

THE RULE OF LAW

Steve Sheppard

Associate Professor of Law, The University of Arkansas, Fayetteville, Arkansas, USA

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Summary

This paper describes the “rule of law,” a significant means by which laws are restrained to benefit the people who are bound by them. Representing the notion that citizens should be governed by laws, not men, the term represents a few necessary conditions beyond which it does not have a fixed canonical meaning but is controversial in almost every respect. Its seven core ideas ensure that no person has unbridled discretion to rule, but instead every person who may use the power of the law is bound by laws when that power is used. These seven conditions are no guarantee of a just legal order, but they are an indication of what one would look for to ensure the rule of law is capable of establishing a just system through laws. The seven conditions are: (1) The law holds a monopoly on violence that may enter people’s lives within the state; (2) The institutions of law must be independent of external influence and control; (3) The law applies to everyone universally; (4) Officials may only act according to a law enacted prior to their action; (5) The law is publicly known; (6) The law requires only coherent obligations;

(7) The law must be fairly applied. Although even the best organized legal systems do not always attain this ideal, it is a reasonably attainable goal, which many nation-states have achieved following the break-up of the feudal order and the development of the bureaucratic state. Beginning with the end of the feudal state and the rise of professional lawyers, and fueled by the eighteenth-century revolutions in the United States and France, these ancient propositions for the rule of law took on new life. Arguments have arisen over more comprehensive requirements of the rule of law, many of which have been enshrined in the basic principles of law in the different states. These arguments have been over the interpretation of laws, the source of legitimacy of laws, and whether the law must assure certain forms of equality, internal integrity, justice, individual rights, limits on state intrusions on private life and commerce, and distributive justice. Some of these arguments have been largely settled, others have not.

1. Introduction

The “rule of law” is an ideal structure of laws employed by government not only used to describe the concept of law in the modern world, but also to improve the practical affairs of law and the state. Experience has shown the rule of law to be a successful means of developing forms of stable government that are both sufficiently flexible to respond to changing circumstances and sufficiently conservative both to ensure predictable order and to guard against tyranny. The rule of law has proved essential in the effort to promote the interests of the governed, rather than the governors. Although the rule of law is usually associated with popularly elected western liberal governments, it is a concept relatively independent of ideology, though it is incompatible with authoritarian and tyrannical views of government.

The term does not have a fixed canonical meaning, but is controversial in almost every respect. Even so, there are several core ideas that are bound into it, and these ideas have become a unifying structure for law across the globe. Aristotle asserted the essential claim of the rule of law: citizens should be governed by laws, not men. The key to this idea is that no person should have unbridled discretion to rule over another; but instead, every person who may use the power of the law ought to be bound by laws when that power is used.

This notion has led to certain further ideas that are basic for any government that acts through law. The first idea is that the law must effectively exercise a monopoly on force within the state. The second is that legal institutions must exist, according to which officials act independently to determine who should be harmed or helped, and the power of the law to do so is spread among these institutions, so that the law is not the power or property of an individual. (This idea reinforces the notion that the people who create or legislate legal obligations should not be the same people who enforce them.) The third is that the law applies to everyone, universally, so that no one is above its reach, not even the officials who make it, and no one is the special target of the law. The fourth idea is that no person should be harmed or deprived of help by the state unless the officials of the state act according to a law that was already enacted as a universal rule. The fifth is that law must be public knowledge accessible to and largely known by all of the citizens. The sixth is that the law must be coherent in the obligations it creates, so

that citizens can follow its demands and so that the demands describe a pattern of related and coherent obligations, not obligations that would be unreasonable or conflicting when considered all together. The seventh is that the law must be fairly applied, that no person should be penalized by the law through prejudice, bias, or without sufficient care to prove the penalty is warranted.

There is of course no particular significance to the arrangement of these ideas into seven principles. The components might well have been described otherwise, but they do represent essential conditions, which both scholarly reflection and the experience of states suggest are necessary to the rule of law. Most importantly, these seven ideas represent an ideal, and while even the best organized legal systems do not always attain the ideal, these components represent indicia that an observer might expect to be present in considering the degree to which the ideal is achieved.

The rule of law is not a utopian dream but an attainable goal, which many nation-states and multi-national institutions have strived to achieve—and did achieve—in the twentieth century.

2. Seven essential components of the rule of law

Laws are the result of human action. Laws result when individual officials work in concert to create a system for the state that both sets rules for making, changing, and applying laws and sets rules for governing daily human conduct to the degree officials believe is desirable to regulate the conduct of the citizenry. These rules are laws, which are created and applied by individual officials tasked by other laws to do these things (see *Modern Legal Systems*, and *Distinctions Between and Similarities Across Legal Systems*).

There are many ways of criticizing the sufficiency or the content of the laws of a given state, such as whether the laws reflect the preferences of the majority of the citizens, or the received view of the leaders of a dominant religion, or the philosophical view of mankind's natural condition, or an economic view of the growth of happiness or wealth, and so on. None of these criticisms, however, are part of the concept of law in itself; they are ways of evaluating law that only contingently might happen to be incorporated into the methods of lawmaking.

