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Erwin Chemerinsky

Berkeley Law

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By Professor Erwin Chemerinsky

Few concepts in law are more basic than the rule of law, few are more frequently invoked, and yet few are more imprecisely defined. I confess that I reacted with some skepticism when I learned of the American Bar Association's new effort to define the rule of law. It is understandable why this should be a focus, but I wondered whether there really was anything new to say on the subject, let alone anything with practical usefulness.

On reflection, I think that my skepticism was unwarranted. There is a great deal to say and much work to be done to clarify the meaning of the rule of law. In this article, I focus on three questions: First, why is it useful to have another effort to formulate a practical definition for the rule of law? Second, what are the pitfalls in doing so? Third, what are the questions that need to be addressed in formulating a definition?

In other words, my goal in this article is not to develop a practical definition of the rule of law. Rather, I hope to identify the problems and issues that must be confronted in doing so.

Why Another Effort to Define the Rule of Law?

In researching what others have written about the rule of law, I was struck by the number of previous attempts to define the rule of law and how abstract
According to Raz, the rule of law has eight "guiding principles":

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of crime-preventing agencies should not be allowed to pervert the law.

While it is difficult to disagree with any of these propositions, they do not really provide much guidance. For example, Raz's idea that laws should be relatively stable gives no indication of when it is appropriate to change laws, whether by overruling precedent or revising statutes. Another concept—the principles of natural justice must be observed—sounds valid in theory but there is not now, and likely never will be, any agreement as to what are the principles of natural justice. All would also agree that crime-preventing agencies should not pervert the law, but the question of what constitutes a perversion of the law, as opposed to desirable law enforcement, confronts courts every day.

The vagueness of Raz's definition of the rule of law is common to other efforts as well. One of the more famous attempts to define the rule of law was the Act of Athens, drafted in 1955 by jurists from forty-eight countries. They declared that the rule of law includes the following four principles:

1. The State is subject to the law.
2. Governments should respect the rights of the individual under the rule of law and provide effective means for their enforcement.
3. Judges should be guided by the rule of law, protect and enforce it without fear or favor, and resist any encroachments by governments or political parties on their independence as judges.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the rule of law, and insist that every accused is accorded a fair trial.

Again, while the principles are unassailable, they are so abstract that it is difficult to find much practical usefulness in them. There is a real danger to such abstraction, which makes it easy to dismiss the usefulness of the concept of the rule of law. The philosopher, Judith Shklar, has stated:

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.

Yet, there is great danger in dismissing the concept of the rule of law. As an example, consider that in recent years the American government has claimed the authority to detain American citizens as enemy combatants without providing due process, and to engage in torture in violation of treaties and federal statutes. At the very least, these actions raise profound questions about the rule of law, its meaning, and its application in wartime. The actions of other nations around the world likewise demonstrate that we are living in a time when a clearer concept of the rule of law is enormously important.

From a practical perspective, what does the rule of law provide? First, it sets forth rules for how to design a government. This is less important in a society with a long-standing, stable government committed to the rule of law but critically important to nations that are in the process of changing their governing structure. Second, the rule of law provides standards regarding how a government should act. As executives, legislators, or judges choose a course of conduct, the rule of law provides crucial guidance. Third, the rule of law provides a basis for evaluating government action. The fundamental principles of the rule of law can be applied to government conduct in any nation and offer grounds for evaluation. Finally, the rule of law provides a basis for arguing for a change in government action. The power of the concept provides a strong rhetorical basis for criticizing governmental practices and urging reforms.

All of these reasons demonstrate why it is important to develop a clearer, more practical definition of the rule of law.

Pitfalls in Trying to Define the Rule of Law

I see several serious pitfalls in the effort to develop a more practical definition of the rule of law. First, there is the problem of abstraction. The definition must be general enough to transcend national boundaries, but specific.
enough to be useful in accomplishing the tasks described above. This is no easy feat. As explained earlier, the efforts of the finest experts in philosophy and jurisprudence have produced highly abstract definitions that lack much practical usefulness. But the other end of the continuum is equally problematic; a definition of the rule of law that addresses the problems facing the United States early in the twenty-first century is not very useful either.

