

# Liberty, Equality, and the Rule of Law

**Author :** Mortimer Sellers

**Date :** March 3, 2014

T.R.S. Allan, *Freedom, Equality, Legality* in **James R. Silkenat, James E. Hickey Jr., Peter D. Barenboim**, [The Legal Doctrines of the Rule of Law and the Legal State](#) (Springer, 2014), chapter 11.

There is an innovative, very influential, and deeply pernicious tradition in English law and jurisprudence equating liberty with license and the rule of law with legal despotism. The beauty of this short chapter by T.R.S. Allan lies in its full implicit refutation of this shared misconception, as found in Thomas Hobbes, John Austin, and H.L.A. Hart, and its shorter explicit repudiation of their gentle contemporary apologist, Joseph Raz. Allan embraces traditional conceptions of the rule of law, demonstrates their central position in British jurisprudence, and makes sense of the doctrines of A.V. Dicey, often misstated as mere legal formalism.

“The rule of law and not of men” in its original, best, and most coherent sense is the antithesis of arbitrary power. This is both a political ideal and a constitutional doctrine: law and government are only legitimate when they serve justice and the common good of their subjects. To legislate, adjudicate, or execute the laws to any other end is contrary to the proper purposes of law, and therefore corrupt. “Liberty” consists in subjection to just laws, made for the common good — not (as some would have it) the simple license to do what one wants.

Prof. Allan makes it clear that there can be no liberty without the rule of law, when the rule of law includes all the procedural and substantive safeguards necessary to contain the private will and self-interest of those in power. This means more specifically that the much-touted doctrine of “parliamentary sovereignty”, or any other form of legislative power, must give way to judicial supervision, when legislation violates rule of law principles, fundamental rights, or reason, in light of the public good.

Constitutionalism and the rule of law are closely related concepts, in that the first exists to achieve the other. Both serve “liberty,” “equality,” and “legality” by preventing public or private oppression. Allan rightly identifies “liberty” as citizenship under the rule of law, “legality” as governance under the rule of law, and legal “equality” as a comprehensive respect for human dignity, secured by the rule of law. The rule of law cannot be reduced to *formal* equality before the law, but also requires a *substantive* equality of concern and respect for all persons in framing and administering the laws that will govern them. There is no rule of law when the legal system serves one faction or segment of society at the expense of the others.

This brings up the most important distinction between Raz and Allan. For neo-Hobbesians “the rule of law” is purely procedural — techniques of legal formalism that make the law more certain, for good or ill, according to the intent of the legislator. For Allan the rule of law is essentially substantive — the project of replacing private interests with the public good in framing and administering justice. This latter understanding is more useful, not only because it accords better with the history and current usage of the phrase, but also because it captures the actual value and purpose of law, which is not certainty, but justice.

As Allan explains, when the rule of law is treated as a mainly formal ideal, its connection with liberty consists in restraining discretion. But discretion is an inevitable and at times unavoidable aspect of

administering the law. The purpose of the rule of law is not to abolish discretion but to guide it towards its proper end, which is justice. The lesson is not that there should be no administrative or executive discretion, but that discretion should not be arbitrary. The rule of law prevents oppression by constraining arbitrary power.

Liberty, equality, and the rule of law are all powerful and resonant terms, which makes it tempting to misuse or redirect them, as Thomas Hobbes did in the interest of stronger government and stability. But the words' positive connotations first arose from and properly only belong to their original and more natural meanings, which is why Allan's argument is so refreshing. He has reclaimed the rule of law for the English legal tradition, and restored old conceptions of democracy and parliamentary sovereignty, to make them once again compatible with the rule of law, constitutionalism, the common good, and justice.

Cite as: Mortimer Sellers, *Liberty, Equality, and the Rule of Law*, JOTWELL (March 3, 2014) (reviewing T.R.S. Allan, *Freedom, Equality, Legality in* **James R. Silkenat, James E. Hickey Jr., Peter D. Barenboim, The Legal Doctrines of the Rule of Law and the Legal State** (Springer, 2014), chapter 11), <https://juris.jotwell.com/liberty-equality-and-the-rule-of-law/>.