(Rule of) Law as Civilization

Antoine Bailleux
Professor of Law (USL-B)

Workshop
Law and constitutions in the civilizing process(es)
5–6 December 2019

1. This short presentation is based on a very limited knowledge of Elias' work. It is just an attempt from a lawyer's perspective to draw new connections between the German sociologist's analyses on the civilizing process and:
    a. A few insights from legal theory on the specificity of law; and
    b. Current developments regarding the "rule of law" movement.

2. It appears from Robert van Krieken's paper "Law and Civilization: Norbert Elias as a Regulation Theorist" that the vision of law underpinning Elias' work is both excessively broad and too narrow.

    a. Too broad because it encompasses any type of top-down regulation. Elias seems to implicitly endorse the Austinian definition of law as a set of general commands backed up by credible threats of punishment or other adverse consequences ("sanctions") in the event of non-compliance[1]. Yet, as H.L.A. Hart will later clarify, demands made upon a victim by a robber armed with a gun, although they match the above definition, cannot be regarded as law[2]. Similarly, the orders of a tyrant – or parental injunctions, for that matter –, while backed up by the prospect of sanctions, hardly qualify as law. This is because having *power* over someone, namely being in a position to make them act according to one's will (or whim), is not the same as having *authority* over them – which entails a legitimacy of some sort – let alone *legal authority* – which implies that this legitimacy originates in law itself.

    b. This brings me to the second point: Elias' (assumed) understanding of law is also too narrow because it seems to reduce it to its most visible expressions, i.e. rules and sanctions. Yet, as we just saw, this "normative sting" is not specific to law. After all, social organizations can exist – and develop to a certain extent – without a legal order.

3. If law cannot be reduced to a set of rules, then what it is? Hart gives us a first clue when he defines a legal order as a combination of primary and secondary norms. While primary norms either forbid or require certain actions and can generate duties or obligations, secondary norms set up the procedures through which primary rules can be introduced, modified, or enforced. By way of example, most national constitutions

[1] J. Austin, *The provinces of jurisprudence determined*, London, Murray, 1832.
[2] H.L.A. Hart, *The concept of law*, Oxford, OUP, 1961.

contain illustrations of both categories. They forbid some behaviors (e.g.: the State cannot invade the privacy of citizens) and they lay down procedures for the adoption, modification or repeal of primary norms (e.g. they regulate the adoption of statutes) or for their enforcement (e.g. they establish courts of law). According to Hart, there is no legal order (and no law) properly so-called in the absence of secondary norms.

4. Based on the above, I would like to make the claim that law's primary (and distinctive) mission is to confer power a sophisticated form of legitimacy. I am not talking here about the legitimacy that the leader of a pack derives from his physical superiority. I am not referring either to the kind of legitimacy that her medical training gives a doctor when she orders you to stay in bed or take your pills (expert-based legitimacy). I rather have in mind the Weberian type of legal rational authority inherent in any rule of law-based system, in which not only power is a check to power (as Montesquieu famously put it) but in which rules themselves give, share and curb power. To put it simply, the distinctive feature of law does not lie in the fact that the power is exercised through norms, but rather the opposite: that some norms pre-exist the exercise of power. And that the legitimacy of norms always and exclusively derives from other, pre-existing norms. This self-contained legitimization system carried by the law has a name: legality.

5. A closer look reveals that these norms can be roughly split up in two categories. Some of them *enable*. They empower specific people, in a specific setting, through specific channels and procedures, to enact rules that will be vested with legal authority. Some other rules *forbid*. They lay down the framework within which the "powers that be" can lawfully exercise their discretion: they set the stage for the free play of politics, including the limits that cannot be crossed (e.g. fundamental human rights). In that sense, legal regulation (statutes, decrees, etc.) is never made out of thin air. Lawmaking necessarily rests on a prior legal operation, namely identifying the legal basis of one's normative power as well the legal limits to the exercise of that power. To put it differently, making the law, issuing norms for the future, is a fundamentally political exercise – it is not a legal one. But the legitimacy of such an operation entails a backward-looking assessment typical of legal reasoning. It can be captured in the following question: does the legal text that we want to adopt fit into the pre-existing system of norms, both in terms of legal basis and of legal framework?