Second, there is the problem of repetition. Because so much already has been written on the rule of law, there is no need to reinvent or repeat these ideas. However, philosophers and jurists continue to do so today, nearly four hundred years after John Locke set forth the basic concept of the rule of law. According to Locke, the rule of law requires "established settled knowable law, applied by a judge who is both known and indifferent, who does not produce judgments that are varied in particular cases, but to have one rule for rich and poor, for the favourite at court and the country man at plough."6

One of the most famous efforts to elaborate on this basic concept of the rule of law took place in 1959 when, 185 judges, practicing lawyers, and teachers from 53 countries assembled under the aegis of the International Commission of Jurists and created a detailed definition of the rule of law known as the Declaration of Delhi.7 Like many previous efforts, the declaration reasserted the universality of the rule of law and the importance of an independent judiciary. However, the task now must be to do more than repeating these and other efforts, to build on them to develop a more practical definition of the rule of law.

Third, it is important to avoid confusing the familiar with the essential and the unfamiliar with the unnecessary. For example, is a written constitution necessary for the rule of law? Must there be a free market economy in order to have the rule of law? While it is tempting to generalize from the American experience and answer these questions in the affirmative, that would be a mistake. England, for example, has long been committed to the rule of law but has no written constitution.

Conversely, it is a mistake to assume that just because something is familiar it is synonymous with the rule of law. For instance, in the American criminal justice system, almost 95 percent of all cases are disposed of via plea bargaining. The enormous pressure to plead guilty sometimes leads even innocent people to do so. Is this practice consistent then with the rule of law?

Fourth, there is a pitfall in attempting to be too inclusive in defining the rule of law. There are many aspects to a good and decent society, and the rule of law is merely one of them. For example, whether a particular war is just and worth fighting is an obviously important question, but not likely one to be answered based on the rule of law. Similarly, a society's duty to ensure food, medical care, and shelter for all is important, but probably not to be determined based on the definition of the rule of law.

Finally, it is important to not be too court-centered in defining the rule of law. To be sure, courts are essential to enforcing the rule of law. But, legislatures that devise laws and executive officials who implement them must follow the rule of law as well. The rule of law therefore applies to all government actions, whatever the branch or level of government involved.

Questions to Consider in Formulating a Practical Definition of the Rule of Law

As explained in the introduction, the goal of this article is not to attempt to formulate a new, more practical definition of the rule of law; rather, I hope to raise some of the questions that must be addressed in doing so. To accomplish this, I want to focus on eight aspects of the rule of law that appear in virtually all of the definitions and use that as the framework for identifying some of the key questions that must be addressed.

1. The rule of law requires the formation of general laws according to set procedures.

The obvious question is whether the rule of law requires that a society be democratic. Must laws be enacted by popularly elected legislatures in order for the rule of law to be satisfied? If a military dictator formulates general laws according to set procedures, is that still consistent with the rule of law?

While this issue is of enormous importance in many parts of the world, it may seem less relevant in the United States. Yet, rules with the force of law are promulgated regularly by unelected federal, state, and local administrative bodies in the United States. If the rule of law requires that democratically elected bodies formulate the laws, can rule making by administrative agencies be reconciled with this requirement?

2. Laws must be general, prospective, and clearly stated.

Phrased this way, no one would disagree with this principle. This aspect of the rule of law clearly applies to the content of criminal laws. But what about laws governing civil liability? The nature of a common law system, unlike a civil law system, is that the law is not clearly stated in the form of statutes, but rather is derived from cases. Even more troubling, while retroactive criminal liability violates the prohibition on ex post facto laws, retroactive civil liability is allowed so long as it is reasonable.8 Can such retroactive civil liability be reconciled with the rule of law?

3. The government must obey the law in its actions.

This tenet is also part of every definition of the rule of law. It underlies the basic concept that "we are a nation of laws, not people." Yet, this is too facile a slogan, and it obscures the hard question: When, if at all, is the government justified in breaking the law? This has come to public attention most prominently in the debate over whether tor-
tute is ever justified as part of the war on terrorism. Although torture is prohibited by both treaty and statute, are there situations in which the government can violate these laws, such as in preventing a catastrophic event? This, of course, is one example; there are countless more that raise the question of when, if at all, the government may break the law.

