

Lesson: The Rule of Law

Objective: Provide students with background information on the origins of the rule of law and facilitate a discussion on its impact on government today. (*Colorado Model Content Standards: Civics, Standard 1.2, grades 9-12*)

Activities: Teacher lecture (background material and lecture outline provided); class participation activity; and homework assignment.

Outcome: Develop an awareness in students as to the origins of the rule of law, the impact it has in their everyday lives and the role it plays in the judicial system.

Grade Level: Grades 9-12

Anticipated classroom time: 45-60 minutes

Message from former Colorado Supreme Court Chief Justice Mary Mullarkey:

Courts and the Rule of Law

The American commitment to the rule of law stands in sharp contrast to much of the rest of the world. We have agreed to govern ourselves with written state and federal constitutions and implementing laws made by our elected representatives. When we have disputes that we cannot settle among ourselves, we take them to court. We trust juries and judges to decide our most important concerns; they literally decide matters of life and death, fame and fortune.

In *To Kill a Mockingbird*, the author Harper Lee talks about the courts as the great “levelers” of society. Lee means that the courtroom is the one place where all people are treated as equals. Disputes are to be decided on the merits. Differences among the parties in wealth, intelligence, social status, and the like should not determine the outcome of a case. This concept of the courts as society’s great levelers comes directly from the statement in the Declaration of Independence that all of us are created equal. As the motto above the entrance to the United States Supreme Court puts it, a courthouse is a place of “Equal Justice under Law.”

Of course like any other human institution, the courts do not always live up to our ideals. But there are built-in ways to correct errors. Cases can be appealed to the appellate courts and erroneous decisions can be reversed or overruled. Laws, including our constitutions, can be amended.

Overall, the courts function very well. Every year the Colorado courts resolve over 750,000 cases, the equivalent of about one case for every seven people living in the state. All of these cases are important to the persons involved but very few attract any public attention. That court decisions are an every day part of the American routine shows our acceptance of, and reliance on, the rule of law. Not many countries can say the same.

Teacher background information:

The Rule of Law as a Goal of Development Policy

by Matthew Stephenson, Harvard University Department of Government and Law School

Formal Definitions: Formal definitions of the rule of law look to the presence or absence of specific, observable criteria of the law or the legal system. Common criteria include: a formally independent and impartial judiciary; laws that are public; the absence of laws that apply only to particular individuals or classes; the absence of retroactive laws; and provisions for judicial review of government action. There is no definitive list of formal criteria, and different formal definitions may use different standards. What formal definitions have in common is that the “rule of law” is measured by the conformity of the legal system to these explicit standards.

The main advantage of a formal definition of the rule of law is that it is very clear, and relatively objective once the formal criteria are chosen. Choosing which standards to include may be controversial, but after the standards are made explicit, it is usually not difficult to observe the degree to which countries meet or don’t meet the standards. Formal definitions thus avoid more subjective judgments, for example about whether laws are “fair” or “just.”

Formal definitions suffer from two major drawbacks, however. First, the formal conception may place too much emphasis on the “law in the books” and not pay sufficient attention to the “law in action.” Official rules do not always (or even often) map onto the actual operation of the legal system. Thus a formal definition’s objectivity in observation may be purchased at the price of accuracy. Second, the formal criteria are chosen because there is an (often unarticulated) empirical presumption that those formal characteristics will lead to some substantive or functional outcome (Fuller 1964). Indeed, there is no other way to select the formal criteria.

But if that is the case, it suggests a flaw in the definition. What we really should be interested in – that is, the essence of the rule of law – is the substantive or functional outcome. Whether or not the formal characteristics contribute to that outcome ought to be a matter for research, not presumption. This suggests that the “objectivity” of the formal criteria may be illusory, since they are selected through subjective (and perhaps culturally biased) assumptions about the actual effect of the rules in question.

Substantive Definitions: An alternative to the formal approach to the rule of law is one that looks to substantive outcomes such as “justice” or “fairness.” This approach is not concerned with the formal rules, except inasmuch as they contribute to the achievement of a particular substantive goal of the legal system. Unlike the formal approach, which eschews value judgments, the substantive approach is driven by a moral vision of the good legal system, and measures the rule of law in terms of how well the system being assessed approximates this ideal (Dworkin 1985).

The main advantage of the substantive version of the rule of law is the explicit equation of the rule of law with something normatively good and desirable. The rule of law is good in this case because it is defined as such. This is appealing, first because the subjective judgment is made explicit rather than hidden in formal criteria, and, second, because the phrase “rule of law” has acquired such a strong positive connotation. Many people cannot accept any definition that would allow, even in theory, a repressive or unjust regime to possess the rule of law.

