

# Chapter 1

## What Is the Rule of Law and Why Is It So Important?

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**Abstract** This chapter considers the rule of law from within the rule of law tradition to clarify what the rule of law is, why it is so valuable, and how we can secure it. The rule of law in its original, best and most useful sense signifies the “*imperium legum*” of the ancients and enlightened modernity: “the empire of laws and not of men”. This requires removing the arbitrary will of public officials as much as possible from the administration of justice in society. The rule of law implies constitutionalism, and all states and societies that struggle toward the rule of law are also working towards constitutional government, because well-constructed constitutions alone hold out the hope of controlling the governors as well as the citizens. Above all the rule of law requires an independent and self-confident judiciary, with power to interpret and apply the laws impartially, without fear or favor. The rule of law may be difficult to obtain, but its absence is never hard to perceive. Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. The ultimate goal of every society and every legal system should be equal and impartial justice for all, free from oppression and arbitrary power.

### 1.1 Introduction

These reflections on the rule of law consider the rule of law from within the rule of law tradition. This chapter clarifies: (1) what the rule of law is; (2) what the rule of law requires of us; (3) where the rule of law comes from; (4) why it is so valuable; and (5) how we can secure it. Let there be no confusion about the subject matter of this inquiry. The rule of law in its original, best, and most useful sense signifies the “*imperium legum*” of the ancients, “the empire of laws and not of men” pursued by the early

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humanists, by the partisans of liberal Enlightenment, and republican revolutions across the globe. This is not the later, positivist, more limited understanding of the rule of law as “*Rechtsstaat*,” which has sapped the rule of law everywhere and caused so much confusion. The rule of law in its original and most natural sense is a pure social good, in which the legalism of the *Rechtsstaat* plays only a partial and supporting role. Societies that enjoy the rule of law are vastly better situated than those that do not. This makes the real rule of law (or its absence) the central measure dividing good from bad government everywhere. All law and political institutions can and should be evaluated to determine whether it or they advance the rule of law – or do not.<sup>1</sup>

Five main points should be made as plainly as possible at the outset. First, the definition: “rule of law” is the English translation of the Latin phrase “*imperium legum*”, more literally “the empire of laws and not of men”. This goes beyond the mere legalism of a “rule by law” or “*Rechtsstaat*”, through which one man, or a faction, or a party rules through positive law to impose his or her or their will on others. Second, the rule of law – the *imperium legum* – requires of us that we remove the will of public officials as much as possible from the administration of justice in society. No executive, legislator, judge or citizen should enjoy arbitrary power to act against the public welfare. Third, the rule of law ideal arises from human nature, because all people seek justice through law and all law and governments claim – explicitly or implicitly – that the laws they promulgate serve justice in fact. From this it follows (fourth) that only the rule of law can secure stable justice in society, which makes the rule of law vastly important. So the fifth and greatest question is how to discover, create, interpret, and enforce the rule of law in such a way that law controls and governs the various private interests, not only of ordinary citizens, but also of the public officials who administer the state. All this follows from the original, once pervasive, and still the most useful understanding of the “rule of law” as “the empire of laws and not of men” – not simply the rule of men through law.

## 1.2 What the Rule of Law Is

The rule of law signifies “the empire of laws and not of men”: the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good (“*res publica*”) of the community as a whole. When positive laws or their interpretation or enforcement serve other purposes, there is no rule of law, in its fullest sense, but rather “rule by law” – mere legalism – in service of arbitrary power. The vocabulary here is important, because the concept of the rule of law enjoyed its fullest elaboration in tandem with related struggles for “liberty” and “republican government” against tyranny and oppression. The liberty (“*libertas*”) of the ancients, the

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<sup>1</sup>This chapter repeats and elaborates arguments also presented in M.N.S. Sellers, “An Introduction to the Rule of Law in Comparative Perspective” in M.N.S. Sellers and Tadeusz Tomaszewski, eds, *The Rule of Law in Comparative Perspective* (2010) at 1. Springer.

Enlightenment, and the republican revolutions of emergent modernity, signified protection by the law and government of all members of society against domination by other persons, or by states, or by the governments of states (where “domination” consists in the arbitrary control by one person or faction of another, without reference to the common good). The key here is the purposes for which positive laws and state action are created, interpreted, or enforced. The law may legitimately control us, but public officials must respect law’s proper purpose, which is the common good of society as a whole, and not their own private interests.

