

THE ROLE OF THE RULE OF LAW

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WHAT IS THE RULE OF LAW

The term, the rule of law, has been used by many people to mean many things. At its broadest and least discriminating, it is used as a political catch cry in the international arena to suggest the guarantee of fundamental political and civil rights and the dignity of man. At this level "the rule of law is an expression of an endeavour to give reality to something which is not readily expressible."¹

This paper is not concerned with such a wide use of the term. Rather it aims to discuss the rule of law as used by English lawyers to describe the ideal to which the English (and Australian) systems of law and government should aspire. This is a much narrower concept which, it must be admitted, can be used to support a system of oppressive and arbitrary power, but which is said to have its origins and to have derived its aims from an entirely different philosophy.²

Professor Heuston gives a most attractive statement of the rule as it is used by English lawyers.³

STATEMENT OF THE RULE

"On Sunday morning, November 10, 1607, there was a remarkable interview in Whitehall between Sir Edward Coke, Chief Justice of the Common Pleas and James I. ... The question between them was whether the King, in his own person, might take what causes he pleased from the determination of the judges and determine them himself. This is what Coke says happened: "Then the King said that he thought the law was founded upon reason and that he and others had reason as well as the Judges; to which it was answered by me, that true it was that God had endowed His Majesty with excellent science and great endowments of nature, but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgement of the law, which law is an act which requires long study and experience before a man can attain to the cognisance of it and that the law was the golden metwand and measure to try the causes of the subjects, and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said: to which I said, that Bracton saith, quod Rex non debet esse sub homine sed Deo et lege'. ... The King ought not to be under a man, non debet esse sub homine, but under God and the law, sed sub deo et lege."

EXPLANATION OF THE RULE

Although Bracton and Sir Edward Coke are accredited with formulating the first statement of the rule of law in English Law, it is to Professor A. V. Dicey that we generally turn for its explanation. Dicey saw the rule as comprising three elements:

1. "It means ... 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. Englishmen are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else."
2. "It means equality before the law, or the equal subjection of all classes the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this case 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 courts."
3. "With us the law of the 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; ... the principles of private law have ... by the action of the courts and parliament so extended as to determine the position of the Crown and its servants; thus the constitution is the result of the ordinary law of the land."⁴

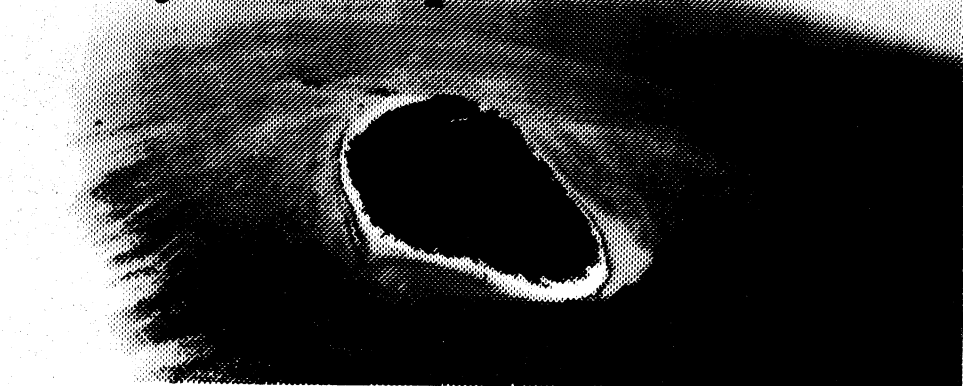
The positivists of the Twentieth Century have reduced Dicey's statement of the rule of law to the following essentials:

"Stripped of all technicalities (the ideal of the rule of law) means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."⁵

This means in the area of criminal law, with which this conference is most closely concerned, that:

1. The category of crimes should be determined by general rules of a more or less fixed character.
2. A person should not be punished except for a crime which falls within these general rules.
3. Penal statutes should be strictly construed, so that no act may be made criminal which is not clearly covered by the statutes.
4. Penal laws should never have retrospective effect.⁶