Laws, in themselves, are tools of human agency, just like hammers, fire, or brick. Just as tools may be used for constructive or destructive ends without regard to their intended purpose, so may laws. Laws may be used for purposes that promote the interests of the citizens in peace, order, and justice, or for purposes of someone other than the citizens through violence, disorder, or injustice. Nothing—no constitution, bill of rights, or system of the rule of law—can ensure that laws will not be directed toward unconstructive ends if a sufficient collection of legal officials acquiesce in the direction.

As described above, the rule of law is the label for certain ideal but specific mechanisms for managing the legal system, which are likely to ensure that the law operates to the benefit of the people who are governed by it. There are, of course, systems of law that do not incorporate these mechanisms. There are also systems of law that incorporate

these mechanisms but which still fail to ensure the law operates to the benefit of the citizens it binds.

The seven essential mechanisms for a minimal concept of the rule of law are that the law is the sole and sufficient force in citizens' affairs, that the law is independent of force and of politics, that the law applies to everyone equally and in universal terms, and that the law operates only as a prior restraint on future conduct. These seven ideas are rather complex and include many component ideas. There are also additional concepts that are part of differing ideas of the rule of law, which are considered below in section 3.

2.1 Law as a Monopoly of Force in Citizens' Affairs throughout the State

The institutions of law must be able to control all forms of violence within the state used against the citizenry. When entities capable of violence exist beyond the law's control—whether they are private, as in the case of criminal enterprises, or public, as in the case of paramilitary, military, and security organizations—citizens are vulnerable to a range of injury that they have done nothing to incur and for which they have no recourse. This vulnerability reduces the individual's acceptance of the law as something worthy of obedience, but more importantly, it leads to instability and tyranny in the state. In order for legal institutions to maintain this monopoly, three conditions must be satisfied: control over potentially competing sources of force, comprehensive regulation, and sufficient enforcement.

2.1.1 Legal Officials Control Potentially Competing Sources of Force

A common view of law is that it is a command issued by the state that is accompanied by a threat of force if the command is not obeyed. For the law to operate successfully under such a view, the law must be capable of carrying out such a threat, which would entail its not being opposed by another source of force. By this view, only when legal officials may issue commands supported by a threat of force, which requires that those commands not be opposed by force, can those commands succeed.

However, many laws do not depend on a threat of punishment or sanction. They operate to give an official or a citizen a license to do something or a power to act, such as in setting procedural requirements in lawsuits, or regulatory standards for manufacture, or enforcement standards for contracts or wills. At most only indirect threats of force are available to prevent others from interfering in the exercise of such a license or power. It is still true, however, that a system of laws must have recourse to force to command obedience to some of its commands, even if not all laws include such commands.

Beyond such concerns over force necessary to enforce the law, there is the problem of competing systems of force. The law does not depend on enforcement of every rule through punishment. Rather, the law is successful (as far as it is the authority on which people act in matters regulated by laws) because people develop and maintain the habit of acting according to the requirements of the laws. Although it is controversial among scholars whether or not this habit must be the knowing obedience of citizens to the laws, it is clear that a sufficient degree of conformity as a matter of course is required,

otherwise the state may descend into anarchy. When sources of force beyond or outside the law exist, which are capable of either defying the dictates of legal officials or commanding obedience to commands contrary to the commands of the law, it becomes less likely that habitual obedience to law will either develop or persist.

For example, if paramilitary forces affiliated with a political party demand that citizens vote for their party's candidate in an election or face reprisals, and legal officials are incapable of protecting the citizens from such reprisals, there is no reason to believe that a law ensuring the independence of a citizen at the ballot will be obeyed. The failure of the legal officials to maintain their monopoly over force either by protecting individual citizens from reprisals or by restraining the paramilitary force or its affiliated party will lead to a diminished authority in the legal system as a whole, as well as diminishing the likelihood that the law will be used to the benefit of the citizens whom it is meant to govern. The diminished capacity for the rule of law follows from the potential for force outside the control of the officials of legal institutions, whether the force is exercised by people affiliated with the government or those opposed to it, by criminal organizations, or by otherwise law-abiding organizations.

There is one exception, however, to the law's monopoly over force, in that each individual may retain the power of self-defense without diminishing the monopoly of legal officials over force. Such an exception must itself be limited, however, by a limitation from self-defense against official's actions. This exception is recognition both that individuals will assert such a power in moments of threat during which official claims of monopoly are unlikely to have practical significance and that the restriction to defense precludes a direct threat to official monopoly over force.

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Biographical Sketch

Steve Sheppard is associate professor in the University of Arkansas School of Law, where he teaches jurisprudence, international law, environmental law, U.S. constitutional law, and equity. A native of Mississippi in the United States, he is a graduate of the University of Southern Mississippi, Columbia University, and Oxford University. He has written widely on the relationship between legal, moral, and official obligations, as well as on the history and theory of legal institutions. Sheppard's works include a two-volume *History of Legal Education in the United States* and, to be published in 2003, the first anthology of the works of Sir Edward Coke, one of the great figures of the common law world, whose views of law and the state presaged the ideas of Locke and Montesquieu. He is completing a monograph on the moral obligations of legal officials and a new edition of Blackstone's *Commentaries on the Laws of England*. He can be contacted at sheppard@uark.edu.