The rule of law

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The essence of the rule of law, as originally attributed to Aristotle, is a "government by laws and not by men".[1] Scholars, judges and organisations in various countries, particularly in recent years, have laboured to define in greater detail the meaning of this concept.[2] There is wide agreement that the concept is difficult to define in a way that captures all of its significant meaning.[3] US Supreme Court Justice Anthony M Kennedy has observed: "The term Rule of Law is often invoked yet seldom defined."[4]

A good starting point in examining the concept is the definition of the rule of law set forth in the 2004 Report of the Secretary General of the United Nations, entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*:

> *[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural legal transparency*.[5]

The principles constituting the rule of law identified in this definition are both procedural and substantive. The rule of law principles are procedural, for example, in that the laws must be the supreme law of the land, publicly promulgated, equally enforced, and adjudicated by an independent judiciary. Further, the laws must be fairly and equally applied, and separation of power must be observed in the enactment and adjudicative processes. The principles of the rule of law are also substantive, however, in that the laws must be consistent with international human rights norms and standards.

Although the concept of the rule of law can be traced back at least to ancient Greece,[6] it has become much more widely discussed in the last 25 years. Justice

1 FA Hayek, *The Constitution of Liberty* (1960) 166.
2 See, for example, AV Dicey, *Introduction to the Study of the Law of the Constitution* (7th edn, 1908) 179–201; Robert Stein, "Symposium, Rule of Law: What Does it Mean?" 18 *Minn J Int'l L* (2009) 293; T Bingham, *The Rule of Law* (2010).
3 See sources cited above at note 2.
4 Anthony M Kennedy, 20th Sultan Azlan Shah Law Lecture: "Written Constitutions and the Common Law Tradition" (August 10 2006) (on file with the author). See also, Bingham, above at note 2; AV Dicey, *An Introduction to the Study of the Law of the Constitution* (1885); BZ Tamanaha, *On the Rule of Law* (2004) 3.
5 UN Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (August 23 2004) p6.

Kennedy has written that he does not recall the term being used often when he was in law school in the 1950s.[7] The fall of the Berlin Wall and the emergence of new democracies in central and eastern Europe spurred greater interest in the concept. As more people on the planet began to live under a democratic form of government, it became clear that democracy alone could not ensure liberty and freedom. The concept of the rule of law and its relationship to the realisation of the important goals of political reforms began to receive much more attention.[8]

Numerous speakers express support for the rule of law without defining exactly what they mean by invoking the phrase. Often, it is used as a shorthand reference to gather support for whatever happens to be the political agenda of the speaker: "It's the rule of law." In fact, the phrase has been used so often in recent years that at least one commentator believed it is now devoid of any meaning.

The late political theorist, Harvard Professor Judith Shklar, has written that the phrase "has become meaningless thanks to ideological abuse and general over-use".[9] I disagree with Professor Shklar. Because of the potential of the phrase to inspire individual actors and inform political and social change, it is important to rigorously identify a meaning to the rule of law. To the extent we can more clearly identify the principles of the rule of law, we can more effectively support the legal and political reforms that will advance it.

Two seminal writings on the rule of law – one in the late 19th century and another in the mid-20th century – have helped modern scholars in their efforts to define the concept. British lawyer and professor AV Dicey wrote in 1897 that the rule of law in England included at least three concepts:

> *It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of wide discretionary authority on the part of the government ...*
>
> *It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals ...*
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> *The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us (in England) the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; ... thus the constitution is the result of the ordinary law of this land.*[10]

Sixty years later, Austrian Nobel Prize-winning economist and political theorist FA Hayek wrote in *The Origins of the Rule of Law* about the history and meaning of

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6 Hayek, above at note 1, at 164–6.

7 Kennedy, above at note 4: "Although I cannot recall the phrase in common usage when attending college and law school a half century ago, it has deep roots."

8 Stein, above at note 2, at 294–5.

9 Judith N Shklar, "Political Theory and The Rule of Law", in AC Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987) 1: "It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter."

