RULE OF LAW IN THE UNITED STATES

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I. INTRODUCTORY

The term "rule of law", while well known in the United States due to Dicey's classic exposition of this term, is not as likely to be used by American lawyers, judges and scholars to convey the situation that Dicey had in mind. "Government under law", "government of law and not of men", "supremacy of law", or even the term "due process of law", used in a broad sense that reflects American constitutional experience, are more characteristically American expressions to be identified or equated with the rule of law terminology.

II. THE WRITTEN CONSTITUTION

The United States is a land of written constitutions, and the notion of constitutional restraints on governmental power pervades American legal and political thinking. The Constitution of the United States governs the nation as a whole. Each of the forty - eight states in turn has its own written constitution. The creation of a federal structure defining the separate areas of authority of the federal and state governments, respectively, necessitated a written document, although it should also be observed that prior to the adoption of the Constitution of the United States, each of the original states had already adopted a written constitution as its own basic law.

III. CONSTITUTIONALISM AND RESTRAINT ON POWER

The traditional emphasis in American constitutionalism has been on the restraint exercised by the written constitution and the

laws on the exercise of governmental power, a restraint made effective by the courts in the exercise of their power to determine the meaning of law. It is for this reason that the term "government under law" more aptly characterizes the central emphasis in American constitutional thinking. The constitutional apparatus for achieving this result is briefly sketched below.

A. CONSTITUTION AS FUNDAMENTAL LAW

In his classic opinion in *Marbury v. Madison* in which John Marshall asserted the power of the United States Supreme Court to pass upon the constitutional validity of an act of Congress, he stated the theory that the Constitution is fundamental law. Legislative enactments stand on a secondary level, and if they are in conflict with the fundamental or higher law, they must necessarily yield in the sense that the court will not give effect to them. The fundamental character of the Constitution is recognized in its provisions that permit amendment only by a process that requires the concurrence both of two thirds of the two houses of Congress and three fourths of the states. This view of a relatively permanent fundamental law means a rejection of popular sovereignty in the sense that the will of the temporary majority as reflected in the decisions of a popularly elected legislative body is itself subject to legal restraint.

B. SEPARATION OF POWERS

The check-and-balance system whereby governmental power is canalized and diffused through the three separate departments is characteristic of both the Constitution of the United States and of the several state constitutions. This system of separation of powers, established by the fundamental law, designed as it is to prevent the concentration of power, is regarded as vital to a system that attaches great importance to the restraint on governmental power. (See Sharp, "The Classical American Doctrine of the Separation of Powers", 2 U. of Chi. L. Rev. 385 (1935).

1. The Judiciary

a. The function of the judiciary is to interpret the law.

Since the Constitution itself is fundamental law, courts exercise the power of judicial review to determine the constitutional validity of acts of Congress, acts of the states legislatures, and assertions of executive authority on both the federal and state level. (See Corwin, "Marbury v. Madison and the Doctrine of Judicial Review", 12 *Mich. L. Rev.* 538 (1914). Likewise the United States Supreme Court reviews the determinations of both the lower federal courts and of state courts to determine whether their proceedings conform to constitutional limitations. Similarly, it is the function of the courts to pass upon the questions of law involved in the interpretation of legislation. Quite apart, therefore, from constitutional limitations, it is the function of courts to examine the validity of executive acts and administrative proceedings for the purpose of determining their lawfulness.

b. But the judicial power is itself limited. Under the Constitution of the United States the federal courts have authority to decide questions of law only in the course of "cases or controversies" before them. For this reason they have denied themselves the power to issue advisory opinions. (The constitutions of a few states permit their state supreme courts to render such advisory opinions on constitutional questions.) Moreover, the appellate jurisdiction of the United States Supreme Court and the jurisdiction of the inferior federal courts is subject to limitation by Congress within the limits of the judicial power as defined in the Constitution. (Const., Art. III) Also, in the exercise of its authority to review constitutional questions, the Supreme Court has formulated a series of self-imposed limitations. Constitutional issues may be asserted only by persons who are proper parties in interest, the constitutional issue must be ripe for adjudication and clearly presented in the case before the Court, legislation will be interpreted if possible to avoid the necessity of passing on constitutional questions, legislation will be presumed to be valid, and doubts are to be resolved in favor of validity. It should be noted also that the Court has said that some types of questions are "political" or "non-justiciable" and hence subject to final determination by either of the other two departments. Finally, it may be observed that the Court has repeateldy denied that it passes on the policy

or wisdom of legislation and that its only function is to determine questions of constitutional power.