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DICEY'S CRITICS

Two sorts of attacks have been made on Dicey's formulation of the rule of law. The first, and perhaps most trenchant, is that the Dicean formulation is merely a reflection of the laissez-fairism of the Whig tradition in which Dicey was working in the mid to late nineteenth century. Professor E. C. S. Wade, who wrote the introduction to Dicey's 10th edition, put this criticism in the following way:

"It is indeed the principal ground of criticism of Dicey's interpretation of the rule of law that it reflects on the author's attachment to the Whig tradition. Thus the supremacy of the legislature, which by 1885 had become a representative legislature in fact as well as in name, the control by Parliament of the armed forces, the protection afforded by an independent judiciary against the excesses of administrative officials, and the remedies of the common law against illegal acts as being the means whereby the political doctrines of free discussion and free association are reserved, are all in keeping with this tradition and therefore find their place in the analysis. ... The abandonment of the principle of laissez faire has altered the nature of our law. A system of law, which like the common law is based on the protection of individual rights, is not readily comparable with legislation which has for its object the welfare of the public, or a large section of it, as a whole."⁷

Wade relates his criticism to the fact that today the legislature has delegated much of its authority in day to day decision making to a wide range of administrative agencies. He accepts that these agencies must work within the law and are governed by it, but points out that their regulation depends upon the fundamental principle of the supremacy of parliament and not on the more limited constitutional concept of the rule of law. Acceptance of the principle of supremacy of parliament imports an acceptance of the rule of law but it does not guarantee it for the principle of supremacy of parliament relies on our faith in a democratic form of government, while the rule of law in Dicean terms, demands that the courts have the power "to restrain the illegal excesses of the administration". A system of government by the administration, although vested with its powers by the parliament, is not inconsistent with an arbitrary regime. Dicey's formulation of the rule of law, depending as it does on review by an independent judiciary, is seen as guaranteeing the enforcement of the principles he espouses. Wade's conclusion is therefore "it is only, where constitutional law is concerned, in that small but vital sphere where liberty of person and of speech are guarded that (the rule of law) means the rule of the common law."⁸

Others have attacked the Dicean formulation of the rule in this area of civil liberties. Sir Ivor Jennings refers to Professor Hall's four prerequisites for the operation of the rule in the area of criminal law and agrees with Hall that the rule of law was not being closely observed during the 1920's and 30's when they were writing.⁹ These criticisms are examined first to assess whether there is greater compliance with Hall's four requirements in Australia in the 1980's than there was in England and the USA earlier in the Century.

OBSERVANCE OF THE RULE OF LAW

1. Hall's Requirements and the Criminal Law

Professor Hall's four requirements can be reduced to a statement reminiscent of the positivist view: That we should be able to discover whether our actions are subject to a penal sanction before we set out on the course of conduct contemplated. In Dicey's terms, a man should only be punishable for a breach of the law and for nothing else.

It is tempting to divide consideration of this question into two parts. To look first at those laws which are made by Parliament, directly through statutes or indirectly through regulations authorised by those statutes. And secondly, to look at the common law, conceived of as created by the courts acting as legislators. These two parts of the question have been reconciled by legal philosophers however as simply being two aspects of the same question. Dicey's rule of law does not require that Parliament enacts all laws. Rather the doctrine requires that Parliament lays down the general principles within which those who create the detail should contain themselves. On this view we may challenge the validity of a regulation because it exceeds the guidelines laid down in the primary Act and we may expect that the courts will give a correct interpretation to the principles of the common law,¹⁰ but we cannot complain when new details are added to fill out the principles laid down by Parliament.¹¹

If we accept this description of the rule of law compliance with it in Australia is high in the area of criminal law. Each jurisdiction has a system of statutes which lays down the general principles on which the criminal law is founded. The detail is then fairly thoroughly explained in the regulations which implement these statutes and in the many reported decisions of the courts. Theoretically, the law is in existence and discoverable before a person undertakes a planned course of action.

2. Wade and Administrative Discretion

Professor Wade's criticism are perhaps less easily answered. An example of something which is important in Australia today may be used to illustrate. The Social Services Act 1947 (Cth.) gives the Minister of Social Services and through him the officers of his Department, full power to implement the Commonwealth Government's policies in relation to the payment of pensions and other benefits. The Act lays down, in general terms, the people who are intended to benefit but it leaves the identification of those people, and the circumstances in which they are to be paid, very much to the discretion of the Minister. Viewed in the light of a decision such as *Green v. Daniels*¹² it is difficult to accommodate this scheme within the definition of the rule of law expounded above.

