

The Rule of Law and Constitutions

1. In a rule of law society, government officials are not supreme; they are always constrained by enduring legal principles; and this constraint is called the rule of law.

In some countries, the government is free to take any action it sees fit, without outside constraint. In these places, the government is supreme. It uses the law to rule the people, but it is not itself subject to any body of legal principles that are supreme even over the government's own wishes. For that reason, such countries may be termed *rule by law* countries: the law is merely a tool of the powerful to control others. As the experience of the world has shown, such governments are dangerous to their people. They may violate their citizens' rights, as by stealing their land or demanding bribes. Even if they were democratically elected to begin with, they may thereafter decide to keep power forever and to give their relatives and cronies powerful offices. After an election, the winning party may use its new power to abuse the opposition, as by outlawing those political parties or imprisoning the leaders or giving public funds to its own followers but no-one else. A government that is truly supreme, that can do anything it wishes, is not ultimately accountable to its people, and unaccountable governments sooner or later always become oppressive. When given unchecked power, even good people tend to become despots.

Therefore, the government should not be free to do whatever it wants; it should be constrained by enduring legal principles. Those principles should, among other things, protect individual rights, require free, fair, and regular elections, and limit what the winners of an election can do to the losers. Such countries may be termed *rule of law* countries because the law, not the government, is the ultimate ruler. Virtually everyone today believes that the rule of law is vital to equitable government.

2. The rule of law is best protected in an entrenched constitution.

Many rule by law countries wish to become rule of law countries. In order to transform themselves, they must find a way to establish and defend enduring legal principles to limit the government. If the people are not devoted to the rule of law in their hearts, it will not flourish, so the first protection is cultural: rule of law societies give rise to rule of law states. But cultural protection is not enough because governments do not always respect the people's desires. For that reason, it is also necessary to enshrine the rule of law in an entrenched, written constitution.

Constitutions protect the rule of law in several ways.

- First, because they are written and specific, they provide clear instructions to all relevant people about the meaning of the rule of law. Government officials will therefore be subject

- to concrete constraints. If they ignore those limits, other officials and ordinary citizens may rally to the defense of the constitution and push back against the violators.
- Second (as noted in the paper on **The Importance of a Democratic Constitution**), ideally the people create the constitution, so the people define the exact meaning of the rule of law for their country. This popular creation will help protect the rule of law, much better than if the rule of law were imposed from above. For one thing, the people will be more likely to be devoted to the rule of law and to rally to its defense if it is their own creation. For another thing, as noted in the next section, there are different versions of the rule of law. If the people establish the rule of law, they are more likely to create a version of the rule of law better suited to their own particular circumstance, than if it were imposed from above. Because it is a better version for their country, it will lead to better politics. Better politics will in turn lead to better socio-economic conditions: a stronger economy, better schools and health care, a cleaner environment, and so forth. In other words, a popularly adopted constitution will improve people's living circumstances. As a result, it will inspire more protective loyalty; because the constitution cares for the people, the people will want to care for it.
 - Third (as detailed in the paper on **Checks and Balances**), a good constitution will divide power among various office-holders, so that it will be very difficult for any one person or body to dominate. As a result, if one person or body tries to violate the constitution, the others will be able to push back. Most obviously, the constitutional enforcement mechanism—whether a court or some other sort of body—will scrutinize the action of office-holders to determine whether they conform to the constitution. But the constitutional enforcement mechanism is not alone. If one official—perhaps the president—tries to subvert the constitution, all the other elements will have some ability to check him—the legislature, the civil service, the state and local governments, the citizenry, even the cabinet. Thus, a good constitution not only defines and adopts the rule of law; it also provides a governmental structure to protect it.
 - Finally (again as explained in the paper on **The Importance of a Democratic Constitution**), a good constitution is entrenched—i.e. hard to change. Ideally, it is best to require that constitutional amendments be put to a referendum, and unless they receive majority or even super-majority support, they will not be adopted. Most centrally, the government should not be allowed to amend the constitution by itself. When a constitution is entrenched in this way, so is the rule of law, because the former embodies the latter.

3. It is appropriate that different countries should entrench somewhat different legal principles to suit their unique circumstances, but the rule of law requires a core set of particular legal principles for all countries.

Notoriously, different people mean different things when they use the phrase rule of law; there is no universally agreed meaning. Sometimes, politicians and commentators use the phrase in a very vague way, without any clear meaning. Scholars also disagree over its meaning, but at least they

give the phrase more precise meanings. All scholars agree that in a rule of law country, the government must be subject to enduring legal principles, but they disagree about which principles. Some scholars believe that the rule of law demands only *legal regularity* (defined below); others believe that it also demands *democracy* and *individual rights*.