c. The important position and function of the federal judiciary is strengthened by the constitutional provisions relating to the appointment and tenure of federal judges. They are appointed for life by the President with the consent of the Senate and cannot be removed from office except by a Congressional impeachment proceeding. Moreover, their pay cannot be reduced after appointment. Theoretically Congress may take some measures designed to impair the independence of the courts or limit their effectiveness. It may by statute provide for enlargement of the Supreme Court, limit the Supreme Court's appellate jurisdiction and at any time reorganize the system of inferior courts and limit their jurisdiction.

State courts judges do not in general enjoy the same secure position. Except in a few states, judges are elected for office with the result that judges must to some extent engage in politics. This factor plus low salary levels in some states means that the most competent men are not always attracted to judicial office. But it should be noted that in a number of states, the weaknesses that inhere in the popular election of judges are mitigated by the use of nonpartisan ballots, election for a relatively long term, and the common custom of re-electing judges who have proven their competence and fairness.

2. The Legislature

Attention is here concentrated on Congress as the national legislative body under the federal system. It is a legislative body of delegated powers, and its powers are usually defined as those expressly enumerated in Article I of the Constitution and the further powers implied from those expressly granted. However, in dealing with matters involving external affairs, Congress has sometimes been said to have powers that inhere in national sovereignty. Apart from the limitation inherent in the conception of limited delegated powers, Congress is further limited by the separation of powers concept and by the constitutional statement of rights designed to secure the freedom of the individual. Congress may not perform executive

functions in the enforcement of the laws and in such matters as appointment and removal of officers. It may not hear and try cases. It is expressly prohibited by the Constitution from passing bills of attainder But while it may not hear and try cases it may properly conduct investigations as an aid to the legislative process, and the investigations may assume the form of a quasi judicial hearing but without effective constitutional restraint. Moreover, Congress is not limited by the Constitution to the enactment of general laws with the result that it frequently enacts private acts designed to furnish special relief or benefits for named individuals. (The constitutions of many states expressly prohibit the enactment of special or local laws.)

3. The Executive

The executive functions are defined in Article II. The principal functions of the President are to enforce the laws, appoint officers, conduct foreign affairs and serve as the commander-in-chief of the military forces. Executive discretion in the handling of foreign affairs and the determination of military policy is not subject to effective judicial review as a practical matter either because the problems presented do not readily lend themselves to judicial review or because the President's act may be said to fall within the sphere of nonjusticiable or political determinations. But where the President's acts conflict with acts of Congress within the sphere of its legislative competence, the judiciary may act to assert the hegemony of Congressional power. (See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). Executive acts and administrative determinations resting on legislative authority are subject to review to determine the legality of the act or proceedings by reference to the underlying enabling legislation. Although it is classic doctrine that Congress may not delegate its legislative powers, the truth is that courts permit wide delegations of authority subject to the limitations that some kind of standard be stated. The more effective judicial review is found in the interpretation of executive and administrative determinations and proceedings to determine the scope of authority under the statute, to investigate whether statutory procedures are complied with, and whether

constitutional rights are violated. Yet even within these limits it is possible for Congress to vest broad and nonreviewable discretionary authority in executive and administrative agencies in implementing legislative policy and in dispensing statutory privileges or limiting private freedom. Moreover, the authority of administrative agencies to conduct quasi judicial hearings subject only to limited judicial review necessarily means a substantial inroad upon the idea that under our system of government by law, the adjudication of claims must be in the hands of the judiciary.

C. BASIC RIGHTS

1. General Considerations.

The rights that are judicially enforceable as limitations on the powers of the fedaral government are those spelled out in the first eight amendments to the Constitution (Bill of Rights) as well as the few catalogued in the original text. Noteworthy among the substantive rights are the freedoms of speech, press, assembly and religion, freedom from expropriation of property without compensation, and freedom from ex post facto laws and bills of attainder. Special mention should be made of the First Amendment's provision that Congress shall make no law respecting an establishment of religion. Taken in conjunction with the further provision forbidding laws that prohibit the free exercise of religion, this language has been interpreted to require the separation of church and state and this is turn means that the government may not establish a church or use public funds to finance the carrying on of religious activities. In short, it states the principle of voluntarism in religious matters.

