

Part I

WHAT *is* THE RULE *of* LAW

The *rule of law* is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. But what is meant by “a government of law, not men”? Aren’t laws made by men and women in their roles as legislators? Don’t men and women enforce the law as police officers or interpret the law as judges? And don’t all of us choose to follow, or not to follow, the law as we go about our daily lives? How does the rule of law exist independently from the people who make it, interpret it, and live it?

The easiest answer to these questions is that the rule of law cannot ever be entirely separate from the people who make up our government and our society. The rule of law is more of an ideal that we strive to achieve, but sometimes fail to live up to.

The idea of the rule of law has been around for a long time. Many societies, including our own, have developed institutions and procedures to try to make the rule of law a reality. These institutions and procedures have contributed to the definition of what makes up the rule of law and what is necessary to achieve it.

This section of the Dialogue offers quotations that define components of the rule of law as it has been understood at different times and in different contexts. It asks Dialogue participants to use these quotations in giving meaning to the concept of the rule of law. It then considers a working definition of the rule of law that has been proposed by the American Bar Association’s World Justice Project.

WHAT MAKES UP THE RULE OF LAW?

No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

—ARTICLE 39, MAGNA CARTA (1215)

In 1215, King John of England signed the Magna Carta (or Great Charter). A group of barons, powerful noblemen who supported the king in exchange for estates of land, demanded that the king sign the charter to recognize their rights.

Article 39 of the Magna Carta was written to ensure that the life, liberty, or property of free subjects of the king could not be arbitrarily taken away. Instead, the lawful judgment of the subject’s peers or the law of the land had to be followed.

So what does this ancient document have to do with the rule of law? Quite a lot. It recognizes that a person’s fate should not be in the hands of a single individual—here, the king. It demands that a judgment against a person be made in accordance with the law. Magna Carta planted the seeds for the concept of **due process** as it developed first in England, and then in the United States. Due process means that everyone is entitled to a fair and impartial hearing to determine their legal rights.

If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

JAMES MADISON, FEDERALIST PAPER NO. 51 (1788)

James Madison’s quote from the Federalist Papers gets at the heart of the problem that even a government of law is ultimately “administered by men over men.” The framers of the U.S. Constitution addressed this problem by dividing power among the different branches of government (legislative, executive, and judicial). This framework for government, known as the **separation of powers**, ensures that no one person is able to gain absolute power and stand above the law. Each branch of our government has some level of control or oversight over the actions of the other branches.

The rule of law does not depend upon a U.S.-style separation of powers. In a parliamentary system, for example, the powers of the executive and legislative branches are combined; procedures such as “no confidence” votes and regularly scheduled elections serve as a check on the party that controls the parliament. The key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.

To make laws that man can not and will not obey, serves to bring all law into contempt. It is very important in a republic, that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?

—ELIZABETH CADY STANTON (1860)

It is very difficult for a nation to maintain the rule of law if its citizens do not respect the law. Assume that people in your community decided that they didn't want to be bothered by traffic laws and began to ignore stop signs and traffic signals. The ability of police officers to enforce the laws would be overwhelmed and the streets of your community would quickly become a chaotic and dangerous place. The rule of law functions because most of us agree that it is important to observe the law, even if a police officer is not present to enforce it. Our agreement as citizens to obey the law to maintain our social order is sometimes described as an essential part of the **social contract**. This means that, in return for the benefits of social order, we agree to live according to certain laws and rules.

Elizabeth Cady Stanton's quote also highlights another important aspect of the rule of law. People must be asked to obey laws that they can and will obey. If laws become impossible—or even difficult—to follow, the respect of citizens for the law will begin to erode.

There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.

—U.S. SUPREME COURT JUSTICE FELIX FRANKFURTER,
UNITED STATES V. UNITED MINE WORKERS (1947)

Judicial independence means that judges are independent from political pressures and influences when they make their decisions. An independent judiciary is essential to maintaining the rule of law. Judges should not be pressured by a political party, a private interest, or popular opinion when they are called upon to determine what the law requires. Keeping the judiciary independent of these influences ensures that everyone has a **fair** chance to make their case in court and that judges will be **impartial** in making their decisions. Judges also must explain their decisions in public written opinions, and their decisions can be appealed to a higher court for review. These elements of judicial decision-making ensure that judges remain accountable to the rule of law.

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

—JUSTICE HUGO BLACK, *GIDEON V. WAINWRIGHT*, 372 U.S. 335 (1963)

The Supreme Court's opinion in *Gideon v. Wainwright* secured the **right to counsel** for indigent criminal defendants unable to afford legal assistance on their own. The decision in *Gideon* was grounded in the Sixth Amendment to the Constitution, which guarantees criminal defendants "the assistance of counsel." At issue in *Gideon* was whether this guarantee of assistance required the state to provide legal counsel if a defendant could not afford to exercise his or her constitutional right.