But this explicit link between the rule of law and some conception of substantive goodness has drawbacks. First, and most obviously, determining how “just” a particular legal order is requires a subjective – and extremely complex – judgment call. Second, defining the rule of law as a “good” legal system risks making the concept so vague that it’s not very useful. Why should we bother talking about whether a society has or doesn’t have the “rule of law” when what we really are asking is whether the society is good or not? Third, the relationship between law and societal outcomes is problematic in the substantive definition. It is conceivable that there could be a society that had unjust law, or no law at all,

and yet achieved substantive justice according to the normative criteria selected. On the other hand, one could imagine a society that had normatively perfect law and legal institutions, but where law was marginal to the point of irrelevance in actual social life, and where social outcomes tended to be normatively bad. Which society has more rule of law from the substantive perspective? Is it the law that must be good, or the social outcomes? If the former, then don't all the problems with the formal definition apply? If the latter, why talk about law at all?

Functional Definition: A third approach to the rule of law is similar to the substantive definition, but tries to avoid the thorny normative issues by focusing on how well the law and legal system perform some function – usually the constraint of government discretion, the making legal decisions predictable, or some combination of both (Hayek 1960). One version of this view, for example, would hold that a society in which government officials have little or no discretion has a high level of rule of law, whereas a society in which they wield a great deal of discretion has minimal rule of law.

The functional definition of the rule of law is broadly consistent with the traditional meaning of the English phrase, which has usually been contrasted with “rule of man.” It has the advantage, too, of defining the rule of law according to outcome-related criteria, but not requiring a moral verdict on the desirability of that outcome. The functional definition is narrow enough that it does not overlap with other more general concepts, and it makes questions as to the relationship of formal characteristics to the rule of law, and of the rule of law to substantive goals, researchable rather than tautological.

Nonetheless, the functional definition suffers from a number of difficulties. First, as with the substantive definition, the relationship between the legal system *per se* and the functional goal can pose problems. It is possible to constrain government officials or realize predictability through means other than the legal system. Suppose one society has less official discretion than its neighbor even though the latter has apparently more restrictive laws. Which enjoys a greater rule of law under a functional definition? Another problem is the fact that looking at “predictability” or “official constraint” or any other function makes it hard to make any definitive statement about the level of rule of law in a whole society. Government officials may make literally thousands of decisions each day in a given system. Some of them may be highly constrained, while others are not. It is not at all clear how to aggregate the levels of discretion for individual types of decisions into an overall measure of the rule of law. An additional point that the functional definition illustrates most strongly is that, despite contemporary rhetoric, there is no *a priori* reason to believe that the rule of law (defined functionally or formally) is necessarily always a good thing. Consider the example of official discretion. Official discretion is often a bad thing – when seen as such, the behavior is often called “arbitrary.” On the other hand, sometimes official discretion is a good thing – in these cases, we tend to think of the behavior as “flexible.” But flexibility and arbitrariness may be two sides of the same coin. Whether official discretion is used for good or ill depends on a host of other factors. The rule of law, while often a good thing, can in some cases create problems. (This point, of course, does not apply to a substantive definition, where rule of law is good by definition.)

Conclusion: Policymakers need to be clear about they mean by the rule of law because answers to many of the questions they are interested in – whether “rule of law” facilitates economic development and whether democracy is a necessary precondition for rule of law, to cite just two examples – depend crucially on what definition of the rule of law is being used. Moreover, the multitude of rule of law concepts is likely to breed confusion and misunderstanding between donors and recipients, or even within different members of the same community.

Perhaps the most important point for development analysts, policymakers, and the donor community in general to keep in mind is that the rule of law has a number of different possible meanings. All of these definitions have problems, and which one is appropriate will depend on the task at hand. But the pros and cons of these various conceptions – and, more importantly, the differences between the definitions – need to be borne in mind. Indeed, in the end it may make sense for donors and

policymakers to eschew the ambiguous rhetoric of the rule of law in favor of the articulation of more specific reform goals.

The Rule of Law in Western Thought

<http://www1.worldbank.org/publicsector/legal/western.htm>

by Melissa Thomas, a consultant on rule of law and judicial and legal reform

The rule of law is an ancient ideal. Plato wrote one of the earliest surviving discussions. While convinced that the best form of government is rule by a benevolent dictator, Plato concedes that, as a practical matter, persons with the necessary leadership qualities are rare. Accordingly, he imagines a utopia that is governed not by a benevolent dictator, but by Nomos, the god of Law. In “The Politics,” Aristotle also considers whether it is better for a king to rule by discretion or according to law, and comes down firmly on the side of law; individuals are too often swayed by private passions. Christian philosophers, seeing the power to rule as a delegation from God, the Lawgiver, saw any kingly act contrary to “natural” law as an express violation of this delegation for which a monarch would surely be punished after death.