True, there is a general Act of Parliament which lays down guidelines and which grants the power to fill in the detail required for its implementation. There are also published regulations to which the public may turn to discover this detail. But the decision in *Green* indicates that knowledge of the general principles and of the details of the regulations does not necessarily guarantee access to all the information necessary to pursue a claim for social security benefits. The manner in which the Act and the Regulations are administered is only fully discoverable from the Departmental manual and from internal Departmental instructions. As these are not available to the public, it is difficult to accommodate the scheme within the accepted confines of the rule of law.

The exercise of such discretion is justified by Dicean theorists on the basis that the decisions made by those exercising the discretion can be reviewed in court. In essence the *Green* case falls within this model. A challenge was taken to the exercise of the administrative discretion and the matter was taken before a court. The one aspect of the case which threatens its accommodation within the rule of law is that until the matter came before the court, Karen Green was denied access to the internal instruction manual on which the decision had been taken. In this respect it could be alleged that there was no compliance with the rule of law since the appropriate principles of the law were not discoverable before the cause of action was commenced. Although in general terms the case can be reconciled with the existence of the rule of law, when viewed more critically it is seen to fall outside the spirit of the rule if not its letter.¹³

DISSATISFACTION WITH THE LEGAL DEFINITION OF THE RULE

So far the analysis of the rule of law has been confined within the narrow limits imposed by legal philosophers. That their conceptions of the rule do not accord with the views of many members of the general public, and some members of the profession, is clear.¹⁴

A few aspects of the public view of the meaning of the rule should be mentioned. First, the relevance of the rule of law, as defined, to situations in which a member of the public must pursue his claims against the administration.

1. Administrative Discretion

The example of the exercise of discretion by the Department of Society Services given above, is probably a sufficient demonstration of the possible inadequacies of the rule of law in this field. Other examples, more relevant to the purposes of this conference, can be given. The discretion exercised by parole boards throughout Australia does not seem to meet the strict requirements of the rule of law. The reasons given for the boards' decision are not open to public scrutiny and therefore cannot be challenged in court, and it is perhaps an inadequate explanation to rely on the prisoner's status as a convicted offender who is serving a sentence imposed by a court. It is true that his sentence has been set by judicial process but it is perhaps superficial to view the proceedings of the parole boards as resulting in a fortuitous foreshortening of the penalty extracted by law.

2. Access to Legal Remedies

The question of public access to the law is also of relevance when considering the relevance of the rule of law. The Dicean formulation depends upon the general availability of legal remedies but few would contend that such remedies are readily available to every member of the public.

The systems of legal aid which exist throughout Australia allow some reason for self satisfaction in this area but poverty and ignorance remain two of the most obvious causes of failure to pursue legal remedies.¹⁵

3. Law Reform

The slow pace at which law reform takes place in our community has also been identified as an example of where the "rhetoric and the reality" depart.¹⁶ While the statute books remain cluttered with the offences of past ages it is thought to be almost dishonest to speak of a Parliament which lays down the general principles by which we are to be governed. On many occasions these ancient crimes are undiscoverable except by a patient historian and when discovered are incompatible with current attitudes.

4. Sentencing Policies

The problem of outmoded law becomes of more general importance when we examine the means available to the courts to punish those convicted of crimes. In Goldberg's words those convicted of crimes "may be committed to an antiquated prison to spend years in confined and destructive idleness, subject perhaps to ill-trained guards and brutalizing fellow inmates, and governed by a set of arbitrary and subjective rules which can produce additional punishments subject to no fair review"¹⁷.

Many more illustrations of the "disparity between legal rhetoric and reality" could be given, but instead the opportunity will be taken to raise what is perhaps the most contentious aspect of the rule of law, that is, its connection with law and order.

LAW AND ORDER AND THE RULE OF LAW

The most common evocation of the rule of law is that made by those who wish to use its principles in support of a call for law and order.¹⁸ Used in this way the term is usually combined with a plea for members of the public to obey the law, or to uphold the rule of law.

