

What is the Rule of Law - and What Is the Alternative?

At the most basic level, the Rule of Law can be recognized by contrast to its opposite, which is the *Rule of Men*. Under the Rule of Men, there is no law but the will of the Ruler -- the whim or fiat of a particular group or person, such as an oligarchy or a dictator.

We experienced the Rule of Men as children, in games like "*Simon Says*" and "*Mother, May I*" -- juvenile diversions concerned not with right, but only with power. These are poor models for governance of a free society.

What the Rule of Law is

What are the hallmarks of the Rule of Law? Under the Rule of Law, life has a certain predictability which allows us to manage our personal affairs, conduct business, and stay out of trouble. We can learn what the rules provide because they are publicly promulgated; and when disagreements arise, we expect court cases to yield similar outcomes in similar cases. We also understand that *everyone* must follow the rules -- no exceptions. Even the government must follow the rules. Whether charging you with a crime or deciding your request for a permit or a zoning variance, the government's discretion is limited.

Under the Rule of Law, the laws are made through methods considered legitimate by consensus of the governed. Here in the United States, whether at the federal, state or municipal level, laws are made by elected representatives, enforced by the Executive, and interpreted by the Judiciary. Laws are *prospective* and not retroactive; that is, new laws apply going forward only. And laws are *general* -- applicable to everyone equally and not directed against specific persons. Put another way, the laws are not arbitrary. And under the Rule of Law, laws are enforced in a manner that is both consistent and predictable.

Finally, the law is accessible to each of us. If the law gives us a right, it also provides a remedy that we can seek in an independent court of law, with the assistance of an independent lawyer to champion our cause.

The Rule of Law also requires guarantees of Due Process. In our Bill of Rights, the Fifth Amendment to the Constitution guarantees, "No person shall be [...]deprived of life, liberty, or property, without due process of law." What process is due depends on the circumstances, but the Bill of Rights further provides protection against unreasonable searches and seizures (Fourth Amendment), as well as against double jeopardy and self-incrimination (Fifth Amendment). The Sixth Amendment provides several rights in criminal cases, including the rights to a jury and a lawyer. In all cases, due process will at a minimum provide you notice of the government's claim against you, and an opportunity to be heard by an impartial tribunal who will decide the matter.

What the Rule of Law is not

When the rules or their application are bewildering, we've likely departed a Rule of Law regime and entered into its inverse -- a regime in which whoever is in power decides how and against whom the "law" is applied. Suppose you are contesting a speeding ticket in traffic court. You have a good lawyer to argue your best case, and also a judge who has no reason to take sides. So far so good. But what if the judge is compelled to find you "guilty" because the *law* -- as decreed by the mayor just last week, well after you were pulled over -- is that every tenth blue car cited pays a fine, no matter what?

Under the Rule of Law, that would be preposterous and could not happen. The mayor's fiat is retrospective and arbitrary -- and an independent judge would invalidate it. In any event, there would be nothing for the judge to find you *guilty* of. Under the Rule of Law, there is a moral and meaningful distinction between guilt and innocence which is not arbitrary. Without it, the rules are inherently arbitrary: should the ruler's

disposition be malignant or benign, the ruler's *whim* -- which can change on a dime -- can be nothing but arbitrary.

With no moral or meaningful guilt or innocence, prosecution shades into persecution: Those in power, who control the force of the state, target their opposition based only on their identity as the opposition -- not because they are meaningfully guilty of anything. Prosecutions are the outcome of power struggles: whoever won the last election - assuming there was an election - is free to persecute their opponents by prosecuting them.

Common Concerns

Q. What if our elected representatives pass unreasonable or arbitrary laws?

A. In the United States, we have a remedy for that. Though Congress has great discretion in passing laws, the Judiciary keeps Congress within its bounds by declining to uphold laws that are *arbitrary and capricious*.

Q. Is *equality under the law* part of the Rule of Law?

A. Absolutely. The Declaration of Independence states:

WE hold these truths to be self-evident, that all Men [persons] are created equal...

What can "created equal" mean? Each of us knows from practical experience that humans come in all different shapes and sizes, with various talents and attributes which serve each of us well in some cases and not so much in others. "Equal" cannot mean *equivalent* or *interchangeable* or *the same*. Under our Constitution, all persons are *equal before the law* -- meaning that no person, regardless of status or position, is above the law.

Q. Even in authoritarian regimes, isn't there a body of law to allow persons to organize their private affairs?

A. Generally, yes. Even in authoritarian regimes, courts continue to work as usual -- until they don't. The ordinary legal system (the normative state) continues to operate alongside a dictatorial power (the prerogative state) encroaching on society. A lawless zone operates alongside the normal one. But at any moment, a person can be yanked from one into the other -- and the lawless zone grows, while the normal zone shrinks.

Heidi Massa, JD
December 2025