4. Government must not infringe the rights of individuals.

This principle raises at least four questions of great importance in formulating a practical definition of the rule of law. First, should the protection of rights apply only to the government, or should private entities also be limited in their ability to violate rights? The American Constitution, almost without exception, limits the protection of rights to state action, that is, action taken by the government. But does this mean that a private employer can fire an employee for his or her free speech, or for having an abortion, or for being gay? In light of the tremendous power of private actors, such as corporations, is it consistent with the rule of law to limit the protection of rights just to the government?

Second, how is it determined which rights individuals possess? In jurisprudential terms, this has been the age-old debate between natural law and positivism as a way of determining the rights of individuals. In contemporary constitutional discourse, it is the debate between originalists and non-originalists. Originalists believe that the meaning of the Constitution was fixed when it was adopted and can be changed only by amendment. Non-originalists, in contrast, believe that the meaning of the Constitution changes over time, by interpretation as well as amendment. The debate over whether there is a constitutional right to abortion or of physician-assisted suicide or for private, consensual homosexual activity ultimately turns on how it is to be determined which rights individuals possess.

Third, are rights primarily "negative liberties," concerned with negative liberties—prohibitions on the government from interfering with speech or religion or denying equal protection or due process. But in international law and in the constitutions of many other nations, there are important affirmative rights, such as the right to food, shelter, and medical care. Is a concept of primarily negative liberties consistent with the rule of law?

Finally, what justifications are sufficient to permit infringing individuals' rights? Are any rights absolute? If not, or for all rights that are not absolute, how is it to be determined what interests are sufficient to justify government actions that limit rights? From a practical perspective, this often is the crucial question.

5. The government must follow fair procedures in depriving a person of life, liberty, or property.

Of course, this concept requires determining what are considered fair procedures. As noted earlier, approximately 95 percent of all criminal cases in the United States are disposed via guilty pleas. Is this enough to satisfy the requirement of fair procedures?

The U.S. Supreme Court has indicated that appropriate procedures under due process are to be determined by balancing competing considerations: the importance of the interest to the individual, the ability of additional procedures to reduce the risk of an erroneous deprivation, and the government's interests. Are these the appropriate considerations? How should they be balanced, for example, in the context of the war on terrorism?

6. The government must treat likes alike and unalikes unalike.

This, of course, is the formal definition of equality promulgated by Aristotle long ago. But what does equality require? Is the appropriate focus of equality just on equal treatment of individuals, or should attention also be paid to whether the results are equal? This, of course, influences countless key issues, such as whether discriminatory impact is sufficient or whether there must be discriminatory intent for a violation of equal protection. It also is the underlying question as to whether affirmative action is justified, an issue confronting the United States and many other countries throughout the world.

7. The government must provide a fair system to resolve private disputes.

An important function of government is to provide a peaceful, fair method of resolving private disputes. This, obviously, is the primary focus of the civil justice system. But a key issue today is
whether the tremendous shift towards private, alternative dispute resolution is sufficient to meet this aspect of the rule of law.

Increasingly, doctors insist on arbitration as a condition for treating patients, and employers rely on arbitration for resolving disputes with employees. Does private arbitration as a central method of dispute resolution satisfy the rule of law?

8. An independent judiciary is essential to the rule of law.

This principle is unassailable. The protections contained in the rule of law will have meaning only if courts enforce them. This also requires independent judges. How is judicial independence determined? Are there minimal protections in the judicial selection and removal process that are needed to meet this requirement? For example, can elected judges ever be sufficiently independent, especially when they must raise large amounts of money from lawyers and litigants who appear before them?

Conclusion

I realize that I have done little more than list some of the most basic and widely debated issues in law. Yet, inescapably, these are the questions that must be faced in defining the rule of law.

It must be remembered that there often will be great pressure to compromise the rule of law to achieve other seemingly noble objectives. The late Justice Louis Brandeis eloquently expressed this danger:

Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficial. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.34

It is the rule of law that offers protection against this concern. Now, perhaps more than ever, developing a practical definition of the rule of law is essential.

Endnotes

10. See Memorandum, supra note 5.
11. See, e.g., Virginia v. Rives, 100 U.S. 313, 318 (1879) ("[T]he provisions of the Fourteenth Amendment... all have reference to State action exclusively, and not to any action of private individuals.").