The procedural rights include the right to a speedy and public trial, indictment by grand jury, trial by jury, right to counsel, right of confrontation, the double jeopardy limitation, the prohibition upon unreasonabel searches and seizure, and the prohibition upon cruel and unusual punishment. In addition, the Fifth Amendment states the general limitation that no person shall be deprived of life, liberty or property without due process of law. This limitation is construed, *inter alia*, to require that criminal laws be sufficiently

definite and precise to inform persons of the nature of the proscribed conduct. Finally, it should be added that the use of the writ of habeas corpus furnishes an effective judicial remedy for ordering the release of persons held without lawful authority.

Some provisions of the original Constitution serve also as a basis for federal protection of private rights as against the states, including the prohibitions upon bills of attainder, ex post facto laws and laws impairing the obligation of contracts. It should be noted also that the several state constitutions detail the rights of persons within their respective jurisdictions. But the largest single source of formal constitutional rights protected on the federal level against the states is the Fourteenth Amendment adopted in 1868 and more particularly the due process and equal protection clauses.

(a) Due Process of Law.

Over a period of years the Supreme Court has developed the proposition that the Due Process Clause of the Fourteenth Amendment serves as a means of protecting the so-called "fundamental rights" of the person. Justice Cardozo declared them to be the rights fundamental to a concept of "ordered liberty". *(Palko v Connecticut*, 302 U. S. 319 (1937). Concepts of "natural right" and "natural justice" have entered into judicial thinking at this point. The fundamental rights as they have been determined by the Court over the years on an empiric basis are both procedural and substantive in character. In its procedural sense due process means that a person shall not be deprived of life, liberty, or property except pursuant to law and in accordance with procedures designed to insure a fair hearing. Due process as a procedural limitation has had its principal application in the area of criminal procedure where it has been identified with the fair trial concept, although it is meaningful also in respect to civil proceedings. Basically it means an opportunity for a fair hearing before a disinterested tribunal, although it is not necessary that trial be by jury. (See Boskey and Pickering, "Federal Restrictions on State Criminal Procedure", 13 *U. Chi. L. Rev.* 266 (1946). Employed also as a means of checking police action, the due process clause furnishes a basis for invalidating convictions based on the use of involuntary confessions.

As a source of substantive liberties of a fundamental character, the due process clause has been used as a means of invalidating legislation that has been found to be an unreasonable interference with the enjoyment of liberty and the use of property. At one time the clause was widely used by the court to invalidate social welfare legislation found to be an unreasonable interference with economic liberty or, more particularly, with freedom of contract. But the recent years have witnessed a decline in the protection of economic liberty because of the court's readiness to defer to legislative determination of what is wise economic policy (*Nebbia v. New York*, 291 U.S. 502 (1934); *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949)). On the other hand, the liberty phase of the due process clause has been relied upon in recent years to invalidate legislation which impinged upon freedom of speech, press, assumbly and religion, or which was found to violate the separation -of-church-and-state principle.

(b) Equal protection of the laws.

The second fundamental limitation under the Fourth Amendment is that no state shall deny to any person the equal protection of its laws. The equal protection clause may be restated as a bar against discriminatory treatment under the law. This limitation has served primarily as the basis for invalidating both state legislation which was found to rest on arbitrary or unreasonable classification and discriminatory administrative practices. As a general proposition discrimination against a particular class has been found not to be unconstitutional if there is a rational basis for the classification in terms of public interest and if the classification is germane to the purpose served by the legislation. But diserimination on racial or religious grounds is per se invalid. Although the Supreme Court at one time, by application of the "separate but equal" doctrine, upheld legislation designed to segregate the Negro and white races in the enjoyment of public and quasi public facilities and services, the Court has more recently declared law-imposed racial segregation invalid on the ground that it creates a racial discrimination. (*Brown v. Board of Education*, 347 U.S. 483 (1954).

