



# Rule of Law

## The Centrality of the Rule of Law

One of the most crucial functions performed by the state is the establishment of a coherent, effective and equitable system of rules by which society operates. Laws define both the powers and the limits of the state and its people. Considered in isolation, each law specifies the rights and obligations of people and legal entities in ways that are either constitutive (prescriptive and enabling) or regulatory (restricting).<sup>1</sup> The test of the coherence of these laws, however, is at the systems level - how they relate to one another as a body of rules and the extent to which alignment within the system is achieved. As a system, laws, lawmaking, legal procedure and enforcement of and adherence to the law should provide both certainty — through the orderly and binding interpretation of existing laws — and flexibility —through mechanisms for peaceful change and the adaptation of rules to new circumstances. This system forms the foundation for the rule of law.

**Through the effective rule of law, lawmaking is the “glue” that binds all aspects of the state, the economy and society.** Each state function is defined by a set of rules that create governance arrangements. The state’s adherence to these arrangements can be seen in the alignment of formal and informal rule sets, the predictability and stability of how the rules are enforced and the degree to which successive administrations and leaders adhere to the constitution and other laws. Rules provide both resources that enable innovation to occur and constraints that limit behavior. As a result of the rule of law, citizens understand a distinct set of rights and duties that guide their behavior in relation to other citizens, as well as toward the larger community of citizens represented by the state. Effective rule of law exercised within just legal frameworks creates a reinforcing loop of stability, predictability, trust and empowerment.

Over time, the focus of legal structures and the rule of law has shifted from ordering individual behaviors to forming the basis of the social compact and the way that states organize power and maintain relationships with their people through citizenship rights. This development is often tied up in the codification of unified constitutions and citizens’ rights documents — which at times occurs in conflict with customary legal systems and older systems of law.

By exploring the historical evolution of the rule of law and current challenges and successes in its development around the world, this sourcebook outlines the systemic nature of lawmaking, its centrality to the effectiveness of other core government functions and its value to citizens, states and markets.

## Sourcebook Objectives in Context

**The objective of this sourcebook is to emphasize the centrality of the rule of law for the effective functioning of the state while outlining the core principles, institutional arrangements and systems that underpin lawmaking, enforcement and cultures of legal adherence.** By taking a principles-based approach to understanding the rule of law, the sourcebook separates itself from the many manuals and how-to guides that have sought to share the experience of Western actors in operationalizing legal, judicial and rule of law reform. Centering on lessons learned from rule of law reforms in case studies from around the world allows the sourcebook to focus on systematic and principled approaches to improving the function.

Given the wide-ranging scope of the topic, the sourcebook primarily explores civil and common law systems — as well as certain mixed systems — in democratically governed states with a clear separation of powers. Because of their complex and expansive nature, the sourcebook does not specifically focus on informal, religious or customary legal systems, or non-democratic states (rule by law) or international law. However, an understanding of the importance of these systems informs the approach to considering the development of the rule of law function outlined within the sourcebook.

The context of modern challenges and opportunities for the rule of law also informs the approaches to developing the rule of law in the sourcebook. In a time when trust in institutions has declined and as the world has experienced gradual fracturing of the ties between justice systems and democratic ideals, states’ ability to tackle issues such as illicit networks, organized crime, police brutality, transitional justice, increasing migration and growing calls for the legal recognition of human rights has been called into question. Yet states are finding new and innovative ways to provide access to justice systems through

1. See, among many other examples: John R. Searle, “Constitutive Rules,” *Argumenta*, 4(1) (2018): 51-54, <https://www.argumenta.org/wp-content/uploads/2018/11/4-Argumenta-41-John-R.-Searle-Constitutive-Rules.pdf>.

both traditional and modern mechanisms; citizens are becoming more engaged in legal activist causes; and environmental rights and needs are more frequently being addressed through formalized green justice. As illustrated in the sourcebook, rules and lawmaking form the foundation for addressing the key questions of our time.

## Constructing the Rule of Law

The rule of law is constituted by a principles-based system that ties together laws, procedures, lawmaking and enforcement mechanisms in a way that is effective, efficient, fair and equitable — both shaping and responding to the norms of a given society. This sourcebook thoroughly outlines the guiding principles, types of laws and rules, institutional arrangements and constructed systems that link the rule of law to citizens, states and markets.

### Laws, Rules and Guiding Principles

In an effective system, rules and laws form the foundation of the social compact between states and their citizens. This sourcebook draws on a typology of these rules and laws developed by Ryan Carlin that showcases the purpose of the law in constraining state powers while linking persons and other legal entities to the state and each other.<sup>2</sup>

- **Institutional rules** outline horizontal constraints within the state. This dimension of the rule of law concerns the extent to which the state constrains itself via the separation of powers, judicial independence and rules around the exercise of authority and decision-making.
- **Individual rules** establish vertical relations between private actors and the state. Enshrined in rules that outline both the negative and positive rights of citizens, this dimension of the rule of law concerns the extent to which persons, firms and other legal entities are equal and accountable before the law via equal enforcement, the applicability of rights and due process and opportunities for the redress of grievances.
- **Social rules** outline horizontal constraints within society. This dimension of the rule of law concerns the security of persons and property and the integrity of contracts made between persons and legal entities.