10 Dicey, note 2 above, at 198–9.

the concept. Hayek traced the idea and development of the rule of law from its origins in the writings of ancient Greek and Roman philosophers to its refinement in English constitutional history.[11] The founders of the American Constitution were influenced by many British writings, particularly those of John Locke, and embedded those ideals in the American Constitution in 1787.

More recently, justices of the United States Supreme Court have written and spoken in support of and explaining the rule of law.[12] On the British side of the Atlantic, a thoughtful and significant book on the rule of law has been written by the late senior law lord, Lord Thomas Bingham.[13]

Through this historical record and modern scholarship and speeches, several principles that are central to the meaning of the rule of law have emerged:[14]

- The law must be superior. All persons are subject to the law whatever their station in life.
- There must be separation of powers in the government. The lawmakers should enact the law in general terms. It should not be the body that decides on application of the law to specific situations.
- The law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a non-arbitrary manner.
- The law must be applied equally to all persons in like circumstances.
- Members of society must have the right to participate in the creation and refinement of laws that regulate their behaviour.
- The law must be just and protect the fundamental human rights of all members of society.
- Legal processes must be sufficiently robust and accessible to ensure the enforcement of those protections.
- The judicial power must be exercised independently of either the executive or legislative powers, and individual judges must base their decisions solely on the laws and the facts of individual cases.

The 'rule of law' definition set out in the report of the secretary general of the United Nations incorporates most of these principles. Further comment about these principles may be helpful.

The first principle reflects the essence of the rule of law dating back to Aristotle: "The rule of law is a government of laws and not of men."[15] Stated another way, no person is above the law.

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11 Hayek, note 1 above, at 164–70.

12 See, for example, Sandra Day O'Connor, Remarks at the CEELI Institute Dedication (June 8 2007), excerpted at *CEELI Institute Newsletter* (June 2007) 2; Stephen Breyer, "Judicial Independence", 95 *Geo LJ* (2007) 903; Kennedy, note 4 above; John G Roberts, Jr, remarks at Fair and Independent Courts: A Conference on the State of the Judiciary (September 28 2006) 5, available at www.law.georgetown.edu/news/documents/CoJ092906-roberts.pdf; and Ruth Bader Ginsburg, "Remarks on Judicial Independence", 20 *U Haw L Rev* 603 (1998).

13 Bingham, note 2 above (building upon his 2005 Sir David Williams lecture).

14 See Stein, note 2 above, at 302.

15 Hayek, note 1 above, at 166.

The second principle ensures that an enacted law will be applied generally to everyone in society and will not be applied to criminalise the acts of only selected persons. Laws must be general and apply to all persons. The ancient Greek writers were particularly concerned about the separation of power between the law-making body and the law-applying body.[16]

The ancient Greeks and the British writers were also particularly concerned about government discretion, which they viewed as antithetical to the rule of law. Government discretion, in their view, would lead to arbitrary government action and was inconsistent with a government of laws and not of men. The third principle requires that the law be sufficiently defined, so that government discretion is limited and arbitrariness minimised.

The fourth principle expresses the central idea of equality. This concept is reflected in writings about the rule of law throughout human history. The Greeks had another word – *isonomia* – that more fully expressed the idea of equality of all under the law.[17] For many ancient Greek writers, *isonomia* represented an even higher ideal than *democracia*. In a democracy, the majority might persecute a minority. *Isonomia*, however, required society to treat all of its citizens equally.

The fifth principle suggests that democracy, or citizen participation in establishing the rules applicable to them, is an essential principle of the rule of law. This principle, which is reflected in the UN secretary general's definition of 'rule of law', is a proposition that does not enjoy universal agreement.[18] It is, perhaps, theoretically possible for a benevolent dictatorship to include the other elements of the rule of law and not have the characteristics of a democracy. While theoretically possible, it seems realistically impossible, and it is difficult if not impossible to give an example of such a non-democratic benevolent dictatorship under the rule of law.

The sixth principle, which embodies a substantive rather than procedural guarantee of the rule of law, expresses the idea that the laws in a society under the rule of law must be just. This principle is intended to distinguish a government under the rule of law from a government ruling by law. In Nazi Germany, for example, some of the elements of the rule of law might have been present, but without the element of just laws the government is not operating under the rule of law.