D. SUMMARY

Theoretically, our system is designed to maintain limitations on the exercise of all governmental authority in order to maintain the integrity of the federal system, preserve the separation of powers and insure the basic liberties of the individual, all in accordance with legal limitations enforced by the judiciary. Actually there are gaps in the system. Although judicial review has on the whole operated effectively to limit the power of the states and prevent encroachment on federal authority, it has not operated with equal effectiveness to limit the authority of the federal government. Over the long run the Supreme Court has for the mos part deferred to the judgment of Congress in determining the scope of its legislative powers with the result that the continued maintenance of federalism will depend largely on the self-restraint of Congress. Executive power may go unchecked either because the nature of the problem does not lend itself to judicial review or because the Executive's acts, particularly in the handling of foreign affaris, are considered political acts beyond the scope of judicial restraint. (See *U.S. v. Curtiss-Wright Export Corp.* 299 US. 304 (1936)). Likewise in deference to the expanded needs for the exercise of specialized administrative authority, large areas of delegated discretionary authority, are not subject to critical surveillance by the courts, and judicial functions are in effect assumed by nonjudicial agencies. (See Vanderbilt, *The Doctrine of Separation of Powers and Its Present-Day Significance* (1953)).

In the protection of basic rights the system has functioned with a fair degree of effectiveness. The due process clause has served as an adequate vehicle or insuring a fair hearing in proceedings whereby governmental action places the citizen's life, liberty or property in jeopardy. Freedom of speech, press, assembly and religion have been elevated to a high place because of the close judicial scrutiny of federal and state legislation impinging upon these liberties, a degree of scrutiny which the Supreme Court has justified on the ground that these are the freedoms indispensably necessary to the maintenance of a democratic society. (See

Thomas v. Collins, 323 U.S. 516 (1945). And the rule of equal protection has proved particularly significant as a means of invalidating racial discrimination by agencies of the government, although the judicial power is not always adequate to secure enforcement of its decrees in the face of an adamant local opposition. In general it may be said that the primary values of a democratic society in terms of the worth of the individual and the importance of the democratic process have determined the points of emphasis in the protection of basic rights during the recent decades.

A problem that has become increasingly conspicuous is the protection of the individual against arbitrary exercise of governmental power in areas where according to traditional thinking the government is dispensing a privilege rather than acting to limit the freedom of the individual. Traditional conceptions of freedom embodied in the Bill of Rights and the general due process limitation may be stated in terms of restraint upon government action. But the emergence of the welfare state as the dispenser of public benefits to meet common needs places a new premium upon equality of right in the enjoyment of public privilege and freedom from arbitrary action on the part of the governing authorities in the dispensing of the privilege. The recent decisions sustaining the public employee's right to be free from discharge on arbitrary grounds or in violation of stated standards or procedures (see *Peters v. Hobby*, 349 U.S. 331 (1955), and *Cole v. Young*, 351 U.S. 536 (1956) and the current litigation on the question whether the Secretary of State must state grounds for denying a passport and whether he must grant the applicant a hearing (see, e.g., *Bauer v. Acheson*, 106 F. Supp. 445 (1952)), are evidence of the new direction in the protection of human rights.

IV. RULE OF LAW IN THE CONTEX OF THE TOTAL LEGAL SYSTEM

To emphasize judicially enforceable restraints upon the exercise of governmental power as the essence of the rule of law concept is to ignore the important consideration that the whole system of

government under law is designed to promote positive purposes in the ordering of human affairs. Even the traditional view that government was to serve the limited function of providing the conditions of internal peace and security necessary to the individual's pursuit of liberty and happiness rested on the notion that private power was to be restrained by law according to the demands of reason, justice and liberty. Rule of law must mean freedom from private lawlessness and anarchy before it can mean anything at all. And the development of the administrative welfare state means a broader view of the positive function of government as the common agency to promote the wider distribution of goods as a means of enlarging the individual's economic security and well-being.

Viewed pragmatically, then, the rule of law means the maintenance of the kind of legal order and governmental operation which in the restraints it imposes and the benefits it confers derives its central inspiration from the freedom of the individual to go his own way in the cultivation of his capacities and interests free from fear and arbitrary restraint, which stimulates freedom of opportunity, which recognizes freedom of voluntary association, which reflects a basic mistrust of the centralization of power in the hands of private groups or public authorities, which rejects the conception that the freedom men enjoy is by tolerance or sufferance of government and insists instead that government is itself subject to law and is one agency among others in our pluralistic society for promoting freedom and the common good. It is in the perspective of these ideas, indigenous to American life and thought, that our formal constitutional structure assumes its significance.