6. In other words, law is not a tool up for grabs by the most powerful; quite to the contrary, it is a civilizing mechanism that imposes self-restraint on the government, neutralizes the raw exercise of coercion and prevents the divide between public and private interest from collapsing.

7. You can see here the shift from what I understand to be the classic presentation of the relationship between law and civilization. According to that common view, the enforcement of law, as a set of rules aimed at governing people (citizens), is *supported* by civilization, i.e. informal rules of morality or good behavior. I do not intend to challenge this view, which is indisputable: it refers to what is sometimes called the "relative autonomy of law" in relation to facts: law will hardly secure obedience if its

content runs contrary to the beliefs and social practices of its addressees. But this again is not specific to law. It is true of any top-down regulation.

8. By contrast, law has a truly specific, distinctive relation to civilization. It is its relation to power. Just like civilization, law harnesses the exercise of power, domesticates it and regulates it. And just like the civilization process described by Elias, it first and foremost engages the ruling class of society (yesterday the King's court, today the rulemaking institutions), which is at both the giving and the receiving end of this circular process.

9. But let me now take a step further by bringing the current development of the rule of law into the picture. People tend to ignore this fact but the rule of law principles derive from the very essence of law as I just described it: they simply make explicit and expand on the logical prerequisites of any legal order, i.e. that the lawmakers must themselves abide by pre-existing norms.

10. I would like to make the bold claim that the current development of the rule of law (or, to put it differently, the increasing legalization of politics), is an offspring (or maybe the latest stage) of the civilizing process described by Elias, with practices such as discrimination or unreasoned decisions being banned from the public space, just like spitting, defecating (or, more to the point, the expression of emotions) once was. A number of common features support this genealogy,

11. First, and perhaps most obviously, the civilizing process and the development of the rule of law share a common origin: they both emerged in a context of social pacification. Just like the civilizing process responded to the need to contain violence in the late Middle Ages, the rule of law essentially picked up the same mission in a post-WW II context – after Auschwitz and the glaring failure of the apparently seamless civilizing process depicted by the German sociologist. But there is more. I understand that at least originally, the civilizing impetus was driven by a need for social distinction; knowing the unwritten codes of good manners was a way for the aristocracy to "stand out" and defend its status vis-à-vis the rising class of bourgeoisie. In a similar vein, it might be argued that the formidable development of the rule of law was (and still is) partly fueled by the same type of concern : it allowed Western States to seize the moral high ground and maintain some sort of superiority toward economically booming challengers such as China or India.

12. Second, and related to this, the rule of law-based civilizing process seems to operate through the same channels as that described by Elias: nowadays, countries are ranked according to their rules of law performances (based on a blaming and shaming strategy) and those who do not live up to the basic standards are simply not welcome in Western-based select "clubs" such as the EU or the Council of Europe. In contrast, those who share these standards will benefit from favorable treatment just like peers in the King's entourage. The well-established case-law of the European Court of Justice on mutual trust supports this view: because all Member States share the same values, each State must presume that the other States respect fundamental rights: legal checks and judicial enforcement of the rule of law principles are presumed to be no

longer necessary because these principles are deemed to be firmly anchored in the identity of each member of the European "club".

