ARTICLE

WHAT EXACTLY IS THE RULE OF LAW?

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ABSTRACT

In the words of Justice Anthony Kennedy, "the term rule of law is often invoked yet seldom defined." Since the time of Aristotle, scholars, judges and legal practitioners have struggled to clearly articulate the meaning of the phrase. This Article contributes to the ongoing discourse by setting forth eight principles that form the central tenets of the rule of law. This Article also identifies five additional principles that might be added to the list of principles defining the rule of law. This continued definitional quest is important, because to the extent we can more clearly identify the principles of the rule of law, we can more effectively support the legal and political reforms that will advance it.

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I. INTRODUCTION

It is hard to avoid the phrase "the rule of law" these days. A multitude of voices throughout the world express support for the rule of law. Frequently the phrase is a shorthand expression to encourage support for "whatever happens to be the political agenda of the speaker."[1] When that happens, the phrase is chameleon-like—taking on whatever meaning best fits the speaker's purpose. Without a clear definition, the rule of law is in danger of coming to mean virtually everything, so that it may in fact come to mean nothing at all.

In fact, the phrase has been invoked so often that one commentator has written that the phrase "has become meaningless thanks to ideological abuse and general over-use."[2] I disagree. Because of the potential of the phrase to inspire individual actors and inform political and social change, it is important to rigorously identify the meaning of the rule of law. To the extent we can more clearly identify the principles of the rule of law, we can more effectively support the legal and political reforms that will advance it.

1. Robert A. Stein, *The Rule of Law*, *in* THE RULE OF LAW IN THE 21ST CENTURY: A WORLDWIDE PERSPECTIVE 11, 12 (Robert A. Stein & Richard J. Goldstone eds., 2015).

2. Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

Although the concept of the rule of law can be traced back at least to ancient Greece, it has become much more widely discussed in the last twenty-five years.[3] Former U.S. Supreme Court Justice Anthony M. Kennedy has stated that he does not recall the term being used often when he was in law school in the 1950s.[4] That was also this writer's experience as a law student at about the same time.

As a result of the fall of the Berlin Wall and the end of the Soviet Union, new democracies emerged in Central and Eastern Europe in the early nineties, and this development raised greater interest in the concept. As more people on the planet began to live under a democratic form of government, it became clear that democracy alone could not ensure liberty and freedom. The concept of the rule of law and its relationship to the realization of important goals of political reform began to receive much more attention.

II. THE MEANING OF THE RULE OF LAW

A. Origins of the Rule of Law

The essence of the rule of law, originally attributed to Aristotle, is a "government by laws and not by men."[5] Scholars, judges, and lawyers in various countries, particularly in recent years, have labored to define in greater detail the meaning of this concept.[6] There is widespread agreement that the concept is difficult to define in a way that captures all of its meaning.[7] Justice Kennedy has observed: "The term [r]ule of [l]aw is often invoked yet seldom defined."[8]

A good starting point in examining the concept is the definition of the rule of law set forth in the 2004 Report of the Secretary General of the United Nations, entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies:*

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3. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 164, 456 n.1 (1960).

4. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the 20th Sultan Azlan Shah Law Lecture: Written Constitutions and the Common Law Tradition (Aug. 10, 2006) (transcript *available at* http://www.sultanazlanshah.com/pdf/2011%20Book/SAS_Lecture_20.pdf [https://perma.cc/6TK8-PZRU]) ("Although I cannot recall hearing the phrase in common usage when attending college and law school a half century ago, it has deep roots.").

5. HAYEK, *supra* note 3, at 166.

6. *See, e.g.*, TOM BINGHAM, THE RULE OF LAW 3–5, 8 (2010); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–201 (7th ed. 1908); Robert Stein, *Rule of Law: What Does It Mean?*, 18 MINN. J. INT'L L. 293 (2009).

7. *See* BINGHAM, *supra* note 6, at 5–7; DICEY, *supra* note 6, at 182–84, 189–91.

8. Kennedy, *supra* note 4.

> [The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[9]

The principles constituting the rule of law identified in this definition are both procedural and substantive.

