

The Rule of Law

Ian Loveland once said, “The rule of law is not a legal rule, whether in the context of the British constitution or any other, but a political or moral principle.”¹

In my essay I will analyse this quote, I will identify the key points he has made, attempt to derive his meaning, whilst discussing these themes with reference to Dicey’s concept of the rule of law.

First of all I must clarify the term he refers to as “The rule of law”. According to the Oxford Dictionary of Law², the rule of law is an aspect famously attributed to the U.K. constitution by Professor Albert Venn Dicey. He outlined three concepts embodied by the rule of law. Firstly that the regular law of the land predominates over any arbitrary or prerogative authority claimed by governments. Secondly the concept of equality before the law or in other words that no man is above the law and everyone is equally subjected to it, from ordinary citizen to Prime Minister. Thirdly that the general principles of the U.K. constitution are derived from the individual’s rights as declared by the courts through judicial decisions (i.e. the constitution is “judge-made”).

Ian Loveland suggests that the rule of law is more of a political or moral principle rather than an actual legal rule. In my opinion the main question here is what exactly qualifies as a “legal rule”? It is true that you will not find the rule of law itself written down and described in any statute book or Act of Parliament. In that sense Loveland is right, there is no single specific rule labelled the rule of law and perhaps this lack of material evidence is enough to deter a less inquisitive lawyer. However, seeing as the U.K. constitution has been identified as an unwritten, uncodified legal system, many other rules and aspects of the common law are also not written. Furthermore, even if the rule of law is only a concept of the English legal system, its importance is vital to our constitution and in that way perhaps the most fundamental of our legal rules? Surely it is enough that a legal rule is applicable and holds some weight in the courts?

In the U.K. the rule of law functions as a restraint on the exercise of executive power by governments. Professor Jeffrey Jowell has argued that the application of the rule of law is accomplished through means of judicial review. This is a procedure whereby the courts are required to determine the lawfulness of actions by the executive and so supervise the exercise of discretionary powers to ensure that they have been exercised lawfully. This system of checks and balances on the executive can lead to ministers or departments being held accountable for their unlawful activities and so upholding the second concept of the rule of law, equality before the law. Dicey found support in cases such as *Entick v Carrington*³ whereby the King’s messengers had trespassed on the claimant’s property by aid of a warrant issued by the Secretary of State. The courts held that this warrant was made using unlawful powers not found in any statute and so the warrant was considered void. Another integral case is *M v Home Office*⁴

¹ Refer to page 56 - Ian Loveland. 2006. Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction. 4th ed. New York. Oxford University Press.

² Oxford Dictionary of Law. 2009. 7th ed. Oxford. Oxford University Press

³ *Entick v Carrington* [1765] 2 Wils 275

⁴ *M v Home Office* [1993] 3 All ER 537

whereby the House of Lords held that the Home Secretary was guilty of contempt of court in his official capacity, this being the first time such a decision was reached against a government minister.

Thus the House of lords has underlined that nobody not even the executive is above the law, this evidence of equality before the law demonstrates how important the rule of law is and so surely it cannot be described as a mere political or moral principle?

However a legal rule should not have aspects of uncertainty and it should not have contradictions. Professor Robert Yewdall Jennings challenges Dicey's theory and provides exceptions to the rule of law by stating inconsistencies relating to the notion of equality before the law. For example children under ten years of age are incapable of committing a crime in the eyes of criminal courts, they are *doli incapax*. Other special provisions include: foreign diplomats who enjoy immunity to criminal law, judges that cannot be sued for their judgements in court and Members of Parliament who cannot be sued for defamation for things said within the Palace of Westminster. Jennings also reminds us that many statutory and non-statutory discretionary powers allow the government to perform many of its roles and responsibilities. In fact there has been a visible increase in growth in number and extent of discretionary powers. If we are to consider the rule of law as an actual legal rule then its inconsistency is perhaps a self inhibiting trait.