Both the early Greeks and the Christian philosophers had a vision of law as a system of rules whose source lay outside of the ruler himself. For the Greeks, law was inherent in the natural order or arose from the timeless customs of the people; for the Christians, law came from God. Accordingly, if a king were to rule according to law, he would be constrained and his powers would be limited.

A king was seen primarily as a judge, who applied the law in specific circumstances. But in the 16th and 17th century, there was increasing recognition of the power of government to make laws. This newly recognized “legislative” function of government posed a serious problem for the rule of law ideal. If kings made the rules, how was the rule of law different from rule by discretion? And how could kings be bound by the law as private individuals? The English philosopher Thomas Hobbes concluded that they couldn’t ([1651] 1962). In opposition, liberals such as Mill insisted that restraints on legislative power were a necessary part of the rule of law ideal.

Jurists and philosophers now distinguish between two types of rule of law. The first is “substantive” rule of law, defined to be rule according to some particular set of laws that are valued for their content, such as guarantees of basic human rights. The second is “formal” or “procedural” rule of law, defined to be rule according to any laws generated by some legislative process, even if they are “bad” laws.

Several other ideas are sometimes swept under the name of “rule of law.” The idea that the persons in government should themselves be subject to law like any private citizen is another idea that is sometimes discussed under the rule of law. Authoritarian states tend to identify rule of law with “law and order,” implying not restraints on the government but restraints on citizens. Increasingly, economists have come to realize that the free market depends on certain institutions and the enforcement of certain rules, such as the freedom to contract and the enforcement of contracts. Very recently, economists and development specialists have begun to discuss the “rule of law” as the enforcement of private contracts. And while the ideal of the rule of law describes the way a king should act--and by implication, the executive branch--many confuse the rule of law with the quality of the court system.

The Rule of Law Revival

<http://www.ceip.org/files/Publications/rulelaw.asp?from=pubauthor%20>

by Thomas Carothers, Foreign Affairs, c.1998, Vol. 77, No. 2 1998

Legal Bedrock: The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In

particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy--regulatory mechanisms, tax systems, customs structures, monetary policy, and the like--would be unfair, inefficient, and opaque.

The rule of law can be conceived broadly or narrowly. Some American jurists invest it with attributes specific to their own system, such as trial by jury, a constitution that is rarely amended, an expansive view of defendants' rights, and a sharp separation of powers. This alienates those from other societies that enjoy the rule of law but do not happen to follow the American approach in its many unusual particulars. Some Asian politicians focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power. More accurately characterized as rule *by* law rather than rule of law, this narrow conception is built into what has become known as Asian-style democracy.

What Good is the Rule of law?

by Melissa Thomas, a consultant on rule of law and judicial and legal reform

The benefits of the rule of law depend on how the rule of law is defined. For the Christian philosophers, the rule of law was identified with the triumph of the substantive commandments of God; it was valuable because it was equivalent to good government. More generally, the advantages of substantive rule of law are the advantages of whatever rules are to be implemented: for example, the guarantee of basic human rights or the presumption of innocence.

Yet the narrower procedural definition of the rule of law has virtues as well; it is expected to make government action predictable. This predictability is supposed to encourage investment and allow people to plan their lives meaningfully. Contract enforcement is that it allows people to trade and thus to increase their utility; this is thought to be a superior process of allocation because people have the best knowledge of what goods will satisfy them. Accordingly, rule of law is associated by economists with economic benefit, including growth (Hayek 1960). For thinkers from the Greeks through today, the rule of law protected citizens from a monarch's individual passion and self-dealing. Meaningful law, and institutions to change it, allows us to more easily identify and change the rules by which our lives are governed, providing a "handle" for social action.

Not much empirical work has been done on the rule of law to verify the various claims made on its behalf. One reason is that it so difficult to measure. From the theoretical standpoint, it is difficult to construct a measure of the rule of law. From the practical standpoint, it is difficult to gather the data, especially because those societies that have a weak rule of law often have poor governmental transparency and recordkeeping. Nevertheless, surveys of the business community have included questions about the respondents' impressions of the rule of law and the operation of courts. Using such survey data, at least one study has found growth positively correlated with the rule of law as measured in a subjective survey (Knack and Keefer, 1995).