Rule of law principles are procedural, for example, in that the laws must be the supreme law of the land, publicly promulgated, equally enforced, and adjudicated by an independent judiciary. Additional procedural rules require that the laws must be fairly and equally applied, and that separation of powers must be observed in the enactment and adjudicative processes.

The principles of the rule of law are also substantive, in that the laws must be just and consistent with the norms and standards of international human rights law. Also, the rule of law requires the avoidance of arbitrariness in the law.

Two seminal writings on the rule of law—one in the late 19th century and another in the mid-20th century—have helped modern scholars and judges in their efforts to define the concept.

British lawyer and professor A.V. Dicey wrote in 1897 that the rule of law in England included at least three concepts:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. . . .
>
> It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals . . . .
>
> The "rule of law," lastly, may be used as a formula for expressing the fact that with us [in England] the law of the

9. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

> constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; . . . thus the constitution is the result of the ordinary law of the land.[10]

Sixty years later, Austrian Nobel Prize-winning economist and political theorist, F. A. Hayek wrote in *The Constitution of Liberty* about the history and meaning of the concept. Hayek traced the idea and development of the rule of law from its origins in the writings of ancient Greek and Roman philosophers to its refinement in English constitutional history.[11] The founders of the American Constitution were influenced by many British writings, particularly those of John Locke,[12] and embedded those ideals in the American Constitution in 1787.

More recently, many current and former justices of the U.S. Supreme Court have written and spoken in support of and explaining the rule of law. Former Justice Anthony Kennedy addressed the subject of the rule of law in an address to the American Bar Association in 2006 and again in an unpublished lecture in Kuala Lumpur, Malaysia also in 2006.[13] Justice Kennedy identified several ideas constituting the rule of law which have had a great influence on the thinking of this writer and the principles set forth in this Article. Justice Kennedy compared the rule of law to the phrase, "Per Legem Terrae, or Law of the Land," dating back to Magna Carta: "It was an appeal to a general civic understanding that principles of fairness and justice must be respected."[14]

Former U.S. Supreme Court Justice Sandra Day O'Connor, who was active for many years in promoting reforms to advance the rule of law in Central and Eastern Europe, has also written

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10. DICEY, *supra* note 6, at 198–99.

11. *See* HAYEK, *supra* note 3, at 164–70.

12. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 32 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) ("[T]he end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man's humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.").

13. Anthony Kennedy, Assoc. Justice, U.S. Supreme Court, Keynote Address at the American Bar Association Annual Meeting (Aug. 5, 2006), https://www.c-span.org/video/?193757-1/justice-kennedy-address [https://perma.cc/KJ7S-US3N]; Kennedy, *supra* note 4.

14. Kennedy, *supra* note 4, at 257–59.

and spoken frequently on the rule of law.[15] "Broadly speaking," Justice O'Connor has written, "the [r]ule of [l]aw requires that legal rules be publicly known, consistently enforced, and even-handedly applied."[16] She attributed to Aristotle the idea that the rule of law is "'nothing less than the rule of reason' balanced by considerations of equity so that just results may be achieved in particular cases."[17] Justice O'Connor emphasized that judicial independence was essential to the rule of law.[18]

Another U.S. Supreme Court Justice, Ruth Bader Ginsburg, in several speeches and articles made clear the importance of judicial independence to the rule of law. Justice Ginsburg has written: "Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially."[19] Justice Ginsburg described the essence of an independent judiciary by quoting former Chief Justice William Rehnquist:

> [The role of a judge is similar] to that of a referee in a basketball game who is obliged to call a foul against a member of the home team at a critical moment in the game: he will be soundly booed, but he is nonetheless obliged to call it as he saw it, not as the home crowd wants him to call it.[20]

Chief Justice John Roberts[21] and Justice Stephen Breyer[22] have

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15. *See, e.g.*, Sandra Day O'Connor, Address at Dedication of the CEELI Institute (June 8, 2007), *excerpted in* CEELI INST. NEWSL., June 2007, at 2; Ruth V. McGregor, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1245, 1246 (2006) (describing Justice O'Connor's advocacy for the rule of law and service on the Executive Board of the American Bar Association's Central and Eastern European Law Initiative).

16. Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1, 1 (2003).

17. *Id.* (quoting Shklar, *supra* note 2).

18. *Id.* at 2–5.

19. Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2006).

20. *Id.* (quoting William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 PEPP. L. REV. 227, 229–30 (1980)).

21. *See, e.g.*, John G. Roberts, Jr., Thirty-First Annual Pepperdine University School of Law Dinner: Keynote Address, *in* 37 PEPP. L. REV. (SPECIAL ISSUE) 1, 6 (2009); John G. Roberts, Jr., William H. Rehnquist: A Remembrance, Address at Middlebury College (Oct. 24, 2006), *in* 31 VT. L. REV. 431, 436–37 (2007); John G. Roberts, Jr., Remarks at Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), https://www.c-span.org/video/?194520-3/judicial-independence&start=1288 [https://perma.cc/P8RB-WNTC].

22. *See, e.g.*, Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903 (2007); Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989 (1996).

also spoken and written to establish greater meaning and understanding of the rule of law and judicial independence.

On the British side of the Atlantic, a thoughtful and significant book on the rule of law was written by the late Senior Law Lord Thomas Bingham in 2010.[23] The core of the rule of law, Bingham wrote, is:

> [T]hat all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.[24]

Bingham expanded on this definition of the rule of law by advancing eight subsidiary principles that give more detailed meaning to this definition of the rule of law.[25] Bingham's eight subsidiary principles raised issues with regard to the rule of law that will be explored later in this Article.

Another widely-read definition of the rule of law has been set forth by the World Justice Project, which is an "independent, multidisciplinary organization working to advance the rule of law worldwide."[26] Originally established by the American Bar Association, the World Justice Project is now an independent multinational, multidisciplinary organization that publishes annual evaluations and rankings on the extent to which the rule of law is observed in more than 100 countries throughout the world.[27] The evaluations in each country are based on a thousand household and expert surveys in that country.[28] The World Justice Project definition of the rule of law is based on four universal principles:

> 1. Accountability[.] The government as well as private actors are accountable under the law.
>
> 2. Just Laws[.] The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons, contract and property rights, and certain core human rights.

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23. *See* BINGHAM, *supra* note 6.

24. *Id.* at 8.

25. *Id.* at 37.

26. *About Us*, WORLD JUST. PROJECT, https://worldjusticeproject.org/about-us [https://perma.cc/B3YF-RUPT] (last visited Sept. 12, 2019).

27. *See* WORLD JUSTICE PROJECT, RULE OF LAW INDEX 6–9 (2019), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2019-Single%20Page%20View-Reduced_0.pdf [https://perma.cc/Z3J8-VFQQ] (cataloging the countries involved in the index and explaining the study).

28. *Id.* at 7–8.

> 3. Open Government[.] The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.
>
> 4. Accessible & Impartial Dispute Resolution[.] Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.[29]

The International Bar Association (IBA) is another organization that has identified characteristics of the rule of law. Because of the difficulty of satisfactorily and comprehensively defining the rule of law, the IBA has instead adopted "an authoritative statement on behalf of the world-wide legal profession [that] . . . sets out some of the essential characteristics of the Rule of Law . . . ."[30] These characteristics include:

> An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law . . . .[31]

B. Core Principles of the Rule of Law

Through this historical record, organizational definitions and modern scholarship and speeches, several principles that are central to the meaning of the rule of law have emerged. They include at least the following ideas.

1. Superiority of the Law

The law must be superior. All persons are subject to the law whatever their station in life.

This first principle states the essence of the rule of law dating back to Aristotle: The rule of law is a "government by laws and not by men."[32] In Politics, Aristotle wrote that "it is more proper that

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29. *Id.* at 9.

30. FRANCIS NEATE, INT'L BAR ASS'N, COMMENTARY ON THE IBA COUNCIL 'RULE OF LAW' RESOLUTION OF SEPTEMBER 2005, at 2 (2009), https://www.ibanet.org/Document/Default.aspx?DocumentUid=A89CFFB1-BD4A-445C-8CAB-553AF21BD7A7 [https://perma.cc/QNP9-ESPY].