- *Legal regularity* refers to the idea that laws must be made in such a way that the people can know the rules that will apply to them and so can plan accordingly. For criminal laws, the people must know what conduct is illegal so they can avoid committing crimes. For contract law, the people must know when and how the courts will enforce contracts so that they can make intelligent decisions about whether to enter into contractual obligations—for example, to buy land or to found a business association. Similar considerations apply in all areas of law: if the people do not have a reasonable opportunity to know the law, then the state will suddenly take action against individuals in completely unpredictable, and therefore arbitrary, ways. To ensure that the people can know the law and plan, legal regularity requires that laws must be published (not secret), prospective (not applying to acts done before the law was adopted), clear (so that the people can know what is required) and general (applying to all alike, both rich and poor, weak and powerful, etc.).
- *Democracy* refers to a political system in which the people govern, most commonly by choosing their representatives in free, fair, multiparty elections. But although the rule of law mandates democracy in general, it does not specify a particular form of democracy, so long as the people really are in charge of the government and not the other way around. Because there are many different forms of democracy, different countries may therefore choose the form that is right for them. Some have bicameral legislatures, some unicameral. Some have presidential systems, some parliamentary systems. Some have proportional representation, some majority voting—and so on.
- *Individual rights* are zones of autonomy and claims on resources in the areas of life most important to individuals as citizens, such as voting, and as private persons, such as marriage. Governments may not intrude on these rights without extraordinary need, such as the safety of the country or the prevention of mass murder; it may not restrict these rights merely in the interest of “public order” or the like. Most rule of law proponents believe that all governments must respect certain core rights, frequently termed “human rights” in various international law instruments. Outside that core, however, different countries will appropriately choose to protect different sets of individual rights according to their particular circumstances. The US constitution, for example, protects an individual right to gun ownership but not public health care; the German constitution, by contrast, protects the individual right to public health care but not to gun ownership. The paper on individual rights explains these ideas in more detail.

Ultimately, of course, the definition of the phrase rule of law is merely a matter of convention; it means whatever human society has decided it means. So what should we hold it to mean and why? As noted, the phrase rule of law refers to those enduring legal principles that should constrain government action. So in defining the rule of law, we are really asking what enduring legal limits we

want to place on our governments in our constitutions. Most of the world now holds a consensus view that good governments must be democratic, must respect individual rights, and must act only in legally regular ways.

4. To make the rule of law a reality, countries need a system of courts or court-like bodies that are independent, professionally trained, and faithful to the law.

The rule of law is a set of enduring legal principles that are typically embodied in a constitution and that constrain government action. The government may not put these rules aside as it likes; the whole point in the rule of law is that the government may not do whatever it wants to do, without limit. But the rule of law will be ineffectual unless someone has the power to enforce it against the government.

Courts or court-like bodies do not actually have the power to enforce their own edicts: they have “*neither purse nor sword.*” Indeed, in conventional measures of raw strength, they are among the weakest government institutions. As noted above, if a part of government tries to violate the law, only the people (through democracy) or the other parts of government (through checks and balances) have the power to push back. But courts or court-like bodies fulfill a different but extremely important role: they can provide interpretations of the law so that the people and the various parts of government will know when someone in government is trying to subvert the law. Courts can, in other words, serve as a rallying point for other, more powerful actors who want to ensure that the rule of law prevails.

To serve this function, courts need not have a lot of money or many soldiers at their beck and call. But they do need to have certain characteristics. First, they need to be *independent* of the other parts of government because their task is to hold all parts of the government to the rule of law, without fear or favor. To that end, judges will sometimes need to make controversial decisions, decisions that offend some office-holders and sometimes even the people. In order to make these decisions, judges must be protected against retribution: their physical security must be guaranteed, and they must have a secure tenure in office and a fixed salary. The paper on **Judicial Independence** elaborates these ideas.

In addition, judges must not conceive themselves as politicians whose loyalty runs to constituents or to other politicians. Instead, they must imagine themselves as professionals whose loyalty runs to the law. To that end, they need specialized training in the law. They must also be neutral: they must not be entangled with or depend upon other parts of government, political associations, or powerful economic interests. In their capacity as citizens, they might vote and even be members of a party, but their membership must be wholly nominal: they must not take part in party activities or hold party office.