Rule of Law - Sage Encyclopedia of Political Behavior Entry

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The “Rule of Law” is a political and jurisprudential construct that describes normative limitations on the ability of a state to impose and enforce legal obligations on its citizens. Popularly, the ideal of the Rule of Law holds that the state should govern through general and neutral laws that are enforced consistently by state actors who are bound by those legal structures. The antithesis of the Rule of Law is arbitrary exercise of power by individuals, groups, or bureaucracies and other state actors. The classic articulation of this concept is that a political unit should be governed by “the Rule of Law, not of men” with the ideal of equality before the law. Beyond these general propositions, however, there is substantial disagreement over the nature of those limits.

Contemporary Western jurisprudence of the Rule of Law – particularly in common law regimes – typically emphasizes the 19th Century legal scholar Andrew Venn Dicey. Writing primarily about the Rule of Law in England, Dicey proposed that the Rule of Law comprised three basic elements: (1) the predominance of law over exercise of arbitrary power; (2) equality of all citizens before the law, regardless of class or status; and (3) democratic involvement in creating law.

Later analyses of the Rule of Law attempted to identify core aspects of that ideal that should apply regardless of the specific culture or legal system. Consequently, the Rule of Law has a range of possible definitions. Some of these definitions describe in formal terms the nature of legal rules and the means for creating, promulgating, and enforcing those rules. Other definitions of the Rule of Law include substantive rights considered implicit in democratic, economic, and human rights. Still others focus on the political and legal institutions thought to be associated with the Rule of Law, such as the importance of an independent judiciary, suppression of corrupt behavior, decision-making transparency and a free press.

The Rule of Law is associated with political, economic, and legal benefits. Commentators and empirical researchers often suggest that the Rule of Law promotes economic development by supporting stability and predictability in economic relations and property rights, considering those to be critical for longer term planning and risk taking. Other benefits are thought to include increased support of human rights and women’s
rights, and recognition of the importance of popular sovereignty and democratic participation in governance. The Rule of Law is also commonly associated with anti-corruption efforts to limit abuses of power and prevent rent seeking by government officials. Additional benefits associated with the Rule of Law include efforts to build and maintain an independent judiciary and legal profession, promotion of government transparency, and educational access.

Despite the positive benefits claimed to be associated with the Rule of Law, attempts by Western agencies to export the Rule of Law to non-Western countries have met with limited success. China, in particular, and many Asian countries in general, have resisted both formal and substantive formulations of the Rule of Law as incompatible with non-Western social and legal norms. Chinese jurists, scholars, and political elites advocate a minimalist, non-substantive understanding of the Rule of Law in the form of “Rule by Law.” Rule by Law idealizes the use of law by the state to govern its citizens, but does not imply any restraint on government by law.

Obstacles to the acceptance and promotion of the Rule of Law as a check on arbitrary government actions arise from multiple sources. As indicated above, these include cultural arguments that the Rule of Law is incompatible with many non-Western cultures. But the resistance also stems from the alleged need to govern effectively in the face of perceived crises, citizen apathy, and arguments that the Rule of Law does not achieve real equality of treatment and opportunity but conversely helps perpetuate social, political, and economic inequalities.

**Historical Roots**

In the Western tradition, the historical origins of the Rule of Law go back more than 2,000 years. Many ancient legal systems, such as the Code of Hammurabi, the Twelve Tables in ancient Rome, and the Mosaic Law of ancient Israel established legal codes to be applied by the sovereign. But while the existence of laws is a necessary precondition for the Rule of Law to exist, it is not sufficient. The Rule of Law ideal requires the sovereign to accept law as a constraint on the sovereign’s interactions with members of the polity. Thus, a political regime cannot claim legitimacy under the Rule of Law if the state is not bound to apply the laws faithfully or may supersede the law for the sovereign’s arbitrary goals.