One difficulty with incorporating the element of substantive justice into the concept of a universal rule of law is identifying what universally constitutes 'just' laws. Laws considered morally repulsive in some societies – for example, capital punishment – are the accepted law of other jurisdictions. Lord Bingham has observed, however, that although there may be ambiguity around the outer borders of this concept, there is general agreement about the core of substantive justice.[19]

Dr Mark Ellis, executive director of the International Bar Association (IBA), has proposed that the definition of the substantive justice element of the rule of law be based upon the non-derogable rights codified in the United Nations Covenant of

16 *Ibid*, at 164–5.
17 Stein, note 2 above, at 297–8.
18 UN Secretary General, above at note 5.
19 Bingham, note 2 above, at 68.

Civil and Political Rights.[20] These rights are those human rights that cannot be abrogated by a government, even in times of crisis.[21] Such rights, he argues, can constitute the core principles of substantive justice required under the rule of law.

A distinction has been drawn in some recent writings between a 'thin' rule of law and a 'thick' rule of law.[22] A thin rule of law describes governance in a society in which many of the procedural principles of the rule of law would be observed, but not the element of substantive human rights law.[23] An example would be a society that has a system of laws governing all of its citizens and an efficient court system to enforce those laws, but the system does not include a robust protection of human rights. A thick rule of law, by contrast, is governance under a rule of law that includes all of the principles of the rule of law, including those relating to substantive justice and enforcement of human rights protections.[24]

The seventh principle expresses the idea that the law must be enforceable. It has long been established that a right without a remedy is not a right at all. In the United States, as far back as *Marbury v Madison* in 1803, Chief Justice John Marshall wrote for the Supreme Court that: "The government of the United States has been emphatically termed a government by laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[25]

The eighth principle, that the rule of law requires an independent judiciary, has been described by US Supreme Court Justice Sandra Day O'Connor as absolutely essential to the rule of law.[26] Alexander Hamilton, writing in *The Federalist* in support of approval of the United States Constitution, described the importance of judicial independence in this manner: "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."[27] Clearly, if governance is to be by law and not by men, it requires an application of the laws in an unbiased, even-handed manner by an independent judiciary.

This principle includes the ideas of both institutional independence and decisional independence. Institutional independence describes the independence of the judicial branch from the executive and legislative branches of government.[28] Decisional independence is the requirement that a judge must decide a particular case only on the basis of the law and the facts presented to the judge in the case.[29] Both institutional and decisional judicial independence are essential to governance by the rule of law.

Perhaps this eighth principle of independence should be broadened to require,

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20 Mark Ellis, "Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice", 72 *U Pitt L Rev* (2010) 191, 201–7.

21 These rights might include the right not be subject to torture, the right to a fair trial, the right to freedom of thought, conscience and religion, the right to non-discrimination and the right not to be punished disproportionately. See *ibid*.

22 Robert Stein, "Symposium, The History of CEELI, the ABA's Rule of Law Initiative, and the Rule of Law Movement Going Forward", 18 *Minn J Int'l L* (2009) 304, 320; Bingham, note 2 above, at 66.

23 *Id*.

24 *Id*.

25 *Marbury v Madison*, 5 US (1 Cranch) 137, 163 (1803).

26 For example, Sandra Day O'Connor, "Fair and Independent Court", 95 *Geo LJ* (2006) 897; O'Connor, above at note 12.

27 Alexander Hamilton, *The Federalist*, No 78, ed by Clinton Rossiter (1961), at 470.

28 Sandra Day O'Connor, "Vindicating the Rule of Law: The Role of the Judiciary", 2 *Chinese J Int'l L* (2003) 1, 1–3.

29 *Ibid* at 3–4.

in addition, an independent law-enforcement process that includes independent police, prosecutors and prison officials. This may be as important as an independent judiciary applying the law fairly to all persons. In addition, an independent bar is essential to protect the independence of judges and safeguard against government action that exceeds its powers.

