

## **RULE OF LAW**

### A Footnote in Time

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In recent years, the use of the term “rule of law” has become more prevalent. As a lawyer, I first heard the term about ten years ago during a lecture on international law. I remember thinking, “What does that mean?” and “Where did that come from?”. Many times someone comes up with a new phrase which somehow spreads around the globe. We have all heard phrases such as “24-7” or “tipping point” which have become commonplace in everyday conversation. When I heard this term “rule of law” a second time about a month later, I stopped to check my temperature and memory to confirm my body and mind were still functioning. I actually thought I might have either fallen asleep for a period of time like Rip van Winkle while the rest of the world was awake, or suffered some major blackout of memory or thought. I couldn’t think of any incident or book, such as Watergate or “The Tipping Point” which could account for the use of “rule of law” around me. “Rule of law” seemed to me to have appeared fully clothed on the stage of life without any gestation period.

Although I was not aware of how the term “rule of law” originated or why, I defined it to mean there were laws existing which applied to the situation being discussed. Further, these laws were supreme; they ruled! My definition of “rule of law” seemed to make sense when I applied it to world situations. For example, when Russian troops invaded Georgia in August 2008, several countries voiced their opposition, saying the invasion was wrong and that Russia must follow the rule of law by withdrawing from Georgia. Since there are specific laws governing the situation, including the right by Georgia as a sovereign nation not to be invaded by another country, these laws must be followed. This is in contrast to someone in a position of power in Russia ordering the Russian troops to invade Georgia. There is no law to invade but rather a power to invade. Here, the correct and acceptable position was that the law actually ruled, not the person in power.

A short time ago, I attended a lecture entitled, “Rule of Law” given by H.E. Judge Rosalyn Higgins, president of the International Court of Justice. She reminded her audience that “rule of law” has a specific meaning in law which differs from its common usage. In his 1885 treatise on England’s unwritten constitution, “Introduction to the Study of the Law of the Constitution”, A.V. Dicey, the English jurist, discussed the supremacy or rule of law and what it meant in relation to England’s unwritten constitution. Although the term “rule of law” can be found as far back as mid-300 B.C. in the writings of two Greek philosophers, Plato and Aristotle, contrasting the rule of law with the rule of man, it was Dicey who revived and discussed the term in such a way that everyone could understand it.

Dicey understood the supremacy or rule of law consisted of three concepts or principles. These concepts as they related to England were:

1. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the courts of the land.

This means in England, no one can be arbitrarily thrown in jail if no law has been broken. Neither a person nor his or her goods can be interfered with unless a law is broken. Society is ruled by law. The correlative of this is that the government can only do things that are authorised by or within the law.

Dicey contrasts England, being ruled by law, with every other system of government where the ruling power (the executive) exercises wide, arbitrary or discretionary powers of constrain over its citizens as demonstrated in matters of arrest, of temporary imprisonment, expulsion from its territory and the like. As Dicey said, “with discretion comes arbitrariness”.

2. No man is above the law, but here [England] whatever his rank or condition is, he is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

This means not only that everyone is accountable if they break the law but also that everyone, regardless of rank or condition, will be subjected equally to the same law and be subject to the same law courts. This position is contrasted with the exemption of officials or others from obeying the same law which governs other citizens or from the jurisdiction of the ordinary tribunals or courts.

3. It is because England has an unwritten constitution that the personal rights and liberties of individuals are always secure. This security comes from being able to go to the law courts to remedy any breach of these rights and liberties.

This concept addresses the importance of not only having the rights and liberties of individuals given in law (even unwritten law) but also having workable remedies for the breach of these rights in a separate government body or branch. It is the separation of power here which is important.

Dicey contrasted England with its unwritten constitution with other countries with written constitutions. He looked at the United States with its constitution containing the Bill of Rights and at France’s written constitution in place at that time. He concluded that the French Constitution provided rights for individuals but no secure remedies. In contrast, the U.S. Constitution set out individual rights and liberties but also provided a remedy through the courts for any breach of these rights and liberties. The U.S. constitution sets out the governing of the country in three separate and equal branches, thus ensuring a separation of power, like England. An example would be if the executive branch denies an individual some right he or she is entitled to under the constitution such as the right of *habeas corpus*, then the courts, being the judiciary and a separate branch of government, have the right and duty to condemn the executive branch’s action as being illegal.

These three concepts of “rule of law” as set out by Dicey demonstrate a much deeper and broader definition than my definition of the term does. “Rule of law” seems to describe the parameters of the law and how the legal system upholds the law.

I was pleased to finally discover what “rule of law” means and where it comes from. When I hear the term in the future, I will think of the following principles to judge whether a country has good governance by the rule of law:

-- No individual is interfered with or punished unless a law is broken. There are no discretionary or arbitrary arrests, rulings or actions by the ruling power (the executive).

-- The law applies to every individual and in the same way. This means, too, all officials are under the same responsibility as any other citizen for every act they do without legal justification. No one is given any concession under the law or in the courts for their rank, position or condition.

-- Individuals have personal rights and liberties given by one branch of government which are defendable by a separate and equal branch. There is a separation of power.

Now I will have to hope that whenever I hear someone else using the term “rule of law”, they are thinking along the same lines!

THE END