31. INT'L BAR ASS'N, RULE OF LAW RESOLUTION (2005), https://www.ibanet.org/Document/Default.aspx?DocumentUid=C5728780-90F7-4377-A70E-590B01B33509 [https://perma.cc/6WSY-NVAU].

32. HAYEK, *supra* note 3, at 166.

law should govern than any one of the citizens . . . ."[33] American Bar Association President Chesterfield Smith summarized this principle in the following way in 1973 in discussing the Watergate controversy and the role of President Richard Nixon: "[N]o person is above the law."[34] The law applies to everyone in society whatever their station in life.

2. Separation of Powers

There must be a separation of powers in the government. The lawmakers should enact the law in general terms. The lawmakers should not be the body that decides on the application of the law to specific situations. The executive applies the law to specific situations. The judicial branch rules on disputes regarding the application of the law to specific situations.

This second principle ensures that an enacted law will be applied generally to everyone in society and will not be enacted to criminalize the acts of only selected persons. Laws must be general, prospective, and must apply to all persons. The ancient Greek writers were particularly concerned about the separation of power between the law-making body and the law-applying body.[35] In *Rhetoric*, Aristotle wrote that "the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them."[36]

William Paley described the necessity of separation of powers in this way:

> The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends . . . .[37]

33. ARISTOTLE, ARISTOTLE'S POLITICS: A TREATISE ON GOVERNMENT 117 (William Ellis trans., 1895).

34. Chesterfield Smith, *President's Page*, 59 A.B.A. J. 1347, 1347 (1973).

35. *See* ARISTOTLE, ARISTOTLE'S RHETORIC AND POETICS 20–21 (W. Rhys Roberts & Ingram Bywater trans., 1954).

36. *Id.* at 20.

37. WILLIAM PALEY, *Of the Administration of Justice*, *in* THE WORKS OF WILLIAM PALEY, D.D. 123, 123 (1833).

3. Known and Predictable

The law must be known and predictable so that persons will know the consequences of their actions. The law must be sufficiently defined and government discretion sufficiently limited to ensure the law is applied in a nonarbitrary manner.

Through the centuries, scholars and philosophers have greatly distrusted government discretion. Decisions by individual persons, it has been argued, cannot be trusted because there is a strong possibility they will be arbitrary.[38] Dicey, writing in the late 19th century, called for the elimination of discretion in government actions.[39]

As expressed above, this third principle of the rule of law recognizes the need for some discretion by government officials in the modern administrative state, but requires that discretion be minimized. Arbitrariness is the danger to be avoided. This principle expresses the idea that discretion, while not forbidden, should be "sufficiently defined and . . . sufficiently limited to ensure the law is applied in a nonarbitrary manner."[40]

4. Equal Application

The law must be applied equally to all persons in like circumstances.

The principle of equality is a central idea in the rule of law. The Greeks had another word—isonomia—that more fully expressed the idea of equality of all under the law, whatever their position in society.[41] For some ancient Greek writers, isonomia represented an even higher ideal than democracia.[42] In a democracy, the majority might persecute a minority. Isonomia, however, requires a society to treat all of its citizens equally. As expressed above, this fourth principle recognizes that the law may treat classes of persons differently, but requires that the different treatment have a rational basis. This idea is captured in the

38. *See* ARISTOTLE, *The Politics*, *in* THE POLITICS AND THE CONSTITUTION OF ATHENS 9, 87–88 (Steven Everson ed., 1996); CICERO, ON THE COMMONWEALTH AND ON THE LAWS 173 (James E.G. Zetzel ed., Cambridge Univ. Press 1999) ("[T]here is nothing more unjust than [laws made by individual persons], since it is the essence of law to be a decision or order applying to all.").

39. DICEY, *supra* note 6, at 183–84.

40. *Id.*

41. *See* HAYEK, *supra* note 3, at 164–65; *see also* Gregory Vlastos, *Isonomia*, 74 AM. J. PHILOLOGY 337, 366 (1953).