13. In relation to this, and it is my third point, it should be noted that the rule of law is supposed to be internalized in much the same way as the good manners identified by Elias: you are expected to respect the rule of law not because you fear retaliation or because of some commitment you made, but because you owe it to yourself: abiding by this rule has become part of your identity. This is most clearly illustrated by Advocate General Sharpston (member of the Court of Justice of the European Union) in an opinion of 2011, where she writes the following:

> 235. Cases involving allegations of involvement in terrorist activities often arouse visceral emotions. The terrorist, after all, appears to have no scruples about disregarding the sacred canons of civilised society. It may be difficult to avoid, even subconsciously, a public perception that we should, in turn, relax our ordinary commitments to a fair trial where such accusations are concerned. Those accused of involvement in terrorist activities, so the argument runs, are worthy of a lower degree of legal protection than those accused of more 'mainstream' offences.
>
> 236. (…). Yet it is the hallmark of a civilised society operating under the rule of law that the normal safeguards and guarantees are not abandoned in response to the fact that society's opponents are not playing by the same civilised rules.[3]

14. The civilized practices described by Elias and the rule of law principles share yet another feature: their lack of explicitness – which does not exclude some form of *ex post facto* codification. The rule of law requirements, just like good manners, cannot be captured in a single definition or in an exhaustive catalogue. A *well-educated* lawyer will immediately identify (or even "sense") a threat to the rule of law when she sees one just like a well-educated person will instinctively spot a flaw in a guest's manners, yet neither would have been able to positively and anticipatively describe the content of the norm that was just broken.

15. Interestingly, lawyers sometimes explicitly refer to the notion of civilization in order to underline this implicit (almost "natural") character of the (rule of) law.

    a. A famous example of it is given by Article 38 of the Statute of the International Court of Justice, which includes in the formal sources of international law the "general principles of law recognized by *civilized* nations". The precise content of such principles is left to anyone's (educated and civilized) guess…

    b. A second illustration is to be found in Article 7 of the European Convention on Human Rights, which provides that there should be no punishment without law. However, by way of exception, the second paragraph states that this

[3] C-27/09 P *French Republic v. People's Mojahedin Organization of Iran*, EU:C:2011:482.

principle "shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations". In other words, there are behaviors that any civilized person should know is inherently wrong even though they are not explicitly criminalized under positive law. Forced sexual intercourse within marriage was, on this basis, prosecuted as rape even though at the time, rape was defined under domestic law in such a way as to include only extra-marital sex. According to the ECtHR, "the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife [is] in conformity not only with a *civilised* concept of marriage but also, and above all, with the fundamental objectives of the Convention (…)."[4]

c. A third and subtler example can be found in the European Court of Justice's case-law about maladministration practices, which targets improper conduct in public office. As AG Geelhoed put it in the famous *Edith Cresson* case[5]:

> It is not entirely possible, nor is it useful to attempt to lay down standards for proper conduct in public office in an exhaustive manner. There will always be an element in which one may not be able to identify which standard has been breached, yet to be able to conclude that the conduct nevertheless is contrary to the general interest. It is in a way similar to how Kenneth Clark once described the phenomenon 'civilisation': 'What is civilisation? I don't know. I can't define it in abstract terms – yet. But I think I can recognise it when I see it...'.

16. Finally, one could argue that the rule of law movement is subject to an expansion dynamic comparable to that of the civilizing process. I understand from Elias' work that civilized manners rapidly extended beyond the aristocratic circles to progressively reach all the social classes. Similarly, basic rule of law principles – or at least the values behind them – are increasingly imposed on people who do not hold any kind of public power. Transparency and non-discrimination requirements are a prime example of such a shift. They became first binding on private bodies such as universities or hospitals in the selection of their contractors. They then extended to employers, orienting their recruitment practices. They now have reached the layman who leases property and looks for a reliable tenant. The increasing "horizontal enforceability" of fundamental rights epitomizes this trend.

17. But while the *dynamics* of the rule of law movement and civilizing process show striking similarities, the contents of the norms that they convey appear to be remarkably different – which arguably further supports the claim that the former is the continuation of the latter, and not the mere replica of its early episodes, as I will try to demonstrate below.

