

## The Rule of Law

The rule of law is the principle that governments and individuals can only act in accordance with publicly known laws that are adopted and enforced in a manner consistent with well established traditions, conventions and procedures. The rule of law was a foundational principle underpinning the preparation of the American Constitution and subsequently the Australian Constitution. It is a cornerstone of democratic societies. It embodies ideas that have been part of political debate since the times of the ancient Greek philosophers Plato and Aristotle.

### What are the main characteristics of the rule of law?

#### **Universality of the scope of the law**

The first principle of the rule of law is that all citizens come within the scope of the law, no matter what their eminence or authority. Those who make and enforce the law are therefore bound by it. Albert Venn Dicey set out one of the best known statements of this principle in 1895:

... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.... [Appointed government officials and politicians, alike] ... and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person (Albert Venn Dicey, *Law of the Constitution*, London: MacMillan, 9th ed., 1950, p.194).

Martin Krygier, international authority on the rule of law, argues that there is a political and social dimension to the principle. The political element is that governments and public officials must comply with the existing law while it is in force. Furthermore, there must be effective ways of forcing governments and officials to submit to the law. If these conditions are not met then a crucial aspect of the rule of law is missing.

The social dimension is equality for all citizens before the law. Traditionally this has been assumed to mean that the law should apply to all regardless of inequalities of wealth or status.

#### **Clarity for all citizens**

A second principle is that the law should be expressed in such a way that people can be guided by it. To achieve this goal a number of conditions must be met. The laws must be clear and understandable. The body of law cannot be contradictory. Laws should apply to future action (be prospective) rather than apply to actions which have already occurred (be retrospective). Unless this is so people will be unaware of their legal position and will be in constant fear of unknowingly breaking some future law. The body of law should be relatively stable because if laws are being constantly changed, people will not trust them. Laws must be taken seriously and enforced.

#### **Supportive and culturally appropriate institutions**

There need to be appropriate institutions to support the rule of law. These institutional arrangements are too varied and rich to be based on one model only. Nevertheless there are four central ideas supporting the principles of the rule of law that have been widely adopted. The first is that those who decide whether specific actions are legal or illegal should not be the same as those who have the power of decision-making in governments. Second, courts should not only be independent but also protected from interference. Third, traditions and conventions matter to ensure that legal decisions are based on reasonable interpretations of existing laws. Finally, there need to be measures to ensure that those who appear in the courts are given a fair hearing.

#### **Legal culture**

There needs to be a culture of law that is widely valued and shared among lawyers. There also needs to be broad agreement within the society that laws really matter.

## Related concepts

The 'rule of law' is usually associated with several other important principles. One is the separation of powers. In most English speaking countries the principle of the separation of powers asks that the legislature (the parliament), the executive (government) and the judiciary (courts) are independent from one another. The legislature enacts laws which it itself must obey while they are in force. The executive governs the country in accordance with existing laws. It may, however, introduce proposals for new laws whose passage depends on it having the necessary number of votes in parliament to ensure that the bill becomes law. The judiciary sits in judgement on civil and criminal cases that are brought before it, depending upon and interpreting existing law in its findings. The purpose of the separation of powers is to place checks and balances on the operation of each of these three institutions to ensure that none acts in an arbitrary and oppressive way. It is also to ensure that none of these institutions has control over the operation of the others.

In the United States one of the best known statements of the principle of separation of powers was drafted by John Adams for the constitution of the Commonwealth of Massachusetts:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.  
(Massachusetts Constitution, Part the First, art. XXX (1780).

It has been said that the last phrase, "to the end it may be a government of laws and not of men" has been quoted by courts across the United States.

Another important concept is that all individuals should be seen to be innocent until proven guilty by due legal process. A further principle is that individuals should only be punished *once* for a specific crime. This is known as the principle of double jeopardy. Retrials may, however, be permitted on the grounds of new evidence. A fourth is that a person who is arrested has the right to be told what crimes he or she is accused of, and to request that his or

her custody be reviewed by judicial authority. Persons unlawfully imprisoned have to be freed. This is known as the principle of *habeas corpus*, a Latin term meaning "Thou shalt have the body (subject to judicial examination)." In many English-speaking cultures there is also a rich tradition of common law, the body of law built up over long periods of time through the constant refinement of legal precedents by outstanding legal minds. Common law is not a necessary condition of the rule of law. It is, nonetheless, an example of the importance of legal culture.

## Critiques of the rule of law

It has been argued that the rule of law does not prevent a government acting in an arbitrary or biased manner. The principle of legal equality can easily be undermined since laws can affect people in different ways. On one interpretation of equality, measures to support disadvantaged citizens could be said to be contrary to the principle of the rule of law. The concept of 'rule of law' says nothing of the 'justness' of the laws themselves, but simply sets out how the legal system should uphold the law. Individual rights can be set aside when a government finds it convenient to do so. Anti-terrorism legislation is cited as an example.

## Responses: Why the rule of law is important

There is no perfect application of the rule of law. All the subversions of the principles of the rule of law described above can occur. The abuses are, however, much less likely to happen when a rule-of-law culture is strong.

When considering the significance of the rule of law, Krygier argues that we need to begin by asking: "What we are trying to achieve?" This question, he says, is best answered by contrasting the rule of law with its alternative, the arbitrary exercise of power. This is the evil that the rule of law is trying to curb.

The second question is: What are the main reasons for wishing to curb the arbitrary exercise of power? One widely agreed reason is to prevent or reduce the fear of harm and oppression. We rely upon the law to protect us from harm from other individuals or groups in our society. To do this effectively there have to be widely accepted rules of behaviour and sanctions for those who fail to observe those rules. We also need protection from the arbitrary

actions of the state itself. This is best achieved by requiring governments to operate under laws that conform to the character of the rule of law.

Another reason is to encourage beneficial interactions among citizens. There is need for 'legitimate expectations' between citizens without which their relationships will be uncertain and at times dangerous. Predictability is one need; security is another. Clarity about the rules affecting relationships between citizens is a third. In this way citizens are made aware of their rights and responsibilities vis-à-vis each other.

## Other legal traditions: Rule by law rather than the rule of law

There are other longstanding legal traditions that do not conform to the rule of law in the Western juridical tradition even when they use the same language. Chinese legal thinking, reaching far back into Chinese history, is an example. In the People's Republic of China there is an assumption that laws should enhance the power of the state and the nation. The Chinese government therefore adopts the principle of *rule by law* rather than *rule of law*. It is a crucial distinction. The rule of law seeks to place *limitations* on the discretionary powers of the government rather than to *enhance* them.

## Useful sources

Krygier, M. (2001). "Rule of law" in *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier Science Ltd, pp.13403-13408.

This fact sheet draws significantly on this essay.

Cooray, M. *The Australian Achievement: From Bondage to Freedom*, <http://www.ourcivilisation.com/cooray/btof/index18.htm>

A discussion of principles of the rule of law in an Australian liberal context.

Li, B. (2000). "What is Rule of law?" *Perspectives*, vol. 1(5), [http://www.oycf.org/Perspectives/5\\_043000/what\\_is\\_rule\\_of\\_law.htm](http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm)

A discussion of the meaning and the ideals of law.

See also discussion of Rule of Law in Wikipedia, [http://en.wikipedia.org/wiki/Rule\\_of\\_Law](http://en.wikipedia.org/wiki/Rule_of_Law)

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