Towards a Practical **Definition** of the Rule of Law

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
and largely unhelpful most have been. Even one of the most complete and widely cited definitions by the eminent philosopher, Joseph Raz, does not provide much clarity or guidance. 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...
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 rep-
etition. 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.”

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. Like
many previous efforts, the declara-
tion 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 prac-
tical definition of the rule of law.

Third, it is important to avoid con-
fusing the familiar with the essential
and the unfamiliar with the unnecessary. For
example, is a written constitution nec-
essary for the rule of law? Must there be
a free market economy in order to
have the rule of law? While it is tempt-
ing to generalize from the American
experience and answer these questions
in the affirmative, that would be a mis-
take. 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 bargain-
ing. The enormous pressure to plead
guilty sometimes leads even innocent
people to do so. Is this practice consist-
tent 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
de determined based on the definition
of the rule of law.

Finally, it is important not to be too
court-centered in defining the rule
of law. To be sure, courts are essential
to enforcing the rule of law. But, legisla-
tures 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 govern-
ment 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 defini-
tion 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 dis-
agree 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. 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 defini-
tion 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 ques-
tion: When, if at all, is the govern-
ment justified in breaking the law? This has
come to public attention most promi-
ently in the debate over whether tor-
ture 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 may 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 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 govern-
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. But 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 beneficent. 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. 14

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.").