An argument has been made that the definition of the rule of law should include a further principle: a requirement for the law to protect the security of persons and property. Rachel Kleinfeld Belton has written:

> *Law and order is central to the popular understanding of the rule of law. Most citizens within weak states see law and order as perhaps the main good of the rule of law. Law and order is essential to protecting the lives and property of citizens – in fact, it is a prime way of protecting the human rights of the poor and marginalized, who often face the greatest threat from a lack of the rule of security. In this end goal, the rule of law is often contrasted with either anarchy or with a form of self-justice in which citizens do not trust in the state to punish wrongdoers and to right wrongs but instead take justice into their own hands and use violence to enforce the social order.*[30]

Other definitions of the rule of law have been advanced by others who have struggled to define this critically important but elusive concept in a comprehensive way. Lord Thomas Bingham offered this definition of the rule of law in his 2010 book on the subject:

> *[A]ll persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered by the courts.*[31]

Lord Bingham then added eight sub-rules to fully detail the principles that constitute the rule of law.[32] His definition and sub-rules generally incorporate all of the principles discussed in this chapter.

The World Justice Project, a free-standing rule of law organisation originally created by the American Bar Association, has also developed a working definition of the rule of law with four principles:

- *The government and its officials and agents as well as individuals and private entities are accountable under the law.*

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30 Rachel Kleinfeld Belton, "Competing Definitions of the Rule of Law", Carnegie Endowment for International Peace (2005) 11, available at http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

31 Bingham, note 2 above, at 8.

32 Lord Bingham's eight sub-rules are as follows:
- "The law must be accessible and so far as possible intelligible, clear and predictable." *Ibid* at 37.
- "Questions of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion." *Ibid* at 48.
- "The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation." *Ibid* at 55.
- "Ministers and public officers at all levels must exercise the powers conferred on them in good faith fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably." *Ibid* at 60.
- "The law must afford adequate protection of fundamental human rights." *Ibid* at 66.
- "Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties are unable to resolve." *Ibid* at 85.
- "Adjudicative procedures provided by the state should be fair." *Ibid* at 90.
- "The rule of law requires compliance by the state with its obligations in international law as in national law." *Ibid* at 110.

- *The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.*
- *The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.*
- *Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.*[33]

Based upon this definition, the World Justice Project has developed eight indicators constituting a rule of law index, by which to evaluate the rule of law in 102 countries.[34] Again, this definition includes generally the principles discussed earlier constituting the rule of law. Significantly, it should be noted that the World Justice Project's definition includes the law and order principle of "protecting the lives and property of citizens" urged by Rachel Kleinfeld Belton.[35]

The IBA, wary of the difficulty of satisfactorily and comprehensively defining the rule of law, in 2005 adopted a resolution that does not purport to be a definition, but rather "an authoritative statement on behalf of the worldwide legal profession ... [that] merely sets out some of the essential characteristics of the Rule of Law".[36]

Characteristics of the rule of law, as noted in the IBA resolution, include:

an independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law[37]

The rule of law, in the purest sense, I suggest, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence, therefore, should be judged in relative terms; what is possible in highly developed Western democracies may simply not be achievable in a developing country. But no country can justly claim perfect adherence to these principles. The rule of law, then, is a lodestar to which we can turn for guidance now and in the future. It is humankind's best hope for freedom and justice.

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33 World Justice Project, "What is the Rule of Law?" Available at http://worldjusticeproject.org/what-rule-law.

34 Those indicators are:
- Constraints on government powers;
- Absence of corruption;
- Open government;
- Fundamental rights;
- Order and security;
- Regulatory enforcement;
- Civil justice; and
- Criminal justice.

Ibid at 2.

35 Compare *ibid* at 9, with Belton, above at note 30, at 11.

36 IBA, "Commentary on the IBA Council 'Rule of Law' Resolution of September 2005" 2, available at www.ibanet.org/Document/Default.aspx?DocumentUid=A89CFFB1-BD4A-445C-8CAB- 553AF21BD7A7.

37 *Ibid.*