Effective rule of law systems utilize a set of core principles that guide rules, laws and procedures. As outlined in the sourcebook, these principles have been formulated based on the experiences of successful rule of law reforms, the work of experts at the United Nations and World Justice Project and the writings of judicial experts.

Types of Rules	Key Principles
<b>Institutional Rules</b>	<ul style="list-style-type: none"> <li>• All institutions, people and legal entities are subject to the law</li> <li>• The judiciary is independent, autonomous and makes enforceable decisions</li> <li>• The government operates with accountability and transparency</li> </ul>
<b>Individual Rules</b>	<ul style="list-style-type: none"> <li>• Fundamental human rights are protected through just laws</li> <li>• Laws are readily known, certain and clear</li> <li>• Persons and legal entities can access justice, grievance redressal and dispute resolution mechanisms</li> <li>• The law is applied equally</li> <li>• Justice systems presume innocence and ensure the right to a fair trial</li> </ul>
<b>Social Rules</b>	<ul style="list-style-type: none"> <li>• Laws are consistently and proportionately enforced</li> </ul>

### Institutional Arrangements and Systems of the Rule of Law

Although principled rules, laws and procedures form the foundation of the effective rule of law, institutional arrangements for lawmaking and revision and adherence to enforcement are crucial to the operationalization of a credible, certain and flexible system. The sourcebook discusses some of the key sources of law and the roles of central institutions in common and civil law systems. While these arrangements vary in different contexts (e.g., the absence of a written constitution in some commonwealth societies or the centrality of judicial review in others), the sourcebook provides a roadmap for how effective institutions operate and interact and make, amend, enforce and drive credibility around a system of law.

### Development of the Rule of Law Function

Based on the experience of the case studies around the world and the writings of rule of law scholars, the sourcebook does not assume linear development of the rule of law function but rather various “profiles” of fluid patterns based on the performance of institutional, individual and social rules. In general, states advance from dysfunction and limited rule of law — where criminalization, violence and distrust of the system and state are endemic — to a legal system with basic legitimacy for the rule of law before developing an effective, equitable and citizen-centric rule of law function. The various developmental profiles consist of:

2. Adapted from Ryan Carlin, “Rule-Of-Law Typologies in Contemporary Societies,” *The Justice System Journal*, 33 (2012): 154-173, [https://www.researchgate.net/publication/297282783\\_RULE-OF-LAW\\_TYPOLOGIES\\_IN\\_CONTEMPORARY\\_SOCIETIES](https://www.researchgate.net/publication/297282783_RULE-OF-LAW_TYPOLOGIES_IN_CONTEMPORARY_SOCIETIES).

- **Violent Unrule of Law** where the state does not hold a monopoly on the use of violence in its territory—and the rule of law crumbles.
- **Unstable Lawlessness** where the judiciary lacks power and autonomy, which leads to poor protection of citizens’ rights. Even though conflict is largely contained in this developmental type, there are minor threats of armed conflict.
- **Peaceful Unrule of Law** where the state is not constrained horizontally by an independent judiciary nor constrained vertically to uphold citizen’s rights — but there is peace.
- **Incomplete Rule of Law** is complete except for positive rights (e.g., the right to health and basic education).
- **Overburdened Rule of Law** may resemble the Complete Rule of Law but is characterized by overlapping and redundant rules and procedures that add unnecessary regulatory burden to citizens, firms and other legal entities. It lacks the elements of fairness, efficiency and effectiveness that are elements of the Complete Rule of Law.
- **Complete Rule of Law** contains all the basic attributes of the rule of law.

The sourcebook adapts Thomas Carothers’ basic taxonomy of strategies for reforming and developing the function, including reforms for individual laws and procedures, judicial institutions and systems as a whole and increasing legal compliance.<sup>3</sup> In addition to Carothers’ taxonomy — and instead of providing a prescriptive manual for developing the function — the sourcebook notes several lessons learned for implementing successful rule of law reforms. These range from the necessity of focusing on both form and function within nascent legal structures and not compromising during constitution-making (or re-making) to investing in legal human capital and fully considering the context of past reform efforts and areas for change management.

In addition to strategies and lessons learned, the sourcebook provides insights on benchmarking and a number of diagnostic tools to consider when planning how and where to implement future rule of law reforms. These benchmarks can support the state to understand the quality of its current laws and law-making processes, the performance of its judiciary and the level of access that citizens and other legal entities have to the justice system. Armed with these benchmarks — as well as key international indicators (e.g., the Rule of Law Index) and the experience of successful reforms in a variety of contexts — reformers and policymakers will be well-armed to address the development of the rule of law function.

## Conclusion

The rule of law is one of the most crucial functions performed by the state; it is the “glue” that binds all aspects of the state, the economy and society and defines the basic rules and procedures that create governance arrangements underpinning other state functions. This sourcebook illustrates the core principles, rule types and institutional arrangements that constitute an effective rule of law system and provides examples of the growth and reform of these systems in case studies from around the world. Given the immensity of the topic and its importance, the sourcebook provides only a brief view into the complexities of developing the rule of law function — leaning instead on the experiences of others and hoping that this work will support the launch of communities of practice focused on building the rule of law as a central element of systemic approaches to governance, growth and amending the social compact.

3. Thomas Carothers, “The Rule of Law Revival,” *Foreign Affairs* (March/April 1998), <https://www.foreignaffairs.com/articles/1998-03-01/rule-law-revival>.