In the Western tradition the first serious treatments of the Rule of Law as a limitation on the ability of the state to act outside the law were Plato’s *The Republic* and Aristotle’s *Politics*. Notably, in Book II of the *Politics*, Aristotle distinguished states ruled by individuals (such as a monarchy where a sovereign exercises arbitrary power over subjects) from polities ruled through laws applicable to all including the sovereign itself. Aristotle observed that all individuals, including rulers, are subject to self-interested appetites and passions that corrupt their ability to exercise power and make decisions rationally in the interest of the overall populace. Aristotle therefore considered the Rule of
Law to be a mechanism for controlling otherwise unrestrained passions by subjecting them to the dictates of natural law and reason.

Later jurists and scholars refined the Western bases for the Rule of Law. Cicero condemned sovereigns who refused to comply with the law and argued that public officials should themselves be subject to the law. The *Corpus Iuris Civilis* developed under the Roman Emperor Justinian and other legal works provided the foundation for much of medieval jurisprudence produced a millennium later. Central to these works was the normative ideal that the sovereign should follow the law even if the law could not actually constrain the sovereign.

In Western Europe during the Middle Ages, customary law, combined with weaker forms of popular sovereignty, acted as a check upon the ability of leaders to breach or ignore legal obligations. In England, Magna Carta (1215 C.E.) was an agreement to limit the English crown’s ability to impose duties and cost on the English nobility. Parliament later extended Magna Carta’s guarantees by statute to provide similar protections to all English citizens. Magna Carta’s central concepts of protection of individual rights and liberties against state power and the need to limit government action to specific spheres of activity later influenced the United States’ Declaration of Independence, as well as the United States Constitution and its Bill of Rights.

**Definitions**

Andrew Venn Dicey’s *Introduction to the Law of the Constitution* (1885) framed the modern Western jurisprudential debate over the nature of the Rule of Law. Dicey described the Rule of Law in expressly British terms and argued that in the U.K. the Rule of Law comprised three related concepts. First, Dicey observed that the Rule of Law means a predominance of law and legal institutions as the means of governance, rather than arbitrary exercise of personal power. For Dicey, under this conception the Rule of Law meant that the state must govern through prospective laws and may not punish individuals arbitrarily or retroactively for acts that were not illegal at the time they were committed.

Second, the Rule of Law according to Dicey meant that all individuals are entitled to be treated equally under the law. Dicey’s second conception of the Rule of Law meant that even state officials were subject to legal process in their personal capacities and were not entitled to receive different or more favorable legal treatment and process because of status or class.

Third, Dicey observed that constitutional rights in England were said to arise from the ordinary private law as applied and recognized by the courts. Constitutional rights emerged from the common law and the unwritten constitution of England rather than from an act of the state. Accordingly, because the rights of British citizens against their government were exogenous to the sovereignty of the state, those pre-existing rights could
not be subverted by later state action. The Rule of Law means that certain principles and rights remain outside the state and thus limit state power over the citizenry.

Dicey’s three characteristics of the Rule of Law still dominate current political and theoretical discussions and debates over the nature of the Rule of Law. Most importantly, Dicey’s interpretation of the nature of the Rule of Law generated two distinct approaches to identifying and analyzing both the ideal itself and the efforts of states to conform to that ideal. First, while later scholars built upon Dicey’s formula they also attempted to develop a more robust theoretical framework for the Rule of Law and to identify the formal or substantive characteristics or elements of the Rule of Law. Second, other approaches to the Rule of Law primarily attempted to identify the political and legal institutions associated with the Rule of Law. This “institutional” approach is associated with entities and agencies involved in the exportation and development of the Rule of Law in other political regimes.

Theoretical approaches to the Rule of Law occupy a continuum between highly formal articulations and highly substantive descriptions. At stake in that debate is the ability of states to claim legitimacy through adherence to the Rule of Law ideal. Under a formal conception of the Rule of Law, authoritarian states thus may be able to claim that they adhere to formal Rule of Law principles even when they deny human rights, private property protections, women’s rights, educational rights, and other elements that may be present in more substantive formulations of the Rule of Law. Alternatively, states committed to more substantive notions of the Rule of Law may use that commitment as a moral argument to pressure other states to adhere to substantive rights such as human rights, women’s rights, and educational rights as a condition for claiming legitimacy in international relations.

