

# Rule of Law: What Does it Mean?\*

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The rule of law movement has been a major development in the world over the past two decades, a development in which I was substantially engaged during the time I served as Executive Director of the American Bar Association. Until now, this subject has received little attention in the curricula of our nation's law schools. This curricular void will be addressed in a presentation later in this Symposium. A Rule of Law Seminar has now been established at this Law School, and I am delighted that the Journal editors decided to focus the scholarship of this Symposium on this important subject.

An enormous amount of technical legal assistance work has been occurring throughout the world in recent years, primarily in newly established nation states and other underdeveloped countries, to develop a legal infrastructure to support fragile democratic governments in those states. This work has been described collectively as rule of law programs.

After the fall of the Wall in Berlin in 1990 and the collapse of the Soviet Union in 1991, a number of new nations came into existence. In fact about twenty of the new United Nations member states after 1990 emerged directly as a result of the fall of the Soviet Union. Most, if not all, of these nations have, on paper at least, a democratic form of government. There initially was wide-spread optimism about the future, especially in western countries, due to the fact that as a result of these changes, more people were living under a democratic form of government than at any previous time in human history. In fact, it has been estimated that between 1950 and the end of the 20th Century we had moved from less than one of every three persons on the planet living in a democratic state to nearly two out of every three persons in the world living under a democratic form of government.

Unfortunately, that early optimism has been tempered by events over the past fifteen plus years, as it became apparent that a democratic form of government does not ensure the freedom and liberty of its citizens and inhabitants. A democratic form of government may in fact allow and encourage a majority to abuse and deny the rights of minorities. The democratic process itself may be corrupted, resulting in a despotic government. Out of this awareness the rule of law movement was born.

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A threshold question, as we begin this Symposium, is what do we mean by the words the rule of law? It's a phrase that has been used with increasing frequency in recent years. The words are often invoked to support a variety of political agendas. "Support my proposals," we are frequently urged by speakers from all points on the political spectrum, "because this or that will promote the rule of law."

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\* This article has been edited substantially. All footnotes and many of the textual citations have been deleted from the article. Passages have been deleted. Given these substantial edits, it is worth reminding the reader that (a) in spite of the appearance of fewer legal citations, the author's opinion is, nevertheless, well-supported by legal precedent, (b) if the reader intends to rely on this article in an assignment for this course, the reader should obtain, and read, a complete, unedited version of this article, and (c) the edits have been made for purposes of efficiency, readability, and physical constraints, and do not reflect the political or ideological views of the editor.

Government leaders, judges, scholars, lawyers, speakers of all backgrounds invoke the rule of law as both the means to an end and as an end in itself. Everyone, it seems, is in favor of the rule of law.

The phrase has become chameleon-like, taking on whatever shade of meaning best fits the author's purpose. But without a clear definition, the rule of law is in danger of coming to mean virtually everything, so that it may in fact come to mean nothing at all. One scholar, the late Harvard political theorist Judith Shklar, has written that the phrase "has become meaningless thanks to ideological abuse and general over-use.... No intellectual effort need therefore be wasted on this bit of ruling-class chatter."

I disagree with Professor Shklar. Because of its potential to inspire individual actors and inform political and social change, I believe it is important to rigorously identify a meaning to the rule of law. To the extent we can more clearly identify the principles and values that are inherent in this concept, we can more effectively bring about the political and legal reforms that are necessary to advance it.

Two seminal writings in the past century have influenced thinking about this subject. Albert Dicey, a British lawyer and scholar, addressed the meaning of the rule of law in an important book in 1885. In "The Rule of Law," Dicey offered a definition of the words, after first noting what many other writers have noted: that the phrase is very difficult to define. Dicey concluded that the term included at least three concepts: first, the supremacy of the law as opposed to arbitrariness or even wide discretion by governments; second, the equality of all persons before the law; and third, in England, principles establishing the rights of individuals developed by case law through the centuries in that country.