When we have and maintain a legal system that serves the common good of society as a whole, then we have the rule of law (because the laws rule and not men), we have liberty (because the law prevents oppression), and we live in a republic (because government advances the “*res publica*” or “common good of its subjects”). The rule of law, liberty, and republican government are three facets of the same substantive good, secured only where the laws rule and protect us from tyranny and oppression. When positive laws and their interpretation and enforcement serve the public good, and prevent domination by any person or group of persons, then we have the “*imperium legum*”, the rule of law in its fullest and best sense: “the empire of laws and not of men”.

Persons may, of course, disagree about what serves the common good best. Nor should we forget that the “public good” (“*res publica*”) also includes and protects the legitimate private goods and interests (“*res privata*”) of separate individuals and groups. This raises the second-order question, how best to discover and preserve the common good through law: “What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance.”<sup>2</sup> The difficulty of answering this question should not obscure the central importance of the value that it seeks to advance. The rule of law is not simply one or a few or the most important of the techniques sometimes used to secure the “empire of laws and not of men,” but rather the “*imperium legum*” itself. There is no rule of law unless the law itself rules, and regulates the private interests of those with power, so that they cannot act against the common good of society as a whole.

### 1.3 What the Rule of Law Requires of Us

The rule of law requires that we remove the private will of public officials as much as possible from the administration of justice in society. Private as well as public power should be regulated by law, to advance the common good. When acting in a public capacity our only concern should be the public good. When acting in a private capacity, the law should also limit our self-interest to protect the community as a whole. The concept of law embodied in the rule of law tradition therefore

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<sup>2</sup>John Adams, *A Defence of the Constitutions of Government of the United States of America*, volume I (1787) at 128.

includes an element of impartiality that regulates the scope of public power. Legislators should legislate for the common good. To do otherwise would be “corrupt” (a term of art) and undermine the rule of law. Public officials should execute the laws in the light of the common good. To do otherwise would be “tyranny” (another term of art) and violate the rule of law. Judges should interpret the law to advance the common good. To do otherwise would be “arbitrary” (a third term of art) and violate their duty to society. The rule of law constrains the guardians of the law to serve the interests of the law, which is the interest of the whole, rather than any particular party or faction.

The rule of law requires fidelity to one overarching value, sometimes called “liberty,” the state that obtains when law prevents domination by powerful interests, public or private. Note the limits of this requirement. The rule of law does not require that citizens always act in the public interest, but rather, that they do so when the law determines such deference to be necessary, in the light of the common good. Citizens may and properly should have and pursue private interests, but not at the expense of their public duties (which increase as they gain more authority). There can be a significant gap between the requirements of law and morality. The law determines what is *necessary* and therefore required to prevent domination and promote the public good. Morality reflects what is *useful* in advancing the good of society as a whole, but may not be required. Law has much the narrower jurisdiction.

The rule of law requires that laws be made and enforced only to serve their proper purpose, which is the common good or *res publica* of society as a whole. From this many other requirements follow, but always limited by the central purpose of the enterprise. For example, legal certainty is a great friend of liberty. Well-known and easily understood laws can be significant constraints on self-serving power. But legal certainty at the expense of the common good would defeat the purpose of law. Advocates of rule *by* law sometimes undermine the rule *of* law by legitimating the enactments of tyrants. Positive laws promulgated in the private interest do not satisfy the rule of law – although they may sometimes be an advance on otherwise unregulated tyranny. Promulgation and the other virtues of legal formalism often advance the empire of laws. But they are only secondary and contingent requirements of the rule of law, and not the thing itself.

## 1.4 Where the Rule of Law Comes From

The rule of law ideal arises in the first instance from human nature, because all people and all nations seek – or claim to seek – the rule of justice through law. All legal systems claim to be actually and normatively “legitimate,” in the sense that they have the moral right to rule. This does not suggest that all such claims are true or sincere, but rather that they are made – implicitly or explicitly – by every existing system of law. The law’s universal claim to obedience is dependent upon a prior claim to serve justice. Note the vagueness and procedural ambiguity of the first-order claim to legitimacy. Rulers may claim to find the law through sortition, or by

virtue of their own infallibility, or (as Numa did) by direct consultation with God. The veracity (or not) of such claims is less significant than their unanimity. All legal systems depend on the assertion (explicit or implicit) that the laws do and should rule, and not men. All claim to implement the rule of law.

