



# Revisiting the Rule of Law



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During the Trump Presidency, the phrase “rule of law” – a principle usually confined to law schools, courtrooms and bar association initiatives – burst into public consciousness and became part of our civic discourse. Although it is reasonable to expect lawyers to be able to readily define the term, I found myself to be uncertain about its meaning. Thus, I decided to revisit the principle of the rule of law and share my findings with you, my fellow DBA members.

Like any good researcher, I started with Google. I was delighted when my first search attempt (“rule of law meaning”) returned a [uscourts.gov](https://www.uscourts.gov) webpage as the top result. It defines the rule of law as “a principle under which all persons, institutions, and entities are accountable to laws that are: publicly promulgated; equally enforced; independently adjudicated; and consistent with international human rights principles.”<sup>1</sup> A related webpage provides case summaries and discussion questions that “analyze how landmark Supreme Court decisions maintain the rule of law and protect minorities” with respect to four topics: (1) expression of unpopular views (military funeral protests, flag burning); (2) participation in the judicial process (race/gender and jury selection); (3) exercise of religious practices; and (4) access to education (immigration, separate is not equal, implementing desegregation).<sup>2</sup> For anyone who wants to delve into these topics, or teach others about them, the [uscourts.gov](https://www.uscourts.gov) website provides a great place to start.

A more comprehensive definition is offered by the World Justice Project (WJP), which argues that the rule of law “underpin[s] development, accountable government, and respect for fundamental rights,” and correlates with “higher economic growth, greater peace, less inequality, improved health outcomes, and more education.” WJP identifies four universal principles of the rule of law: (1) account-

ability of both the government and private actors under the law; (2) just laws that are clear, publicized, stable and applied evenly, including laws that protect fundamental rights (i.e., personal security, contracts, property and human rights); (3) open government that provides accessible, fair and efficient processes to enact, administer and enforce laws; and (4) accessible justice, i.e., justice that is timely delivered by competent, ethical and independent jurists who are accessible, have adequate resources, and reflect the makeup of the communities that they serve. WJP also provides an annual Rule of Law Index for 128 countries that focuses on these topics: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice.<sup>3</sup> WJP’s data and analysis is available on its website, which I recommend to anyone who is interested in the international presence (or absence) of the rule of law.

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## ENDNOTES:

<sup>1</sup><https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law#:~:text=Rule%20of%20law%20is%20a,with%20international%20human%20rights%20principles.>

<sup>2</sup><https://www.uscourts.gov/educational-resources/educational-activities/rule-law.>

<sup>3</sup><https://worldjusticeproject.org/about-us/overview/what-rule-law.>

Those who place more weight on legal scholarship may wish to check out R. Stein, *What Exactly is the Rule of Law?* 57 *Hous. L. Rev.* 185 (Fall 2019). Stein identifies these central tenets of the rule of law: (1) the law is superior, i.e., no person is above it; (2) government powers are separated into legislative, executive and judicial branches; (3) the law is known, predictable, and places limits on government discretion to ensure the law's nonarbitrary application; (4) the law applies equally to all persons in like circumstances; (5) the law is just and protects the fundamental human rights of all persons; (6) the law is enforceable, i.e., people have access to justice; (7) the judiciary is independent; and (8) people can participate in the creation of laws. Stein adds five more principles that could be included: (9) the law protects the security of persons and property; (10) the law is written so that ordinary persons can understand it; (11) there is a means to resolve legal disputes without excessive cost or delay; (12) the legal profession is independent; and (13) the country honors its obligations under international law.

Finally, those who like to think about old concepts in new ways may be interested in M. Krygier, *What's the Point of the Rule of Law?* 67 *Buffalo L. Rev.* 743 (May 2019). Krygier contends that rather than recite or refine lists of individual rule-of-law elements, we should focus on the *telos*, or purpose, of the rule of law. He argues that the central problem that the rule of law seeks to address is the arbitrary

exercise of power. Leaders arbitrarily exercise power when they (1) are not subject to any control or limit, other than their own will or pleasure; (2) exercise power in unpredictable ways that others cannot know, foresee, or comply with in advance; and (3) do not allow targets to defend themselves, question the exercise of power, or have any impact on the exercise of power. The problem with arbitrarily exercising power is that it is an immoral way to treat people: "Whensoever someone has power to treat you arbitrarily, even if they choose not to, you are in their power, subject to domination by them, whatever they arbitrarily choose to do. And that ... is a deeply demeaning condition for a person to be in." The central goal of the rule of law, therefore, is a negative one: to limit the arbitrary exercise of power and its resulting evils. But Krygier also argues that the rule of law has a positive goal: to encourage the just exercise of power, including the creation and support of well-functioning governments that understand, respond to and meet the needs of their people. Krygier's article is entertainingly written, thought-provoking, and highly recommended for your reading pleasure.

At the end of my ramble through this (admittedly limited) rule-of-law research, I confess to being no more certain about the meaning of the phrase, although I do feel closer to catching a glimpse. I invite you to take your own journey through this or another legal topic, and to share your findings in this space. Thank you for reading and best wishes for 2021! ●

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