On the formal end of the spectrum, the Rule of Law requires the state to adhere to basic principles regarding the creation and use of law to regulate private interactions among individuals and public interactions between individuals and the state. Thus, for a state to claim legitimacy under the Rule of Law ideal it must begin with the proper procedures and uses of law—rather than by ad hoc or arbitrary decrees of the sovereign. Although lists of formal elements comprising the Rule of Law vary widely, formalist descriptions of the Rule of Law do share common principles. Scholars such as Joseph Raz, Lon Fuller, and John Finnis have suggested a number of formal principles comprising the Rule of Law ideal, including:

- **Publication of laws** — Persons subject to the law must have notice of what the law requires, and consequently the law must be published.
- **Integrity in creating law** — Laws should be enacted according to clear, transparent, and open rules and processes.
- **Integrity of application** — Executive agencies (such as police forces) and judicial decision makers should apply the law faithfully and refrain from arbitrary exercises of discretion, providing special benefits to certain individuals or classes not specified in law, or ignoring the law in exercising their powers.
• **Independence of the judiciary** — The judiciary must be able to apply the law free of outside political influences.

• **Nonretroactivity and Prospectivity** — Laws should be prospective in their application, constraining or permitting future conduct after the effective date of the law. The Rule of Law ideal is inconsistent with the use of laws to retroactively punish or prohibit past conduct that was not illegal or improper at the time it occurred.

• **Understandability** — Under the Rule of Law ideal, laws must be understandable to persons subject to the laws so they may reasonably be able to conform their behavior to legal requirements.

• **Noncontradiction** — The noncontradiction principle prohibits the enforcement of laws that require contradictory obligations or prohibitions by those subject to the laws.

• **Possibility of compliance** — It must be possible for subjects to comply with the mandates and prohibitions of the laws and rules promulgated by the state. For example, sociological studies of the process for obtaining a business license in some countries are so expensive, complex, and time-consuming that citizens cannot reasonably comply and must therefore operate their businesses illegally without a license.

• **Stability** — Another principle common to formal requirements of the Rule of Law ideal is stability. A state that makes frequent, radical changes to the legal rights and obligations of its citizens undermines the ability of those subjects to rely upon law as the primary mechanism for communicating legal requirements.

• **Generality and neutrality** — Under these principles, laws should ideally be general in application, and not designed to benefit or suppress particular persons or classes of persons.

More substantive conceptions of the Rule of Law take these formal components and add additional characteristics. One problem is that at a minimalist level the strictly formal iterations of the Rule of Law arguably are as compatible with totalitarian regimes as with democratic regimes. Although he is generally considered to espouse a formalistic theory, economist Friedrich A. Hayek argued in *The Road to Serfdom* (1944) that the Rule of Law likely could not exist in authoritarian or socialist regimes, connecting the Rule of Law with free markets, representative democracy, and individual autonomy.

Although no state can fully comply with the demands of the Rule of Law all the time, Hayek considered that combination of factors as best suited to protecting individual autonomy against arbitrary interference by the state. Moreover, for Hayek, the ideal of the Rule of Law could only be fully realized in a market economy. This meant that states such as Nazi Germany that were organized through central planning by state authorities would inevitably fall away from this ideal through their inability to refrain from an inexorable centralization of power.

Other theorists and organizations have proposed versions of the Rule of Law with even greater substantive content. While pre-World War II Germany adhered to a highly
formal version of the Rule of Law, experiences with legal positivism and the use of law by the Nazi government caused post-war Germany to develop a highly substantive version of the Rule of Law. The post-war German concept of Rechtsstaat encompasses not just formal elements of the Rule of Law, but also an emphasis on human rights and human dignity. Similarly, following the kidnapping and later execution of Walter Linse, a human rights lawyer investigating Soviet Union human rights abuses, the International Commission of Jurists published a highly substantive version of the Rule of Law in its Declaration of Delhi (1959). This declaration proposed that the Rule of Law was an important tool for securing individual civil and political rights and for creating educational, cultural, social, and economic conditions conducive to realizing individual aspirations and dignity. Other proponents of substantive versions of the Rule of Law have added additional substantive components such as respect for human rights, respect for women’s rights, educational and occupational rights, rights to basic necessities of living such as housing, food, and shelter, and democratic rights.