Some fifty years later, Austrian economist, political theorist, and Nobel Laureate Friedrich Hayek published another influential writing adding meaning to the concept of rule of law. In 1960 Hayek wrote an important paper entitled, "The Origins of the Rule of Law," tracing the history of the concept of the rule of law through many centuries. Starting with the Greek and then the Roman philosophers, the British philosophers, and the French enlightenment, Hayek identified from these writings the ideas represented by the words the rule of law. Hayek argued persuasively that this concept has been understood, expressed, and advocated by philosophers for more than two thousand years.

Hayek credits Aristotle for introducing the concepts of separation of powers, predictability and superiority of law as essential characteristics of a free state. He further attributes to Aristotle the genesis of the phrase, "government by laws and not by men."

Aristotle contended over two thousand years prior to the American founding that the law maker should be separated from the judge and jury. This is so because lawmakers pass general laws prospectively, "while ... the juror [is] actually judging present and specific cases." Aristotle also argued that laws should be predictable and non-arbitrary. Aristotle wrote that governance by law is preferable to majority rule. "Anyone," he wrote, "who bids the law to rule seems to bid god and intellect alone to rule, but anyone who bids a human being to rule adds on also the wild beast." In short, Aristotle contended, the law is superior and binds everyone.

The Greeks had a word that captures much of the meaning of the rule of law - "isonomia." Translated, isonomia means equality of laws to all manner of persons. To the Greeks, the concept of isonomia was very important and, indeed, to some the word represented an even higher virtue than *democratia*, the idea which we identify with the Greek city states.

The Roman philosopher Cicero, writing almost 300 years after Aristotle, agreed that men should be mere mouthpieces for the law to express itself. Cicero argued that restricting judicial discretion was a necessary element to achieve freedom of the law. The idea of limiting judicial discretion was motivated primarily by the rule of law's disdain for arbitrariness. Abhorrence of

arbitrariness is a major theme that runs through all the rule of law writing through the centuries. They consistently expressed the view that individual decisions cannot be trusted because there is a strong possibility they will be arbitrary.

Hayek also traced the development of the rule of law concept through the writings of the great British legal scholars: Edward Coke, William Blackstone, David Hume, and of course, John Locke, who had such an enormous influence on our founding fathers. And these writings advocated the same important principles concerning the rule of law: the law should be superior, the law must be non-arbitrary, the law must be enforced by an independent judiciary separate from the lawmakers, the law must treat all persons equally.

The concept of the rule of law was clearly understood by the American founders. Even before the colonies formally declared their independence, Thomas Paine, in a widely circulated tract entitled "Common Sense," wrote "so far as we approve of monarchy, that in America THE LAW IS KING. For as in absolute governments the King is Law, so in free Countries the Law ought to be King; and there ought to be no other."

The founding fathers embedded these ideas in our remarkable Constitution and incorporated in it the important values of separation of powers, an independent judiciary, a government under law, and equality of all before the law.

The last twenty years have seen a great resurgence of thought and talk about the rule of law and its role in shaping and maintaining free societies. I don't recall the phrase being used when I was a student in law school, but now it is a dominant and fundamental core concept in the idea of freedom and justice. On the American side of the Atlantic, not least among those commentators taking up advocacy of the rule of law are several Justices of the Supreme Court of the United States. Two Justices in particular - Justice Anthony M. Kennedy and Justice Sandra Day O'Connor - in several speeches have either explicitly or implicitly through illustrations and examples sought to define the rule of law and identify its essential constituent parts.

Justice Kennedy has been the most detailed in his description of the rule of law. In an address he delivered to the American Bar Association in 2006 - amended a few days later by an address he delivered in Kuala Lumpur - Justice Kennedy set forth his definition, at a minimum, of a society governed by the rule of law in three paragraphs:

"1. The Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all its officials."

In this first paragraph of his definition, Justice Kennedy includes several concepts identified by the ancient philosophers - the law is known, not arbitrary; the law applies equally; and the law is superior.

"2. The Law must respect and preserve the dignity, equality, and human rights of all persons."

Justice Kennedy's definition includes a moral component to the rule of law. In Nazi Germany there were laws, and the laws were enforced, but this is not what is meant by the rule of law. What was missing there was a moral content, which Justice Kennedy described as "the dignity, equality, and human rights of all persons." Absent this moral content, the concept may be referred to as rule BY law, rather than rule OF law.