This use of the term has no technical definition and its relationship to the Dicean formulation is remote. What those who ask us to uphold the rule of law are suggesting is that there has been (or is likely to be) some fundamental dislocation of our system of government if we do not act in support of its institutions. Thus, this type of appeal to the rule of law is most often heard in connection with statements which indicate that there has been an increase in the rate of reported crime or in situations in which a proportion of the community is refusing to respect a particular law. In these circumstances members of the public are urged to uphold the rule of law by offering assistance to those assigned to enforce the law and by ensuring that little or no support is given to the law-breakers.

Dicey's formulation of the rule of law has nothing to offer in relation to this use of the term for the Dicean principle presupposes a system of law and government which is supported by its subjects. The answers to the questions raised by the use of the term in this way lie in principles of moral philosophy which are outside the scope of this paper.¹⁹

FOOTNOTES

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1. J. A. Jolowicz, Secretary of the Colloquium, "The Rule of Law as Understood in the West", (Chicago University 1957) extracted in Wade's introduction to Dicey, Introduction to the Study of the Law of the Constitution (10th ed., Macmillan & Co., 1962) p.cix. Such a use of the term has been called a "perversion of the doctrine of the rule of law" by the philosopher Joseph Raz, The Rule of Law and Its Virtue (1977) 93 L.Q.R. 195.
2. Raz, op.cit. pp. 200, 202, 205; Rawls, A Theory of Justice (Oxford University Press, 1972) p.236; Hermann, The Fallacy of Legal Procedure as Predominant over Substantive Justice, (1974) 23 De Paul L.R. 1408, 1409.
3. R.F.V. Heuston, Essays in Constitutional Law (2nd ed. Stevens and Sons, 1964) pp. 32-33 quoting from Prohibitions Del Roy (1607) 12 Co. Rep. 63.
4. A.V. Dicey, The Law of the Constitution, op. cit., pp. 202-203.
5. F.A. Hayek, The Road to Serfdom (University Chicago Press, 1944) p.54; Raz, op.cit., p.195.
6. These are the four prerequisites which Jerome Hall would demand of a system of criminal law which complied with the rule of law. Hall, Nulla Poena Sine Lege (1937) 47 Yale Law Journal p.165, and see Rawls, op. cit. pp.237-239.
7. E.C.S. Wade, op.cit., pp. cii-ciii.
8. Wade, op.cit., p. civ, and see Hermann, op.cit. pp.1419-1420 who points out that the Nazi legal system satisfied the legal positivists' requirements for valid rule of law.
9. Jennings, The Law and The Constitution (5th ed. University of London Press, 1972) pp.51-52; Hall, op. cit.
10. The common law is regarded as always having been in existence. The task of the courts is to discover it and give it a correct interpretation.
11. "It is one of the important principles of the doctrine that the making of particular laws should be guided by open and relatively stable general rules." Raz, op.cit. p.198. The American realist school of legal philosophy would challenge this concept of the function of the judiciary as they regard judicial decision-making as something akin to acting on whim, the law produced as nothing more than an "orderly collection of ... decisions." L. Newton, The Rule of Law and the Appeal to Community Standards (1976) 21 American Journal of Jurisprudence 96.
12. (1977) 13 A.L.R. 1, at pp.7-8, although it is to be noted that the decision of Stephen, J. in the High Court is in accordance with the rule of law.
13. See editorial comment on Green v. Daniels (1977) 51 A.L.J. 227, and Carney, Unemployment Benefits, Three Legal Issues (1977) 2 Legal Service Bulletin 365.
14. Raz recognises this in his article, op.cit. p.197 and see C. Johnson, The Rule of Law and The Closure of a Legal System (1973) 18 American Journal of Jurisprudence p.38.
15. See the comments of A.J. Goldberg, a former justice of the U.S. Supreme Court, The Role of Law in a Free Society (1973) 7 Georgia Law Review 403 at p.407.
16. Goldberg, op.cit. pp.407-408.
17. Loc. cit.
18. Lord Widgery, then Lord Chief Justice of England, The Rule of Law (1976) 51 New York University Law Review 365.
19. Ronald Dworkin takes up the question of whether citizens have moral rights against their governments in Taking Rights Seriously (Duckworth, 1977).

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