The law's claim to serve justice, rather than the interests of those in authority, arises from human nature and the realities of social power. People more readily submit to laws they perceive to be just, therefore all legal systems claim to realize justice in fact. These natural and universal origins of the rule of law explain the concept's latent appeal, but not its actual success. Beside the universal human desire for the rule of law is the historical rule of law tradition, through which lawyers, governments, and nations have sought to specify, implement, and ultimately to realize the rule of law in practice. This gives the world a basis for evaluating existing legal systems. It is not enough simply to assert the primacy of law. States must actually advance it. If "law" in practice were reduced to the simple self-interested commands of those in power, then the "*Rechtsstaat*" would be an instrument of oppression, and law itself no more than a weapon, to be wielded for good or ill by whosoever holds the sword of the state.<sup>3</sup>

The American John Adams,<sup>4</sup> followed the Englishman James Harrington,<sup>5</sup> in quoting the Florentine Donato Giannotti,<sup>6</sup> who divided the whole history of law and politics into a battle between two parties: those fighting for the rule of law (or government "*de jure*") and those fighting for the rule of certain particular men (or government "*de facto*").<sup>7</sup> This descent of authority, back from America and France to England, Venice, Florence, and ultimately Rome, illustrates the high points of the modern rule of law tradition, which sought to work out in practice what the rule of law requires in principle. The conflict between the "*de facto*" theory of law as the instrument of power, and the "*de jure*" conception of law as the product of reason and justice, has been the driving force of legal modernity, and the development of constitutional government throughout the world.<sup>8</sup>

## 1.5 Why the Rule of Law Is So Valuable

The rule of law is of vast and permanent value to any society, because only the rule of law can secure justice, by preventing tyranny and oppression. The Universal Declaration of Human Rights, approved by the General Assembly of the United Nations

<sup>3</sup> See Joseph Raz, "Authority, Law and Morality", 68 *The Monist* (1985) 285, 299.

<sup>4</sup> John Adams, *A Defence of the Constitutions of Government of the United States of America*, volume I (1787) at 126.

<sup>5</sup> James Harrington, *The Commonwealth of Oceana* (1659), ed. J.G.A. Pocock (1992) at 6.

<sup>6</sup> Donato Giannotti, *Libro della Republica de' Viniziani* (1540) in F. Diaz, ed. *Opere politiche* (1974).

<sup>7</sup> Cf. Cornelius Tacitus, *Annalium ab excessu divi Augusti libri* at I.2.

<sup>8</sup> See M.N.S. Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism, and the Law* (1998). Macmillan.

without dissent, recognized that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.”<sup>9</sup> More recently, the General Assembly identified “human rights, the rule of law and democracy” as “universal and indivisible core principles of the United Nations.”<sup>10</sup> These ringing assertions, repeated or paraphrased by the European Convention on Human Rights,<sup>11</sup> the American Convention on Human Rights,<sup>12</sup> the African Charter on Human and Peoples Rights,<sup>13</sup> and numerous other regional agreements and national constitutions<sup>14</sup> illustrate the substantive moral component always present in appeals to the “rule of law”. The “rule of law” in its best and usual sense implies the fulfillment of justice through law and the negation of arbitrary government.

The battle of the rule of law against arbitrary government takes place in every human society when those with power seek to expand their discretion, and their subjects resist. Nor are the advocates of unfettered power without arguments in their favor. The most learned apostle of despotism, Thomas Hobbes, denied any distinction between “right and wrong,” “good and evil,” “justice and injustice,” beyond our separate and conflicting desires.<sup>15</sup> Hobbes had seen in the horrors of England’s Civil War the indiscriminate misery of anarchy, “which is the greatest evil that can happen in this life.”<sup>16</sup> From this it follows (he suggested) that we need an absolute and uncontested sovereign power to rule us and keep us safe.<sup>17</sup> The fear of anarchy is a powerful and compelling argument for despotism, and as a result the struggle for freedom usually begins with small and incremental advances, beginning with the simple call for written laws, to contain the discretion of those in authority, and only later even attempting to secure just and impartial laws, a much more difficult undertaking.<sup>18</sup>

The rule of law is so valuable precisely because it limits the arbitrary power of those in authority. Public authority is necessary, as Thomas Hobbes rightly observed, to protect against private power, but the rule of law keeps public authorities honest. The rule of law implies constitutionalism, and all states or societies that struggle

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<sup>9</sup> *Universal Declaration of Human Rights* (December 10, 1948), Preamble.

