PRINCIPAL ELEMENTS OF THE RULE OF LAW IN THE LEGAL SYSTEM AND PRACTICE OF THE UNITED STATES

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The "Rule of Law" term is an expression in common usage by the disciples of Anglo-Saxon law which is not susceptible of such precise definition as to carry the same meaning to all. It is here used to denote the body of precepts of fundamental individual legal rights governing certain institutions of government which are vested with appropriate power of enforcement of rights, and those procedures by which such precepts may be applied through those institutions. These elements — of precepts, institutions and procedures — exist in law to effect the protection of essential interests of the individual guaranteed by society through limitations on the authority of the state[1]. The precepts applied by our (U.S.A.) legislatures, executive agencies, courts and the bar are thereby recognized to be the basic law establishing fundamental legal rights.

It is relevant to consider briefly the nature of "fundamental legal rights," then the nature of the "institutions" and of the "procedures" which are deemed essential parts of the Rule of Law. Although the requirements of concise statement forbid excursion

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(1) The original, primary concern of the Rule with protection of fundamental rights against encroachment by the state has broadened to include rights or privileges based on affirmative action by the state to provide equal opportunity in public services such as education, public housing, etc.; and to protect against encroachments by other individuals or groups.

into the metaphysical nature of "law" and the history of its development, reference to the recorded origins of some of these elements may make more concrete the necessary generality of terms used in the foregoing definition of the Rule of Law content.

(a) The "fundamental legal rights" with which the American lawyer is familiar include some which are abstractions in their origin — "human rights" — and some which are concrete in origin and in present embodiment. The Colony of Virginia which became one of the original thirteen component state units of the new American Union in 1789 adopted a "Declaration of Rights" in 1176, shortly before the "Declaration of Independence" proclaimed by delegates from all of these thirteen colonies, and thirteen years before the French "Declaration of the Rights of Man and of the Citizen" of 1789 and the American Constitution of that same year.

In this Virginia Declaration the word "right(s)" appears eight times. Some of the rights there proclaimed are extremely general in nature, almost wholly abstractions of the purpose of government, e.g., "**the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety." The are stated to be "inherent rights." The Declaration includes a "Right to uniform Government." In contrast to these, other rights there specified are much more concrete, within a framework of readily identifiable institutions and procedures: "The Right of Suffrage," and "That in all capital or criminal prosecution a Man hath a Right to demand the Cause and Nature of his Accusation, to be confronted with the Accusers and Witnesses, to call for Evidence in his Favour, and to a speedy Trial by an impartial Jury of his vicinage..."

Every American lawyer learned as a school boy the inspired assertions of the framers of the Declaration of Independence in 1776: "We hold these truths to be self-evident — that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." This Declaration and other eighteenth century source-materials of American written constitutions derive

from beliefs that these assertions and commands were but declaratory of principles of natural constitutional law deduced from the nature of free government, that natural law is the basis of all constitutions and is inherent in the idea of a government of limited powers. Judicial interpretation of the Fifth and Fourteenth Amendments of the Federal Constitution has largely impaired, if it has not in fact invalidated, these earlier American theories of rights[2].

A horizontal breakdown of rights recognized in American law and government will identify some as of an essentially political rather than legal nature, e.g., the right of suffrage, and separation of legislative and executive powers of the state from judicial power (also found in the Virginia Declaration). Other rights are more strictly legal, such as the right of confrontation of the accused by the adverse witnesses in person, speedy trial by jury, and prohibition of excessive bail.

It is arguable that a society in which universal suffrage does not exist irrespective of sex, race, national origin, religion, etc., may, nevertheless, be governed by the principal fundamentals of the Rule of Law. The legal system of a "colonial" area which does not have full autonomy of self-government may still be found to live under those fundamentals. In Great Britain Parliament is supreme and the judiciary does not enjoy constitutional power to exercise review over statutory enactments — as in the American system; yet it would be absurd to assert that for this reason the Rule of Law is not an outstanding characteristic of the whole British system. It is submitted that the line of demarcation between "political" and "legal" rights is largely one of subjective personal opinion and the premises of content, and that characterization of some rights as political rather than legal does no offense to the importance of the former in the scheme of government which has evolved and is judged by its citizens to be best fitted to the national needs.

The writer suggests that the Colloquim bear in mind that there are rights and prescriptions in the American constitutional framework of a primarily "political" nature which our courts hold

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(2) **Pound**, "Introduction to the Philosophy of Law," p. 20.

are not "justiciable," i.e., subject to the customary judicial process of the courts. It would consequently seem advisable to concentrate upon "rights" susceptible of enforcement chiefly through the courts — in study of American concept of the Rule.