In a criminal trial, the state has many resources at its disposal, including lawyers who prosecute the state's case. As Justice Black notes, it is difficult to claim that a defendant has been treated with fairness and impartiality and has been given equal standing before the law if the defendant must face the state without a lawyer of his or her own.

I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

—MARTIN LUTHER KING, JR.,
"LETTER FROM BIRMINGHAM JAIL" (1963)

The words of Martin Luther King from Birmingham Jail remind us that there is a distinction between **law** and **justice**. The law, even if it is uniformly applied, does not in itself guarantee a just result. The rule of law is intended to promote stability, but a society that operates under the rule of law must also remain vigilant to ensure the rule of law also serves the interests of justice. As this quote points out, the continued strength of the rule of law sometimes depends on individuals who are willing to risk punishment in pursuit of justice.

[N]either laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary.

—U.S. COURT OF APPEALS JUDGE DIANE WOOD,
"THE RULE OF LAW IN TIMES OF STRESS" (2003)

Judge Wood's comments highlight the need for, first, an open and transparent system of making laws and, second, laws that are applied predictably and uniformly. **Openness and transparency** are essential. If people are unable to know and understand what the law is, they cannot be expected to follow it. At the same time, people deserve to know why a particular law has been passed and why they are being asked to obey it.

The rule of law also requires that people can expect **predictable results** from the legal system; this is what Judge Wood implies when she says that "the laws must not be arbitrary." Predictable results mean that people who act in the same way can expect the law to treat them in the same way. If similar actions do not produce similar legal outcomes, people cannot use the law to guide their actions, and a "rule of law" does not exist.

When we [Americans] talk about the rule of law, we assume that we're talking about a law that promotes freedom, that promotes justice, that promotes equality.

—U.S. SUPREME COURT JUSTICE ANTHONY KENNEDY,
INTERVIEW WITH ABA PRESIDENT WILLIAM NEUKOM
(2007)

Justice Kennedy suggests that the rule of law has taken on special meaning for the people of the United States, based on our history of looking to the law to fulfill the promises of freedom, justice, and equality set forth in our nation's founding documents. As will be further discussed in Part II of the Dialogue, our understanding of the rule of law in the United States did indeed develop around the belief that a primary purpose of the rule of law is the **protection of certain basic rights**. The United States Constitution represented the first effort by a nation to establish a written constitution of laws that would bind the government and guarantee particular rights to its people. Today, the rule of law is often linked to efforts to promote protection of human rights worldwide.

WHAT DOES THE RULE OF LAW MEAN?

After reading through the preceding quotes and comments on the rule of law, ask Dialogue participants to begin working out the meaning of the “rule of law.” In doing so, ask participants to think about these questions:

- Identify what components of the quotes and comments you think are **essential** to a definition of the rule of law, and which you think are **optional** or **aspirational**. Be prepared to explain your reasoning.
- Consider any important aspects of the rule of law that you do not see reflected in the quotes and comments. What are they?
- Form groups of four to five participants. Members of each group should use their individual understanding of the rule of law to create a shared group definition of the rule of law that all members of the group can agree upon.
- Share the group’s definitions with other participants in the Dialogue.
- Compare and discuss similarities and differences among the group definitions. Identify components of the rule of law that were shared by all the groups.

THE RULE OF LAW AND THE ABA WORLD JUSTICE PROJECT

In 2007, ABA President William Neukom established the World Justice Project. The World Justice Project recognizes the problem that “the ‘rule of law’ is a frequently used term that is rarely defined.” One goal of the World Justice Project is to develop a broadly accepted definition of the rule of law that could be used to measure adherence to the rule of law both in the United States and abroad. Based on the belief that the rule of law is a prerequisite for building societies that offer opportunity and equity to all their citizens, the World Justice Project proposes to use its definition of the rule of law to create an index that will measure how nations around the world are—or are not—following the rule of law.

The World Justice Project has proposed a working definition of the rule of law that comprises four principles:

1. A system of self-government in which all persons, including the government, are accountable under the law
2. A system based on fair, publicized, broadly understood and stable laws
3. A fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced
4. Diverse, competent, and independent lawyers and judges

QUESTIONS *for* DISCUSSION

- The World Justice Project asserts that “the rule of law is the platform for communities of opportunity and equity and is essential to addressing the world’s most persistent and harmful ills.” Do you agree with this statement? Why or why not?
- Compare the World Justice Project’s definition of the rule of law to your own definitions of the rule of law that you created individually or in your small group. What similarities and differences do you see between the definitions? Are there elements of the World Justice Project definition that you would add to your own definition of the rule of law? Why or why not?
- Think about your own experiences or familiarity with the law in the United States. To what extent do you think the rule of law in the United States adheres to the World Justice Project’s definition of the rule of law? To what extent do you think that the United States fails to live up to this definition?
- The World Justice Project suggests that the four principles it has used to define the rule of law are universal principles. Do you think that these principles would be universally accepted by nations around the world? Why or why not? Do you think these principles *should* be universally accepted? If not, how would you modify this definition to reflect what you think are universal principles of the rule of law?