42. *See* HAYEK, *supra* note 3, at 165; *see also* Vlastos, *supra* note 41, at 348 (explaining that isonomia does not mean "equality of distribution" but rather the "equality of law").

statement of the fourth principle by requiring the law must be applied equally to all persons "in like circumstances."

5. Just Laws

The law must be just and must protect the fundamental human rights of all persons in society.

This fifth principle embodies a substantive rather than a procedural guarantee of the rule of law, and expresses the idea that the laws in a society that honor the rule of law must be just. This substantive requirement is intended to distinguish a government under the rule of law from a government operating with a rule by law. In Nazi Germany, for example, some of the elements of the rule of law might have been present, but, unless the laws are just, the society is not governed by the rule of law.

One difficulty with incorporating the principle of substantive justice into the concept of the rule of law is identifying what universally constitutes "just" laws. Laws considered morally repulsive in some societies—for example, capital punishment—are the accepted law of other jurisdictions that purport to uphold the rule of law. Lord Bingham, in his book *The Rule of Law*, addressed this difficulty by observing that although there may be ambiguity around the outer borders of this concept, there is general agreement about the core of substantive justice.[43] I believe the problem is more difficult than Bingham suggests.

I suggest the important sources for identifying the substantive justice principles of the rule of law are the basic human rights documents of the United Nations. These documents—the Universal Declaration of Human Rights[44] and the International Covenant on Civil and Political Rights[45]—set forth principles that the nations of the world have agreed constitute the basic human rights of all persons.

Dr. Mark Ellis, Executive Director of the International Bar Association, has taken this idea one step further and has proposed that the definition of the substantive justice principle of the rule of law be based upon the non-derogable rights codified in the Covenant of Civil and Political Rights.[46] These rights are those

43. BINGHAM, *supra* note 6, at 66–84.

44. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

45. G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966).

46. Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191, 199–201, 200 n.47 (2010).

human rights that cannot be abrogated by a government, even in times of crisis.[47] Such rights, he argues, can constitute the core elements of the substantive justice principle required under the rule of law.[48]

A distinction has been drawn in some recent writings between a 'thin' rule of law and a 'thick' rule of law.[49] A thin rule of law describes governance in a society in which many of the procedural principles of the rule of law are observed, but not the elements of substantive justice and protection of human rights.[50] An example would be a society that has a system of laws governing all of its citizens and an efficient court system to enforce those laws, but the system does not include a robust protection of human rights. A thick rule of law, by contrast, is governance under a rule of law that includes all of the principles of the rule of law, including those related to substantive justice and enforcement of human rights protections.

6. Robust and Accessible Enforcement

Legal processes must be sufficiently robust and accessible to ensure the enforcement of the just laws and human rights protections.

This sixth principle expresses the idea that the laws must be enforceable. In the United States, it has long been established that a right without a remedy is not a right at all. In *Marbury v. Madison*, Chief Justice John Marshall wrote for the Supreme Court in 1803: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[51] "Access to justice" is an essential element of the rule of law, and must afford persons remedies to enforce their rights and the ability to access the courts to pursue those remedies.

47. *Id.* at 200.

48. *Id.*

49. *See, e.g.*, Brian Z. Tamanaha, *A Concise Guide to the Rule of Law*, *in* RELOCATING THE RULE OF LAW 3, 3–4 (Neil Walker & Gianluigi Palombella eds., 2009).

50. *See id.*

51. Marbury v. Madison, 5 U.S. 137, 163 (1803).

7. Independent Judiciary

Judicial power enforcing those just laws and human rights protections must be exercised independently of either the executive or legislative bodies, and individual judges must base their decisions solely on the laws and the facts of individual cases.

The principle that the rule of law requires an independent judiciary has been described by Justice O'Connor as the "foundation" of the rule of law.[52] Alexander Hamilton, writing in The Federalist in 1776 in support of approval of the U.S. Constitution, described the importance of judicial independence in this manner: "no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."[53] If governance is to be by law and not by people, it requires an application of the laws in an unbiased, even-handed manner by an independent judiciary.

