest or resistance. … Civil dissenters act on their judgement that the authorities got the law wrong (177).*

Postema adds that although acts of civil disobedience can be welcomed 'as legitimate exercises of democratic right of protest', their justification will not come from 'rule-of -law-inspired civil dissent' (180).

An example of a dissenter in Law's Rule is an American citizen who defied the town authorities' orders because they lacked a legal warrant (justification). Although this citizen was arrested and convicted for his defiance, the Supreme Court later upheld his legal challenge and overturned the conviction (178). It seems possible to understand that, for Professor Postema, acts of civil dissent are permitted only to the extent that the authority misunderstands the positive rules of the law. However, Professor Postema undertakes an interesting analysis of Lincoln, who is generally said to have violated the US Constitution by issuing the Emancipation Proclamation (1863):

> *On our understanding of the moral foundations of the rule of law and its immediately implied principles, equality in the eyes of the law is an integral component of the ideal. Slavery manifestly violated this core concern for equality. The dilemma, seen in this light, concerned how the best to honor the rule of law (143).*

Moreover, Postema argues that 'the rule of law requires that lawyers and judges regard themselves as acting in the name of the community as a whole' (143). And he adds that judges and lawyers must act according to the 'principles of public political morality…—principles that are binding upon the community as a whole, in whose name judge and lawyers must act' (143).

Considering 'the congruence thesis' we saw in Section II, Postema seems to have a broad view of law, which allows quite wide opportunities for civil dissent.

C. Mutual Accountability and Cultural Sensitivity

In Section I, we saw that in 'Fidelity in Law's Commonwealth' (2014), Professor Postema emphasised the significance of mutual accountability, or fidelity, between private individuals. In his discussion of the rule of law concerning private individuals in *Law's Rule*, he seems to concentrate

more on the implied principle of equality before the law. To reiterate, 'equality' as well as 'fidelity,' and 'sovereignty of law', directly derive from the core idea of the rule of law: limiting the arbitrary exercise of power. Professor Postema articulates the ideal of equality within the context of the rule of law as follows:

> *The rule of law—promising protection and recourse against the arbitrary exercise of power—demands reflexivity. Reflexivity calls for subjection of officials as well as lay persons to the law. All are included in the scope of law's demands. Law is common to all, binding all. The scope of law's protections as well must be universal (62).*

Now, in Chapter 7 of *Law's Rule*, Professor Postema argues that 'there are significant areas of social and political life where we regard as unwelcome [the] intervention of the state through the long arm of the law and regard attempts to hold individuals accountable entirely out of place' (144). This is because:

> *exercising the responsibility of mutual accountability in some areas of community life, or pursued in some ways, can weaken and even tear asunder that bond [provided by fidelity], creating a climate of suspicion and distrust rather than one of solidarity and mutual commitment. Too vigorous or too intensely pursued accountability-holding can incur heavy costs of intrusion and distortion. Decency requires that we pay sensitive attention to the time, place, and especially the manner in which a fellow member is called to account (148).*

In these instances, equality appears to play a significant role. Postema argues that it is possible for us to 'find major asymmetry of power in the nonpublic domain as well [as in the public domain]; and where this is true, the rule of law may legitimately make demands on power wielders' (145). So, for instance, the rule of law itself can justify 'preventing a landlord from unilaterally terminating a tenancy agreement in retaliation against the tenants' attempt to use the law to enforce their housing rights. .... The landlord's unilateral termination of the tenancy … was a clear exercise of arbitrary power in an attempt to deny the tenants [equal] enjoyment of their legal rights' (35).

In Section III, we also noted that in Japan, influenced by Confucianism, the public tends to avoid civil disputes by prioritising peaceful resolutions within the community. Professor Postema's argument, which we have just seen, for limiting mutual accountability between private individuals, seems to support this situation in Japan. However, in Chapter 7 of Law's Rule, he also argues that '[a]ccountability is an expression of a commitment to that which binds the community together' (148) and

what should be excluded is using accountability to weaken that bond.[13]

At one point (134), Professor Postema cites a passage from a report of the Raoul Wallenberg Institute reading that '"there is usually no single right answer to the question how the rule of law requirement must be implemented" in a political community and its legal system'. However, with its complex structure, Postema's ideal of the rule of law gives us valuable tools for analysing the rule of law in a broader context that has only rarely been explored. Postema does not expect us to simply accept the status quo. And while Law's Rule may not provide a definitive answer, it encourages us to seek the right balance among 'fidelity', 'equality', and 'sovereignty of law' in a manner that is appropriate for the specific situation at hand. This balance is essential for promoting the core principle of the rule of law: limiting the arbitrary exercise of power.

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[13] In this paper, I am not able to discuss this 'bond'. In Chapter 1 of Law's Rule, Postema, writes that 'law provides a bulwark of protection, a bridle on the powerful, both those in positions of political authority ("imperium") and those in the community at large who seek to dominate and exploit the weak, and a bond constituting and holding together the polity and giving public expression to an ideal of association' (7).