If the rule of law is to be labelled as a moral principle alone, can it bear this title and still hold weight in our legal system? During the construction of the Constitutional Reform Act 2005 the rule of law was a topic of much debate. The then Lord Chancellor Lord Falconer moved an amendment inserting a new clause into the Constitutional Reform Bill during its report stage in the House of Lords. He discussed the point that the rule of law guides the actions of ministers and public officials and the government should have no difficulty accepting it. Lord Falconer then suggested "the notion of the rule of law cannot be expressed in the form of an ordinary legal rule"⁵ by this he meant that it was such an essential concept of law that it should not be subject to the same interpretation as normal legal rules. He then added another clause concerning the safeguard of the relationship between Lord Chancellor and the rule of law during the Bill's third reading. The purpose of the Lord Chancellor is to uphold the rule of law, he is obligated to speak out in Cabinet against proposals he believes to be against the rule of law. This is perhaps what Ian Loveland meant when he described the rule of law as a moral or political principle?

Furthermore, there are some radical ideas concerning a political principle of the rule of law. Lord Woolfe once remarked extra-judicially that if Parliament created an Act that violates the rule of law, then this Act could potentially be disobeyed by the courts. For example if Parliament were to abolish the courts power of judicial review, then morally and politically the courts would be required to act equally unthinkably in a manner also without precedent.

Another limitation of the rule of law can be found in its principle of legality. The rule of law requires some form of lawful authority to justify any interference with the rights of an individual. It imposes this requirement for lawful authority but it does not impose the quality of this authority. In *IRC v Rossminster LTD*⁶ the case reveals the weakness of this condition where Parliament is prepared to enact very broad

⁵ Neil Parpworth. 2008. Constitutional & Administrative Law. 5th ed. New York. Oxford University Press.

⁶ *IRC v Rossminster LTD* [1980]AC 952

legislation justifying such interference with an individual's rights. If judges must apply such Acts of Parliament regardless of moral content then possibly the rule of law lacks moral principle and contradicts Dicey's third concept of judicial supremacy.

In our modern constitution in the U.K. the rule of law has much contemporary significance. Since the establishment of the Human Rights Act 1998, government actions have been more intensely scrutinised by the judiciary who demonstrate more willingness to uphold the rule of law. In *A v Secretary of State for the Home Department*⁷ the House of Lords held that the Secretary of State had been wrong in thinking there was a public emergency following a perceived terrorist threat. Lord Steyn is quoted to have said that the decision "anchors our constitutional system on the rule of law"⁸ and Lord Nicholls also commented that indefinite detention without charge simply cannot exist in any country that values the rule of law. In *Secretary of State for the Home Department v JJ*⁹ the Court of Appeal held that some control orders amounted to a deprivation of liberty contrary to Art 5 of the European Convention of Human Rights (ECHR). Thus the rule of law even functions as a protection of liberty (as T.R. S. Allan once declared). The way in which the rule of law is integrated with the ECHR in upholding liberty and justice allows the rule of law to apply to all European constitutions. Loveland suggests that whether in the context of the British constitution or any other, the rule of law remains only a political principle. At long last I am brought back full circle to resolve my original question as to whether the rule of law can be regarded as a legal rule or moral principle.

In conclusion I have decided that whether or not the rule of law should be defined as a legal rule or moral principle is irrelevant. In the process of writing his book, Ian Loveland has clearly taken upon himself the unnecessary task of classifying the entity that is the rule of law. During the drafting of the Constitutional Reform Act 2005, professional drafters refrained from defining the rule of law in writing on the statute pages giving a reason that this concept is already well understood and to attempt to codify it would be a needless action. However it is more likely that they decided this task of generating an accurate, succinct definition of the rule of law to be near impossible. In my humble opinion, the rule of law may well be a legal rule as well as a moral and political principle. To try to contain such an intangible body of law that has such importance and power within mere words and definitions contained by a dictionary is perhaps just a fruitless endeavour.

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⁷ *A v Secretary of State for the Home Department* [2005] UKSIAC 1/2002

⁸ Neil Parpworth. 2008. *Constitutional & Administrative Law*. 5th ed. New York. Oxford University Press.

⁹ *Secretary of State for the Home Department v JJ* [2006] 3 WLR 866

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