The U.S. Supreme Court

The Framers considered the rule of law essential to the safekeeping of social order and civil liberties. The rule of law holds that if our relationships with each other and with the state are governed by a set of rules, rather than by a group of individuals, we are less likely to fall victim to authoritarian rule. The rule of law calls for both individuals and the government to submit to the law's supremacy. By precluding both the individual and the state from transcending the supreme law of the land, the Framers constructed another protective layer over individual rights and liberties.

Class participation activity:

Identify the essential characteristic of the rule of law

- The supremacy of law, which means that all persons (individuals and government) are subject to law.
- A concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures.
- Restrictions on the exercise of discretionary power.
- The doctrine of judicial precedent.
- The common law methodology.
- Legislation should be prospective and not retrospective.
- An independent judiciary.
- The exercise by Parliament of the legislative power and restrictions on exercise of legislative power by the executive.
- An underlying moral basis for all law.

Homework assignment:

1. The definition of the rule of law is strongly impacted by a country's social and political structure. Compare the definition shared in class to that of a third-world or middle-eastern country. (internet search key words "define rule of law")
2. The most commonly accepted purpose of the rule of law is to limit the arbitrary acts of government. Explain how this influences the judiciary.
3. Prepare a three paragraph essay outlining your concept of the rule of law and why it is important to you.

Colorado Model Content Standards: Civics

STANDARD 1: Students understand the purposes of government, and the basic constitutional principles* of the United States republican form of government.

1.2 Students know the essential characteristics of limited* and unlimited government

Grades 9-12: As students in grades 9-12 extend their knowledge, what they know and are able to do includes: comparing and contrasting limited* and unlimited government* (*for example, constitutional republic*, authoritarian*, and totalitarian government**); comparing how constitutions* promote the principles* of a political system and provide the basis for government; and describing how constitutions* and the rule of law* may limit government

Class outline:

The Rule of Law in Western Thought

The rule of law is an ancient ideal.

- Plato wrote one of the earliest surviving discussions.
- Aristotle considers whether it is better for a king to rule by discretion or according to law in “The Politics,” and comes down firmly on the side of law; individuals are too often swayed by private passions.
- Christian philosophers, seeing the power to rule as a delegation from God, the Lawgiver, saw any kingly act contrary to “natural” law as an express violation of this delegation for which a monarch would surely be punished after death.

Early Greeks and the Christian philosophers had a vision of law as a system of rules whose source lay outside of the ruler himself.

- Greeks, law was inherent in the natural order or arose from the timeless customs of the people
- Christians, law came from God. Accordingly, if a king were to rule according to law, he would be constrained and his powers would be limited.

A king was seen primarily as a judge, who applied the law in specific circumstances.

In 16th and 17th century--increasing recognition of the power of government to make laws.

Newly recognized “legislative” function of government posed a serious problem for the rule of law ideal.

If kings made the rules, how was the rule of law different from rule by discretion? And how could kings be bound by the law as private individuals?

Jurists and philosophers now distinguish between two types of rule of law.

- “Substantive” rule of law, defined to be rule according to some particular set of laws that are valued for their content, such as guarantees of basic human rights.
- “Formal” or “procedural” rule of law, defined to be rule according to any laws generated by some legislative process, even if they are “bad” laws.

Other ideas are sometimes swept under the name of “rule of law.”

- Persons in government should themselves be subject to law like any private citizen is another idea that is sometimes discussed under the rule of law.
- Authoritarian states tend to identify rule of law with “law and order,” implying not restraints on the government but restraints on citizens.
- Increasingly, economists have come to realize that the free market depends on certain institutions and the enforcement of certain rules, such as the freedom to contract and the enforcement of contracts.
- Very recently, economists and development specialists have begun to discuss the “rule of law” as the enforcement of private contracts.

Rule of Law Revival Legal Bedrock

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.

- Upholds the political and civil liberties that have gained status as universal human rights over the last half-century.
 - Examples: Anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty.
 - Central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient.

- Judges are impartial and independent, not subject to political influence or manipulation.
- The government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

Relationship between the rule of law and liberal democracy

- Makes possible individual rights.
- A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law.
- Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it.
- Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement.
- Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy--regulatory mechanisms, tax systems, customs structures, monetary policy, and the like--would be unfair, inefficient, and opaque.

The U.S. Supreme Court

Defines rule of law as:

- The Framers considered the rule of law essential to the safekeeping of social order and civil liberties.
- The rule of law holds that if our relationships with each other and with the state are governed by a set of rules, rather than by a group of individuals, we are less likely to fall victim to authoritarian rule.
- The rule of law calls for both individuals and the government to submit to the law's supremacy. By precluding both the individual and the state from transcending the supreme law of the land, the Framers constructed another protective layer over individual rights and liberties.