

THE RULE OF LAW

Rule of law – 1. supremacy of law. 2. A feature attributed to the UK constitution by Professor Dicey (Law of the Constitution, 1885). It embodied three concepts: the absolute predominance of regular law, so that government has no arbitrary authority over the citizen; the equal subjection of all (including officials) to the ordinary law administered by the ordinary Courts; and the fact that the citizen's personal freedoms are formulated and protected by the ordinary law rather than by abstract constitutional declarations

Conventions – practices relating to the exercise of their functions by the Crown, the government, Parliament, and the judiciary that are not legally enforceable but are commonly followed as if they were.

Rechtsstaat is a doctrine in continental European legal thinking, originating in German jurisprudence, that can be translated as "legal state", "state of law", "state of justice", "state of rights", or "state based on justice and integrity".

Rechtsstaat is a "constitutional state" in which the exercise of governmental power is constrained by the law

Immigration – the act of entering a country other than one's native country with the intention there permanently

Asylum ə'saɪləm – refuge granted to an individual whose extradition is sought by a foreign government or who is fleeing persecution in his native state.

Law lords, Lords of Appeal in Ordinary – formerly, up to 12 persons, holders of high judicial office or practising barristers of at least 15 years' standing, who were appointed to life peerages under the Appellate Jurisdiction Act 1876 to carry out the judicial functions of the House of Lords. Under the Constitutional Reform Act 2005 these functions were transferred to a new Supreme Court and the Law Lords were removed from the legislature

Lord Chancellor – historically, the head of the judiciary, a government minister and Speaker of the House of Lords. He thus combined judicial, executive and legislative functions.

Secretary of State for Justice is a senior position in the Cabinet of the UK Kingdom, held in conjunction with the office of Lord Chancellor

Parliamentary sovereignty – the constitutional principle that the legislative competence of Parliament is unlimited

Secretary of State for the Home Department or Home Secretary is a senior official as one of the Great Offices of State within Her Majesty's Government and head of the Home Office. Home secretary is responsible for the internal affairs of England and Wales and for immigration and citizenship for the UK

1. The rule of law is most important as influencing the decisions of the courts as illustrated by the cases in this chapter. However, the UK Constitution is not wholly derived from the rule of law since much of it is outside the law depending on political practices, or at best conventions, between members of the ruling elite. These are policed by the same people who are subject to them without the kind of independent decision-making that is fundamental to the rule of law.

The rule of law as understood in the UK is therefore not the same as the German concept of *Rechtsstaat*, which means that the state and the constitution as a whole should be embodied in legal rights. The rule of law directly applies only where the courts are involved which is a relatively small part of constitutional activity, albeit an important one focusing as it does on individual rights. However, the indirect influence of the courts in promoting public values may be more substantial.

influence of the courts in Parliament.

2. The rule of law may also have a political effect in restraining Parliament from enacting drastic legislation, for example interfering with the courts. A famous example was the Asylum and Immigration Bill 2003–4 which contained a clause excluding judicial review from most asylum cases. A robust challenge led by the law lords, including a suggestion of a campaign for a written constitution, led to the government dropping the clause (see Woolf, 'The Rule of Law and a Change in the Constitution' (2003) 63 CLJ 317, 328–9). Recent anti-terrorism powers have been limited to some extent by rule of law considerations (Section 24.7). However, challenges by asylum seekers and other immigrants are still restricted and other aspects of the rule of law have been weakened by government intervention (e.g. Sections 9.6.1 and 24.3.4).

3. The rule of law is widely recognised internationally, although its meaning is rarely specified. For example, the preamble to the UN Universal Declaration of Human Rights refers to the rule of law as 'essential'. The principle is embodied in the European Convention on Human Rights (ECHR). The European Union claims to be based on the rule of law (Treaty of the European Union, Preamble). Article 28 of the German Basic Law refers to 'the principles of republican, democratic and social government based on the rule of law'.
4. The Constitutional Reform Act 2005 s1 states: this Act does not adversely affect:
 - (a) the existing constitutional principle of the rule of law, or
 - (b) the Lord Chancellor's existing constitutional role in relation to that principle.However, the Lord Chancellor has no defined role in this respect. He has functions in relation to judicial appointments and in his other role as Secretary of State for Justice, has functions in relation to running the courts. These will be discussed later (Section 7.7.3.1). Along with other ministers he has a general duty to uphold judicial independence.

5. There is a duty to cooperate with the law. In *Brown v Stott* [2001] 2 All ER 97 Lord Hope said:

The rule of law requires that every person be protected from invasion by the authorities of his rights and liberties. But the preservation of law and order on which the rule of law also depends, requires that those protections should not be framed in such a way as to make it impracticable to bring those who are accused of crime to justice. The benefits of the rule of law must be extended to the public at large and to the victims of crime also (at 128). Thus in *Brown* the normal right to remain silent was overridden by a requirement to disclose the

name of the driver of a car in connection with a drink-driving charge. This was because of the social importance of road safety.