Justice Kennedy's second paragraph continues with the words, "To these ends the Law must establish and safeguard the constitutional structures necessary to build a free society in which all

citizens have a meaningful voice in shaping and enacting the rules that govern them.” In this part of his definition, Justice Kennedy raises an important issue: is democracy an essential requirement of the rule of law? I believe that it is. It might be possible to imagine a benevolent dictator who would provide all of these virtues for a society, but none can be identified in human history. Our experience supports the conclusion that a government in which the citizens participate in developing the rules by which they are bound is an essential element of the rule of law.

Justice Kennedy’s definition continues with a third paragraph:

“3. The Law must devise and maintain systems to advise all persons of their rights and it must empower them to fulfill just expectations and seek redress of grievances without fear or penalty of retaliation.”

In other words, the law must be enforceable.

Justice Sandra Day O’Connor, in remarks focused primarily on an independent judiciary which she has called the “lynchpin” of the rule of law, identified several “values” of the rule of law which she regarded as fundamental. First, she asserted that “the Rule of Law requires that legal rules be publicly known, consistently enforced, and even-handedly applied.” The separation of powers is “essential in maintaining the Rule of Law” in large part because it ensures decisions are made non-arbitrarily. The law is superior to any group or person “however powerful.” And the law should “always constrain the rule of man.” Justice O’Connor’s definition contains many of the concepts identified by the Greek, Roman, and British writers.

Justice O’Connor elevated an independent judiciary as more than just an element of the rule of law, but in fact “the foundation that underlies and supports the Rule of Law.” The judiciary plays an essential role in giving life to other values, such as predictability and transparency. In her characteristic direct manner, she described an independent judiciary as meaning the judges cannot do “any crazy thing [they] want,” but must act in a fair and impartial way.

Current scholarship and thinking about the rule of law has also occurred on the other side of the Atlantic. In 2006, Law Lord Thomas Bingham, delivered the Sir David Williams lecture on the subject of the rule of law. In his address he noted that the English Constitutional Reform Act of 2005 declared the rule of law to be a constitutional principal in the United Kingdom but did not define it. Since the statute did not define the rule of law, Lord Bingham undertook in this important lecture to set forth the values that he believed constituted the rule of law. He began by noting, as have so many other writers, how difficult the phrase is to define.

Lord Bingham offered this definition of the rule of law: “All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.” That is, the law is superior, applies equally, is known and predictable, and is administered through a separation of powers. Lord Bingham followed up this definition by setting forth eight sub-rules that comprise the general principles he expressed. Those sub-rules incorporate many of the concepts already identified: the law is accessible, clear, predictable, non-arbitrary, just, applies equally, protects human rights, resolves disputes without prohibitive cost or delay, and is enforceable.

More recently, the American Bar Association convened a World Justice Project in Vienna in 2008 to examine and promote the rule of law. As part of that project, the ABA developed a working definition of the rule of law that includes many of the same concepts previously identified. The World Justice Project also developed a rule of law index - a series of questions to ask about the circumstances in a specific nation state - in order to assist the leaders of that nation to assess the degree to which the rule of law is present or absent in that country.

To return to the question: what do we mean when we speak of the rule of law? We have more than two thousand years of writing and thinking about the rule of law to inform us - this is not a new, undeveloped set of ideas. Philosophers and scholars from different eras have identified values embraced by societies throughout history defining the meaning of the rule of law. Building on the common themes of ancient and modern writers, philosophers and jurists, I offer the following definition as ideal characteristics of a society governed by the rule of law:

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.
4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.
5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.

This definition should not appear revolutionary; it is based upon the words and ideas of jurists at the highest level of our nation, our founding fathers, and the philosophers and writers that helped lay the ideological foundation for western democracy. Together these rule of law values ensure that individuals are offered their best chance of fulfilling their maximum potential.

The rule of law, in the purist sense, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence should be judged in relative terms; what is possible in an advanced western democracy may not be possible in a developing nation. No country may rightfully claim perfect adherence to these ideals. The rule of law should be viewed as a lodestar to which counties can turn for guidance now and in the future. It is our most fundamental value.