<sup>10</sup> See U.N.G.A./RES/61/39, 18 December, 2006, on “The rule of law at the national and international levels”. Cf. U.N.G.A./RES/62/70; U.N.G.A./RES/63/128.

<sup>11</sup> *European Convention on Human Rights* (4 November, 1950), Preamble.

<sup>12</sup> *American Convention on Human Rights* (22 November, 1969), Articles 8 and 9.

<sup>13</sup> *The African Charter on Human and Peoples Rights* (27 June, 1981), Articles 3, 6, and 7.

<sup>14</sup> See, for example, *Constitution of Russia* (12 December, 1993), Article 1; *Constitution of the Peoples Republic of China* (4 December, 1982), Article 5.

<sup>15</sup> Thomas Hobbes, *Leviathan* (1651) at I.vi.24; I.xiii.63.

<sup>16</sup> *Id.* at II.xxx.175.

<sup>17</sup> *Id.* at II.xviii.90.

<sup>18</sup> The famous story of the *decemviri* and the struggle for the rule of law in Rome was told by Livy in the third book of his history (*ab urbe condita libri* III.33ff). For similar developments in Athens, see Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (1986). University of California Press.

toward the rule of law are also working toward constitutional government, to control power with reason, or (more prosaically) make “ambition counteract ambition”,<sup>19</sup> with the constant aim to “divide and arrange the offices in such a manner as that each may be a check upon the other – that the private interest of every individual may be a sentinel over the public rights.”<sup>20</sup> The rule of law is valuable, because only the rule of law compels “the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefits of them, and be sure of their continuance.”<sup>21</sup>

## 1.6 How to Secure the Rule of Law

The fundamental principle of the rule of law is so widely and universally accepted as to be almost a truism. The laws should rule, and not arbitrary power. The real difficulty arises in securing the rule of law in practice. The great constitutionalist, John Adams, observed that “in establishing a government which is to be administered by men over men”, the greatest difficulty “lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” This requires a “well-ordered constitution” so that justice could prevail “even among highwaymen,” by “setting one rogue to watch another,” so that “the knaves themselves may in time, be made honest men by the struggle.”<sup>22</sup> Many of these necessary legal and political controls were as well-known (as John Adams expressed it) “at the time of the neighing of the horse of Darius” as they are today.<sup>23</sup> The basic guarantors of the rule of law include representative government, a divided legislature, an elected executive, and above all, an independent judiciary serving for extremely long and non-renewable terms in office.<sup>24</sup>

To recognize the necessary connection between the rule of law as an ideal and well-constructed constitutional government does not and should not be taken to imply that all states can or should maintain the same constitutional structures in practice. The social, historical, geographical and other circumstances in different societies will never be entirely the same necessarily, limiting what is appropriate, prudent and possible. Certain practices will never be justified, however, and certain standards and basic institutions will be shared by every society that aspires to attain “the government of laws and not of men.” This brief investigation cannot and should not presume to offer a detailed formula for securing the real rule of law, but it can

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<sup>19</sup>“Publius” [James Madison], *The Federalist* LI (February 6, 1788).

<sup>20</sup>*Id.*

<sup>21</sup>John Adams, *A Defence of the Constitutions of Government of the United States of America*, volume I (1787) at 128.

<sup>22</sup>John Adams, *A Defence of the Constitutions of Government of the United States of America*, volume III (1788) at 505 (Letter VII, December 26, 1787).

<sup>23</sup>*Id.*, Preface, at I.ii.

<sup>24</sup>*Id.*

help to establish a basic outline of the common elements necessary to any rule-of-law polity, including some of the exceptions and allowances that may be needed to establish the rule of law in fact, when history and governments are deeply set against it.

The rule of law will be best secured by stable constitutional government, because well-constructed constitutions alone hold out the hope of controlling the governors themselves. If the only legitimate purpose of government is to advance the common good, and to establish justice (which follows from the common good), then procedures will be needed to determine what the common good requires in practice, and adjudicate between rival conceptions of the public welfare. A rule of law constitution does this by so structuring public institutions and civic debate that private interests cannot usurp public power. This civic architecture of law and government has two main purposes: first, to secure good public officials, second, to make them rule well. The two are related, but one does not always follow from the other. Constitutionalism and the rule of law tradition recognize the inevitable fallibility of human judgment. No person is so well-placed or well-intentioned that she or he will not benefit from the checks and balances of a stable and constitutional rule of law.