6. The relationship between the rule of law in its wider sense and parliamentary supremacy has generated a debate as to which comes first. The predominant view is that Parliament has the last word but there are respectable arguments to the contrary. These will be discussed when considering parliamentary sovereignty (Section 8.5.6).

Different versions of the rule of law

We have seen that the rule of law embraces a range of ideas. In this section, I shall outline three main versions of the rule of law, developing these in greater detail later. A broad distinction can be made between the rule of law as government *by* law (versions 1 and 2) and the rule of law as government *under* law (version 3). The three versions are as follows:

1. *The 'core' rule of law.* This is the basic rule of law which we discussed earlier. It means government *by* law in the form of general rules as opposed to the discretion of the ruler. All it requires is that the rules are validly made and applied. It does not specify their content. It assumes that general rules, even those made by a tyrant, are better than government by the unpredictable whim of a ruler, even a kind one. It implies 'equality' in the sense that everyone who falls within a given law must be treated the same under it and that government must respect its own laws. This does not amount to much since there can be different laws for different groups of people. 'Equality' can be said to be satisfied if each individual in the group is treated equally under the laws relating specifically to the group. The core rule of law is therefore consistent with hideously repressive regimes. As John Stuart Mill remarked:

the justice of giving equal protection to the rights of all is maintained by those who support the most outrageous inequality in the rights themselves. (1972, ch 5)

2. *The 'amplified' rule of law.* The amplified rule of law claims that certain principles relating to fairness and justice are inherent in the notion of law itself as a guide to human conduct and that these moderate bad laws, for example a requirement that laws be announced clearly in advance and be applied by independent courts. It is not claimed that these principles cannot be overridden by other factors. The amplified rule of law is primarily procedural. It could conflict with the core rule of law, for example, a rule which allows a witness in court special protection (e.g. *W (Algeria) v Secretary of State for the Home Dept* [2012] 2 All ER 699, Section 24.3.4).
3. *The 'extended' rule of law.* This is the most ambitious version. It claims that law encapsulates the overarching political values or general moral principles of the community – assumed to be liberal – such as freedom of expression and non-discrimination (Allan, 2006). It claims also to link law with republican ideas of equal citizenship. In as much as this version relies upon vague and contestable concepts, it also conflicts with the core rule of law. It is often claimed that the flexibility of this version of the rule of law allows the courts to respond to the changing values of society. This presupposes that courts are well placed to understand these.

In *R (Anufrijeva) v Secretary of State for the Home Dept* [2003] 3 All ER 827, different approaches to the rule of law led to judicial disagreement. A statute stated that the entitlement of an asylum seeker to certain benefits terminated when the Home Office determined that asylum should be refused. A majority of the House of Lords held that this did not apply until the asylum seeker had been informed of the decision, in that case several months later so as the applicant could exercise her right to challenge the decision in the courts. Lord Bingham, however, dissenting, held that the court should follow the plain words of the legislation. Lord Bingham was thus staking out a core rule of law position while the majority followed the extended rule of law approach. They took the view that unless a statute explicitly says otherwise it must be read so as to accommodate basic rights (the 'principle of legality' (Section 6.5). (See also *Seal v Chief Constable of South Wales Police* [2007]. Section 17.6.1).

Craig (1997) has distinguished between 'formal' and 'substantive' versions of the rule of law. The formal version centres on the shape and application of the law, whether it has been properly made, whether it is clear and fairly applied (thus reflecting the 'core' and 'amplified versions' above). There should be independent courts to interpret and apply the law, which should apply equally to those who fall within it. Without independent courts and equality the notion of rules is meaningless (*R (Cart) v Upper Tribunal* [2010] at [34]–[37]). The substantive version opens out to the content of the law, whether it is fair and just and reflects the values of society. Thus it includes the extended version. The danger of a broad approach is of course that it could reduce the rule of law to a discussion of whether the particular commentator likes the law in question.

The different versions of the rule of law may confuse the debate about the relationship, if any, between the rule of law and democracy. In one sense the rule of law seems to be at odds with democracy in that it depends on decisions being made by an elite of unelected judges. Thus Bellamy (2007) claims that the rule of law points in opposite directions. He is referring however to different understandings of what the rule of law means. On the one hand wider versions of the rule of law assert that fundamental rights should be respected. On the other hand those favouring political solutions use a narrower version, which they associate with the importance of the democratic process as producing valid laws that should be obeyed precisely because they have been through that process. From this perspective the judges have the more limited role of interpreting and applying laws validly made by Parliament but not pronouncing on their wisdom or their conformity to a higher law.