As expressed, this seventh principle includes the ideas of both "institutional" and "decisional" independence. Institutional independence describes the independence of the judicial branch from the executive and legislative branches of government.[54] Decisional independence is the requirement that a judge must decide a particular case only on the basis of the law and the facts presented to the judge in the case.[55] Both institutional and decisional independence are essential to governance under the rule of law.

8. Right to Participate

Members of society must have the right to participate in the creation and refinement of laws that regulate their behavior.

This principle, included in the U.N. Secretary General's definition of the rule of law, suggests that a democratic form of government is a requirement of the rule of law.[56] Lord Bingham, in his treatise on the rule of law in the United Kingdom, also suggests that this principle is part of the rule of law.[57] There is not

52. O'Connor, *supra* note 16, at 2.

53. THE FEDERALIST NO. 78, at 382 (Alexander Hamilton) (Terence Ball ed., 2003).

54. O'Connor, *supra* note 16, at 2–3.

55. *See id.* at 3–4 (explaining that "decisional independence" is also referred to as "individual" judicial independence).

56. *See supra* note 9 and accompanying text.

57. BINGHAM, *supra* note 6, at 66–67.

universal agreement with the idea that the rule of law exists only in democratic societies.[58] It is, perhaps, theoretically possible for a benevolent dictatorship to include most, if not all, of the other elements of the rule of law and not have a democratic form of government. While theoretically possible, it is difficult, if not impossible, to find an example of such a nondemocratic benevolent dictatorship under the rule of law.

There is considerable authority, noted above, that these eight principles are central to the meaning of the rule of law. The next Part discusses other principles that might also be considered to be important aspects of the rule of law.

III. ADDITIONAL PRINCIPLES THAT MIGHT BE ADDED TO THE DEFINITION OF THE RULE OF LAW

Issues raised by scholars and the various definitions of the rule of law that have been advanced suggest these additional principles that might be added to the list of principles that define of the rule of law.

A. Protection of Persons and Property

Should the following "law and order" principle be part of the definition of the rule of law?: **The law must protect the security of persons and property.**

A thoughtful scholar writing about the rule of law has argued that maintenance of law and order and the protection of persons and property should be one of the principles constituting the rule of law. Rachel Kleinfeld Belton has written:

> Law and order is central to the popular understanding of the rule of law. Most citizens within weak states see law and order as perhaps the main good of the rule of law. Law and order is essential to protecting the lives and property of citizens—in fact, it is a prime way of protecting the human rights of the poor and marginalized, who often face the greatest threat from a lack of security. In this end goal, the rule of law is often contrasted with either anarchy or with a form of self-justice in which citizens do not trust in the state to punish wrongdoers and to right wrongs but instead take justice into their own hands and use violence to enforce the social order.[59]

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58. *See* Tamanaha, *supra* note 49, at 18 (explaining that "the rule of law does not, in itself require democracy").

59. Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, CARNEGIE PAPERS, Jan. 2005, at 3, 11 (footnote omitted).

Supporting this view is the World Justice Project definition of the rule of law quoted above, which provides in its second universal principle that the "fundamental rights" protected by the rule of law include protection of persons and property.[60]

While this argument has considerable merit, the danger in including *law and order* as one of the principles constituting the rule of law is that maintenance of security is often times accomplished by laws and actions that violate human rights of the people.[61] For this reason, this principle is not invariably set forth as part of the rule of law.

B. Understandable by Ordinary Persons

The following might also be added to the principles of the rule of law: **The law must be written in a way that can be understood by ordinary persons in society.**

As noted above, Lord Bingham added to his definition of the rule of law, quoted above, eight subsidiary principles to further explain the concept.[62] Bingham's first subsidiary principle, "The law must be accessible and so far as possible intelligible, clear and predictable,"[63] expresses the idea of the third principle in this Article that the law be "known and predictable." Bingham adds a further dimension and meaning to this principle by asserting that the law must be written in a way that can be understood by ordinary persons in society.[64] That is, statutes and judicial opinions should use words that can be understood by the average person.[65] A related point expressed by Bingham is that these sources of law should not be unnecessarily lengthy and complex so as to make it difficult for the public to understand them.[66]

C. Resolving Disputes Without Excessive Cost and Delay

The sixth principle of the rule of law might be expanded to add: **Means must be provided for resolving disputes without prohibitive cost or inordinate delay.**[67]

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60. WORLD JUSTICE PROJECT, *supra* note 27, at 9.