## 1.7 Some Practical Requirements

The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor. The great breakthrough in securing the rule of law in most societies occurs when judges attain tenure “*quam diu se bene gesserint*” (or during good behavior) rather than “*durante bene placito*” (at the whim of those in authority). This transition took place in England with the “Glorious Revolution” of 1688, confirmed by the Act of Settlement in 1701, which also prevented the executive from diminishing judicial salaries, once they had been established by law.<sup>25</sup> The Act of Settlement was a turning point in the progress of the rule of law, which made Britain the envy of other European nations.<sup>26</sup> Wherever judges do not enjoy secure tenure in their offices, their rulings are subject to improper influence and coercion.<sup>27</sup>

Judges secure in their salaries and tenure in office, who believe the law to be just, will do their best to uphold law’s empire, not least because their own status and prestige depends upon the legal system’s standing in society. This confirms the second great basis of the rule of law, which is that laws themselves should seek justice. Not only must judges apply the laws fairly, but the process of legislation must also attempt to advance justice, for its products properly to attain the status of “law.”

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<sup>25</sup> *Statutes of the Realm* VII, 636f.; 12–13 William III, c.2.

<sup>26</sup> See, for example, Voltaire [François-Marie Arouet], *Lettres Philosophiques* (1734), *Lettre 8*, *Lettre 9*.

<sup>27</sup> See, for example, Alexis de Tocqueville, *De la démocratie en Amérique* (Paris, 1835, 1840), volume I, part 2, chapter 8, for how even the elections of judges by the people poses a threat to the rule of law.



This is a complicated point. The concepts of law and fidelity to law imply a claim to justice.<sup>28</sup> The rule of law assumes a theory of law that separates law from the volition of those who serve it. Thus, pursuit of the rule of law also requires the maintenance of legislative procedures that will generate legislation for the public good, and not simply promote the private interests of those with power.

This link between the rule of law and a “common good” theory of justice is profound and essential. The “empire of laws and not of men” seeks a world of “equal” laws that serve all those subject to their control.<sup>29</sup> This absence of partiality is what sets government “*de jure*” apart from government “*de facto*” (to use the old terminology) and distinguishes “the empire of laws” from “the government of men.”<sup>30</sup> But the question remains how to find “good and equal laws.”<sup>31</sup> “Representative government” and “checks and balances” in the legislature (and the separation of both from the actual administration of justice) seem necessary precursors to “good and equal laws”<sup>32</sup> – and here we begin to reach the limits of the “essential” or “necessary” rule of law.<sup>33</sup>

## 1.8 Exceptions to the Rule of Law

John Stuart Mill advanced a theory of liberty and government, still extremely popular among statesmen, according to which some societies may not yet be sufficiently developed in their institutions and culture to support even such simple requirements of just government as the separation of powers between the executive and legislative powers, checks and balances in the legislature and administration of justice, or representative institutions in any branch of the government.<sup>34</sup> In circumstances such as these, perhaps “a ruler full of the spirit of improvement” may be “warranted in the use of any expedients that will attain an end perhaps otherwise unattainable.”<sup>35</sup> But, there are offensive implications in making the judgment that certain peoples or nations are not yet capable of being trusted with political freedom and equality.<sup>36</sup>

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<sup>28</sup> See M.N.S. Sellers, “The Value and Purpose of Law”, 33 *Baltimore Law Journal* (2004) 145.

<sup>29</sup> See the citations to John Adams and Voltaire above; Cf. John Rawls, *The Law of Peoples with, The Idea of Public Reason Revisited* (1999), 71. Harvard University Press.

<sup>30</sup> *Supra*, notes 25–28.

<sup>31</sup> To use John Adams’ felicitous description., *supra* note 2.

<sup>32</sup> *Id.* at I.1.

<sup>33</sup> For the concept of “necessary” law, see Emer de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la conduite et aux affaires des Nations et des Souverains* (1758) at Preface pp. xx–xxi. His “voluntary” law is also “necessary;” in the more natural sense of the terminology; cf. Christian Wolff, *Jus gentium methodo scientifica pertractatum* (1764).