[4] *S.W. v. United Kingdom*, 22 November 1995, para. 44.
[5] C-432/04 *Commission v. Cresson*, EU:C:2006:140, para. 77.

18. The *horizontal* dimension of the rule of law norms starkly contrasts with the (originally) *vertical* connotation of civilized manners. The very purpose of the rule of law is to subject the people who hold power to the same rules as the public at large (with everyone becoming equal before the law), whereas good manners had (have?) the opposite objective: entrench and widen the gap between the ruling class and the masses (with special rules applying to and distinguishing the elite from the populace).

19. This opposition is reflected in the functioning of the "courts" which lie at the epicenter of respectively the civilizing process and the rule of law movement. From what I understand, the King's court is characterized by secrecy, asymmetry, arbitrariness, privileges, and exclusivity, features that the civilizing process seeks to sustain. Conversely, courts of law aim to ensure transparency (of the proceedings), equality (between parties), (legal) certainty, (enforcement of) rights and inclusiveness (of any potential litigant).

20. In the same vein, the relationship between the private and public spheres seems reversed. Whilst the original civilizing process leads to the development of a private sphere (acting in a civilized manner requires hiding certain practices and behaviors), the rule of law movement goes in the opposite direction. Any action that is not performed out in the open is suspicious, virtue being on the side of transparency and publicity.

21. It is not easy to make sense out of such shifts (from vertical to horizontal; from private to public). By way of conclusion, I would nonetheless like to float two ideas in that respect – apologizing in advance for the their potentially naive and piecemeal character.

22. The first one suggests linking up the first shift (from vertical to horizontal) to the development of modern theories of democracy. According to Elias, the monopolization of violence and coercion by nascent States was one of the main triggers of the civilizing process. I would suggest that rule of law-based democracies took this evolution a step further: they are built on the belief that this monopoly does not belong to the State apparatus (or to any incumbent political majority), but to the collective exercise of reason. Legal acts are backed up by coercion and force only to the extent that the people who hold office and (temporarily) impersonate the State can demonstrate that these acts fit into a broader legal system or, put differently, that they respect the rules of the game that we collectively watch.

23. This change in the holder of the monopoly of violence may explain why the civilizing process extended to the State itself, which must also exercise "self-restraint" and submit to the "law" (which is, and not the State, the ultimate source of legitimate violence). In a rule of law-based democratic regime, no one owns the law but the law belongs to everyone. Even the Constitutional Court (the mouthpiece of the State's "superego" in Freudian terms) can only review acts of the legislature according to the

law and based on legal reasoning. If this explanation is at least partially correct[6], then the shift we observed if anything supports the view that the rule of law movement is an offspring (or the latest stage) of the civilizing process.

24. The same goes for the second shift (from private to public), which arguably reflects a change in the relationship between the "public space" and civilized manners. In the process described by Elias (as I understood it), being in the "public sphere" *required* the adoption of civilized manners. As a consequence, shameful behaviors were simply relegated behind the scenes. The publicization dynamic accompanying the rule of law movement takes stock of this first step as it draws on the association of "public sphere" with "civilized manners". It seems based on the assumption that today, acting in public *guarantees* the adoption of civilized manners. As a consequence, imposing the publicity of a practice appears to be an efficient way to make sure that it is going to be carried out in a civilized manner. Of course, this is only a very partial explanation. Shifts in the conception of the "public space", a heightened sense of freedom (and therefore a greater aversion toward the unreasoned exercise of power) and a renewed confidence in deliberative rationality certainly also account for such an evolution. But if at all convincing, the explanation I just put forward should catch our attention as it further supports the hypothesis of a genealogy between the early stages of the civilizing process described by Elias and the current rule of law developments.

*

* *

[6] Obviously, other evolutions are also at play here, such as globalization and the increasing interdependence between countries, which act as a powerful incentive toward self-restraint (and incidentally also link up the rule of law movement to Elias' analyses), but this is probably so obvious that it does not need much explaining…