61. *See generally, e.g.*, Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018) (investigating the procedural safeguards that accompany national security authority and the potential for insufficient safeguards to allow violations of civil liberties).

62. BINGHAM, *supra* note 6, at 37.

63. *Id.*

64. *Id.* at 39.

65. *Id.*

66. *See id.* at 39.

67. *Id.* at 85 ("Means must be provided for resolving, without prohibitive cost or

This idea is advanced in Bingham's sixth subsidiary principle.[68] It may be assumed in the sixth principle about enforceability of legal rights, but it is an important idea that may require expression as a separate principle. Over one hundred years ago, Roscoe Pound asserted that "[j]ustice delayed is justice denied."[69] The assertion was true in 1906 and it is even more true today with greater expense and delay built into the civil justice system.

D. Independent Legal Profession

A very strong argument can be made that the seventh principle of the rule of law requiring an independent judiciary should be expanded to also provide: **An independent legal profession to enforce just laws and human rights protections is essential to the rule of law**.

Without an independent legal profession there is no assurance that the just laws and human rights protections will be enforced. An independent judiciary cannot accomplish this by itself. Indeed, it might be argued that an independent judiciary will not exist without an independent bar.

The fourth universal principle of the World Justice Project definition of the rule of law goes a step further.[70] It extends the requirement of independence to all who "deliver" justice, and that would include, for example, law enforcement officials, such as prosecutors, in addition to attorneys and judges.[71]

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inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve[.]").

68. *Id.*

69. Tania Sourdin & Naomi Burstyner, *Justice Delayed is Justice Denied*, 4 VICTORIA U. L. & JUST. J. 46, 46 n.1 (2014) (explaining that while William Gladstone famously stated that "justice delayed is justice denied," the meaning of the phrase can be traced back to Biblical writings and the Magna Carta). The concept is expressed, but not in the exact wording, in Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, *in* AM. BAR ASS'N, REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 395–417 (1906). *See also* Robert A. Stein, *Causes of Popular Dissatisfaction with the Administration of Justice in the Twenty-First Century*, 30 HAMLINE L. REV. 499, 503 (2007) (describing the historical complaint of delayed justice).

70. WORLD JUSTICE PROJECT, *supra* note 27, at 9.

71. *See id.* ("Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.").

E. Emerging International Rule of Law

Another of Bingham's subsidiary principles is an eighth principle that provides, "**The rule of law requires compliance by the state with its obligations in international law as in national law[.]**"[72]

This idea raises the issue of whether there is an international rule of law. The principles set forth in this Article are directed at the existence of the rule of law in a particular country. They set out the obligations of a government to the citizens of its country to maintain and promote the rule of law in that nation. Bingham draws our attention to the issue of whether the rule of law exists in an international context.[73] He raises the question whether nation states have a duty to other nation states to obey the international obligations agreed to by the community of nation states.[74] I agree with Bingham's eighth subsidiary principle and believe that an emerging international rule of law is developing and will continue to develop over the coming years.[75]

IV. THE RULE OF LAW IS AN IDEAL

It is unlikely that all of these principles will be robustly present in any society. This does not compel the conclusion that the rule of law is not present in such a society.

The rule of law, I suggest, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence, therefore, should be judged in relative terms; what is possible in highly developed western democracies may simply not be achievable in a developing country.

No country can claim perfect adherence to these principles. The rule of law, then, is a lodestar to which we can turn for guidance now and in the future. It is our best hope for freedom and justice.

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72. BINGHAM, *supra* note 6, at 110.

73. *Id.* at 110–12.

74. *Id.* at 112.

75. *Cf.* Thomas M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages* (Pub. Law & Legal Theory Working Paper Series, Paper No. 2, 1999) (arguing that international governance norms will become increasingly uniform and standardized).