<sup>34</sup> John Stuart Mill, *On Liberty* (1859) referred to “backward states of society in which the race itself may be considered as in its nonage.”

<sup>35</sup> *Id.*

<sup>36</sup> And Mill was not shy in spelling these out. *id.*: “Despotism is a legitimate mode of government in dealing with barbarians.”

Despotism in the common interest, even when pursued with a view to developing the higher faculties of those subject to its rule, is still despotism, and vulnerable to abuse.<sup>37</sup>

The dependence of the rule of law upon the institutions of representative government arises from the observation that government *by* any subgroup within the larger society will inevitably become government *for* the interests of that subgroup, above the others.<sup>38</sup> And even were the natural effects of self-interest somehow avoided, the laws of a benevolent despot would suffer from a very incomplete knowledge of the actual needs and circumstances of the citizens that all laws must actually serve, to be worthy of the name.<sup>39</sup> So, the concept of the rule of law implies an attempt to establish just laws, which, in turn, implies representative government, in order to achieve the degree of general knowledge and commitment to the common good necessary for an impartial legal system.<sup>40</sup> The rule of law entails the impartial pursuit of justice, which requires an equal concern for the welfare of all members of society.

While the rule of law without representative government may be a near impossibility, due to the fallibility of human nature, representative government by itself does not assure the rule of law, and may sometimes impede it. The earliest recorded musings about law and justice already distinguish “tyranny” from the rule of law, and contemplate the dangers of the tyranny of the majority, as well as by smaller factions.<sup>41</sup> The word “democracy” implied a sort of popular despotism for most of its history,<sup>42</sup> and the concept of “representative” government was developed to distinguish elected deliberative assemblies from more narrowly “democratic” governments.<sup>43</sup> Representative legislatures must be constructed to respect the rights of minorities, and will require the checks and balances of divided power to guide them away from populism and oppression.<sup>44</sup>

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<sup>37</sup> See Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997). Oxford University Press.

<sup>38</sup> John Stuart Mill, *Considerations on Representative Government* (1861), chapter III.

<sup>39</sup> See James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (1996). MIT Press.

<sup>40</sup> See M.N.S. Sellers, “Republican Impartiality” in 11 *Oxford Journal of Legal Studies* (1991) 273.

<sup>41</sup> See, for example, Aristoteles, *Politika* IV.2.1 (1289 a 26 ff).

<sup>42</sup> So much so that Kant baldly stated that democracy was “im eigentlichen Verstande des Worts notwendig ein Despotism.” Immanuel Kant, *Zum ewigen Frieden* (1795).

<sup>43</sup> “Publius” [James Madison], *The Federalist* No. LXIII (March 1, 1788).

<sup>44</sup> This necessity is well expressed by James Madison (“Publius”) in *The Federalist* No. 10 (November 22, 1787).

## 1.9 Conclusion

This short review of the primary attributes of the rule of law provides a brief reminder of the principles and institutions toward which nations and their peoples struggle, as they seek to create “an empire of laws and not of men.” Establishing the rule of law requires constant attention to the “combination of powers in society” that will form the most impartial laws, for the benefit of everyone, without regard to the interests of those in power. These include representative government, a divided legislature, an elected executive, the separation of powers, and an independent and self-confident judiciary, with the power to interpret and apply the laws impartially, without interference (or influence) over actual cases by executive or legislative power.

The greatest threats to the rule of law differ at different times and places, but the underlying principle remains the same: to separate the law from arbitrary power. In many societies, custom and public opinion are the best and only constraints against despotism. More developed polities create written statutes to constrain those in authority. The single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power. “Rule of law” states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent judges. These fundamental preconditions of an impartial legal system can be vastly improved upon and infinitely refined – but they are hard enough to achieve in themselves and do not entirely prevail under any existing polity.<sup>45</sup>

The rule of law may be difficult to obtain, but its absence is never hard to perceive. Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. Government will always be needed to protect liberty against aggression and secure the many social goods that require large-scale collective action, but the rule of law constrains those in power to the purposes that justify their authority. Scholars may sometimes advocate partial departures from the rule of law, or its incomplete realization, or its different application in different societies, because of transient or unfortunate circumstances, but no one can deny that every departure from the rule of law is a denial of justice. The ultimate goal of every society and every legal system should be equal and impartial justice for all, free from oppression by arbitrary power.

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<sup>45</sup>To give just one example, the United States still retains popular elections of sitting judges in many states of the Union.