Institutional approaches to the Rule of Law look to the specific institutions that are believed to be associated with that ideal. Under this formulation, the Rule of Law consists of how well a political or legal system maintains institutions such as an independent judiciary, protects freedom of speech and the press, fights corruption in its police forces and civil service, promulgates and publishes codified laws enacted through a transparent legislative process, protects women’s rights and human rights, and maintains an independent legal profession.

Organizations such as the American Bar Association and the U.S. federal agencies such as the U.S. Agency for International Development (USAID) seek to promote the Rule of Law by attempting to assist developing nations in building these political and legal infrastructures and by providing training and other civic education assistance to government entities and the legal profession. The U.S. State Department, for instance, promotes a substantive and institutional version of the Rule of Law that includes rights such as a democratic representative system of checks and balances and separation of powers among branches of government. The U.S. Agency for International Development advocates that the Rule of Law requires fair judicial processes and guarantees of individual and human rights including respect for private property and contract rights. And the American Bar Association attempts to export a version of the Rule of Law to developing nations that includes women’s rights and human rights, civic education, and independence of the legal profession.

**Critiques and Threats Relating to the Rule of Law**

Significant critiques and threats relating to adoption of the Western version of the Rule of Law include, as discussed above, resistance from non-Western nations, temptations to abandon the Rule of Law during crises of governance, and apathy toward the Rule of Law by the citizenry. The most significant challenge to the ideal of the Rule of Law as understood in the West comes from Asian states, particularly China, that allege the Rule of
Law is a culture-specific ideal that is unsuited for governance in non-Western cultures. In ancient China, the philosophy of *legalism* ("fa jia") held that individuals were fundamentally selfish and could be motivated toward proper social behavior only through strictly applied and enforced rules, standards, regulations and penalties. Around 200 B.C.E., the legalist philosophy was supplanted in part by Confucianism, which emphasized governing through the example and sound judgment of a virtuous ruler instead of strict legal codes. The Confucian tradition emphasizing governance through a virtuous ruler and the general disfavoring of strict legalism arguably make Chinese and other Asian cultures incompatible to some degree with Western notions of the Rule of Law.

Another significant threat to the Rule of Law ideal is the temptation by governing officials and the governed populace to suprervene legal requirements in times of crisis. Existential threats to the continued existence of a freethinking and empowered polity along with the importance of individual rights clearly raise ideals that compete with the ordinary workings of the Rule of Law. Wartime controls on economic activity and freedom of expression are two examples of emergency measures that may be enacted to protect national security in times of war. But governments that suspend the Rule of Law ideal through “temporary” and “emergency” measures to deal with even lesser crises produce a “power grab” that threatens the continued commitment to the Rule of Law ideal.

A third threat to the Rule of Law occurs when a citizenry becomes apathetic about the actions of government actors. This may occur either because of a lack of civic education and involvement, a perception that ordinary citizens cannot affect government action, or a climate of fear created by a supposed emergency such as the purported War on Terror that causes us to cede power to government that may not be surrendered when the “crisis” is over.

Finally, a fourth threat to the Rule of Law is associated with the Critical Legal Studies movement and the work of critical legal scholars such as Roberto Unger. Unger, and others associated with Critical Legal Studies, suggest that the Rule of Law perpetuates social, economic, and political inequalities by justifying those inequalities on the basis that all members of a society are at least equal before the law even if unequal in natural capacity or opportunity. In this sense, the Rule of Law is seen as entrenching power and wealth disparities while muting legitimate criticism of the social system that created or rationalized the inequalities by justifying the entrenched social system.

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**Cross References**

Authoritarianism; Capitalism; Civic Disobedience; Crisis Decision Making and Management; Democracy; Development, Theories of; Dictatorship; Free Market; Human Rights; Legitimacy, Forms of; Political Morality; Rent-Seeking Behavior; Social Contract; State Development; Totalitarianism
Further Readings:

- International Commission of Jurists, Declaration of Delhi (1959)
- Magna Carta (1215)