

From Wikipedia, the free encyclopedia at: http://en.wikipedia.org/wiki/Rule_of_law

The rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedure. The principle is intended to be a safeguard against arbitrary governance. Samuel Rutherford was one of the first modern authors to give the principle theoretical foundations, in *Lex, Rex* (1644), and later Montesquieu in *The Spirit of the Laws* (1748)..

In continental European legal thinking, rule of law is associated with a *Rechtsstaat*. According to Anglo-American thinking, hallmarks of adherence to the rule of law commonly include a clear separation of powers, legal certainty, the principle of legitimate expectation and equality of all before the law.

The concept is not uncontroversial, and it has been said that "the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use".[1]

The contrast between the rule of men and the rule of law is first found in Plato's *Statesman and Laws* and Aristotle's *Politics*, where the rule of law implies both obedience to positive law and formal checks and balances on rulers and magistrates.

Thomas Aquinas defined a valid law as being one that

- * is in keeping with Reason
- * was established by a proper authority
- * is for the purpose of achieving good
- * and was properly communicated to all.

In Commonwealth law, the most famous exposition of the concept of rule of law was laid down by Albert Venn Dicey in his *Law of the Constitution*.

"The rule of law is a political principle the classic exposition of which is in Dicey *Law of the Constitution* (10th Edn, 1959) p 187 et seq. Dicey identified three principles which together establish the rule of law: (1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts." — Halsbury's *Laws of England*, Vol: *Constitutional Law and Human Rights*, paragraph 6, footnote 1

... 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. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. [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. — Law of the Constitution (London: MacMillan, 9th ed., 1950), 194.

Another definition can be found at Halsbury's Laws of England, Vol: Constitutional Law and Human Rights, paragraph 6

The legal basis of government gives rise to the principle of legality, sometimes referred to as the rule of law. This may be expressed as a number of propositions, as described below.

(1) The existence or non-existence of a power or duty is a matter of law and not of fact, and so must be determined by reference either to the nature of the legal personality of the body in question and the capacities that go with it, or to some enactment or reported case. As far as the capacities that go with legal personality are concerned, many public bodies are incorporated by statute and so statutory provisions will define and limit their legal capacities. Individuals who are public office-holders have the capacities that go with the legal personality that they have as natural persons. The Crown is a corporation sole or aggregate and so has general legal capacity, including (subject to some statutory limitations and limitations imposed by European law) the capacity to enter into contracts and to own and dispose of property. The fact of a continued undisputed exercise of a power by a public body is immaterial, unless it points to a customary power exercised from time immemorial. In particular, the existence of a power cannot be proved by the practice of a private office.

(2) The argument of state necessity is not sufficient to establish the existence of a power or duty which would entitle a public body to act in a way that interferes with the rights or liberties of individuals. However, the common law does recognise that in case of extreme urgency, when the ordinary machinery of the state cannot function, there is a justification for the doing of acts needed to restore the regular functioning of the machinery of government.

(3) If effect is to be given to the doctrine that the existence or non-existence of a power or duty is a matter of law, it should be possible for the courts to determine whether or not a particular power or duty exists, to define its ambit and provide an effective remedy for unlawful action. The independence of the judiciary is essential to the principle of legality. The right of access to the courts can be excluded by statute, but this is not often done in express terms. A person whose civil or political rights and freedoms as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) have been infringed is entitled under the Convention to an effective right of access to the courts and an effective national remedy. On the other hand, powers are often given to bodies other than the ordinary courts, to decide questions of law without appeal to the ordinary courts, and sometimes in such terms that their freedom from appellate jurisdiction extends to their findings of fact or law on which the existence of their powers depends.

(4) Since the principal elements of the structure of the machinery of government, and the powers and duties which belong to its several parts, are defined by law, its form and course

can be altered only by a change of law. Conversely, since the legislative power of Parliament is unrestricted, save where European Community law has primacy, its form and course can at any time be altered by Parliament. Consequently there are no powers or duties inseparably annexed to the executive government.

In American law, the most famous exposition of the same principle was drafted by John Adams for the constitution of the Commonwealth of Massachusetts, in justification of the principle of separation of powers:

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).

The last phrase, "to the end it may be a government of laws and not of men," has been quoted with approval by the U.S. Supreme Court and every state supreme court in the United States.

A similar concept is found in *Common Sense* (1776) by Thomas Paine:

. . . the world may know, that 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 concept "rule of law" is generally associated with several other concepts, such as:

- * *Nullum crimen, nulla poena sine praevia lege poenali* — No ex post facto laws
- * Presumption of innocence — All individuals are "presumed innocent until proven otherwise"
- * Double jeopardy — Individuals may only be punished once for every specific crime committed. Retrials may or may not be permitted on the grounds of new evidence. See also *res judicata*.
- * Legal equality — All individuals are given the same rights without distinction to their social stature, religion, political opinions, etc. That is, as Montesquieu would have it, "law should be like death, which spares no one."
- * Habeas corpus — in full *habeas corpus ad subjiciendum*, a Latin term meaning "you must have the body to be subjected (to examination)". 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.

The concept of "rule of law" per se says nothing of the "justness" of the laws themselves, but simply how the legal system upholds the law. As a consequence of this, a very undemocratic nation or one without respect for human rights can exist with or without a "rule of law", a situation which many argue is applicable to several modern dictatorships. However, the "rule of law" or *Rechtsstaat* is considered a prerequisite for democracy, and as such, has served as a

common basis for human rights discourse between countries such as the People's Republic of China and the West.

The rule of law is an ancient ideal first posited by Plato as grounded in divine reason and so inherent in the natural order. It continues to be important as a normative ideal, even as legal scholars struggle to define it. The concept of impartial rule of law is found in the Chinese political philosophy of legalism, but the totalitarian nature of the regime that this produced had a profound effect on Chinese political thought which at least rhetorically emphasized personal moral relations over impersonal legal ones. Although Chinese emperors were not subject to law, in practice they found it necessary to act according to regular procedures for reasons of statecraft.

In the Anglo-American legal tradition rule of law has been seen as a guard against despotism and as enforcing limitations on the power of the government. In the People's Republic of China the discourse around rule of law centers on the notion that laws ultimately enhance the power of the state and the nation, which is why the Chinese government adopts the principle of rule by law rather than rule of law.

Declaration of Delhi

Main article: Declaration of Delhi

In 1959, an international gathering of over 185 judges, lawyers, and law professors from 53 countries, meeting in New Delhi and speaking as the International Commission of Jurists, made a declaration as to the fundamental principle of the rule of law.

The British View - Lord Bingham's sub-rules

In his speech on 16 November 2006 for the Sir David Williams Lecture in the Law Faculty of Cambridge University (accessible [here](#)), Lord Bingham of Cornhill postulated eight sub-rules of the rule of law:

- * the law must be accessible and so far as possible intelligible, clear and predictable
- * questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion
- * the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation
- * the law must afford adequate protection of fundamental human rights
- * means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve
- * ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers
- * adjudicative procedures provided by the state should be fair
- * the state must comply with its obligations in international law, the law which whether

deriving from treaty or international custom and practice governs the conduct of nations.

Authoritarianism

Rule of law is opposed by authoritarian and totalitarian states. The explicit policy of those governments, as evidenced in the Night and Fog decrees of Nazi Germany, is that the government possesses the inherent authority to act purely on its own volition and without being subject to any checks or limitations. Dictatorships generally establish secret police forces, which are not accountable to established laws, which can suppress threats to state authority.