(b) The other Rule of Law elements — of institutions and procedures — call for no more than passing identification. Of the institutions which are vested with power effectively to transmute precepts into fundamental and accepted legal rights, a structure of courts staffed by judges who are independent of *ad hoc* pressures is an obvious essential. Another institution of equal importance is a professionally trained and fearless bar, free from government control in the exercise of its function, without taint of private corruption, devoted with single-minded purpose to the lawful interest of clients within the rules of the legal system. Agencies of the executive branch which exercise self-restraint in the use of broad powers are vital to the application of the Rule in the growing nexus of daily relations between the citizen and the State.

(c) "Procedures" are, to us, both generic and specific. The "due process" requirements of our constitutional guarantees are of the former category and mean, among other things, fair trial wtih all its ramifications. To our British colleagues "due process" is long since a familiar term; to lawyers of the European Continent the descriptive term is apparently not indigenous, although the content may be.

Jury trial, right to reasonable bail, to representation by counsel, to an appeal from conviction of a criminal offense and many other modes of protection are so specific as to be readily understandable by lawyers generally.

(d) The elements of the Rule of Law in the United States are set within a framework which exhibits certain features peculiar to at least strikingly characteristic of, the American system of government and law. One such feature in the loom of our fabric is the federal structure of American government — a federation of forty-eight states, the national "federal" government, a small federal district in which lies the capital city of Washington, and some

outlying dependencies under varying forms of control or autonomy. The relations between the federal government and the forty-eight states (ignoring the other areas as of minor interest for our present purpose) are governed by the provisions of the federal Constitution of 1789 (and subsequent amendments) as the basic overriding law, and by statutes of the federal legislature, the "Congress." Acts of Congress purport to be adopted in exercise of the powers delegated to the federal government by the Constitution itself. Powers not so delegated are "reserved" to the several states. Certain types of action are forbidden to the federal authority, other types to the individual states and yet others to both of them. Some powers are "concurrent," available to both units of sovereignty.

Most of the federal powers are expressed in general rather than in detailed and specific terms, and as the original document was framed nearly 175 years ago there is constant question whether the federal government may, through its Congress, executive and judicial bodies, exercise control in a field which is not mentioned in the organic instrument and could hardyl have been contemplated by the framers. Expansion of welfare-state controls has thrust upon the national government regulations of relations between employers, workers and their unions, of the use of child labor in industry and commerce, of equality of rights of access to and treatment of all races in schools maintained by the public purse — and many other instances of the exercise of legislative, executive or judicial power. May the federal government alone meet the demands for effective control and uniformity; do the several states alone have such power, or do the states have the power in the absence of federal control and until the Congress has itself acted? Lack of certainty is a constant problem.

(e) The written constitutions of the American structure of government — forty-nine of them, federal and state — all contain prescriptions of fundamental individual rights, in addition to creation of organs of government and division of powers between them. These constitutions are not identical in their listing of rights, yet do not vary widely in substance. Of much greater importance than this lack of uniformity is the final authority of the protective guaran-

tees themselves as superior to and binding upon the legislative, executive and judicial branches of the respective governments, federal and state. The principal "civil rights" of the citizen are listed in these organic documents in those portions which are referred to collectively as the "Bills of Rights." The most important, but not all, of these rights in the federal Constitution are found in the first ten amendments which were adopted *en bloc* in 1791. Others have been added by later amendments, chiefly those adopted at the close of the Civil War of 1861-1865.

The First Amendment says: "Congress shall make no law** abridging the freedom of speech, or of the press***." Though the words of this clause lack precision of meaning and scope (which must be determined by judicial interpretation), the prohibition is not subject to challenge by the legislative or the executive. The Supreme Court has gradually extended this and other prohibitions and commands of the federal Bill of Rights to all encroaching action by organs of the state governments. Statutes, however, may, and there are many which do, implement the general commands of these constitutions, give precision to their meaning and provide penalties for infraction.

These written constitutions are the most important single element and form of the statement of these commands and of their embodiment in our law. Other rights may be added by legislative or executive action, but those specified in the constitutions or which a court of last resort finds to be inherent in them may not be cancelled out or impaired. Ultimate sovereignty lies in the people, not in their executives or legislatures. The constitutions, both federal and state, prescribe how that final power may be exercised, formally, to amend a constitution by limitation, repeal or addition.

(f) The two features of the American system which have been here sketched — the dual set of governments and powers in the federation, and the supremacy of the constitutions — gave rise early in the nineteenth century to the doctrine of judicial review. This is the power of our courts, not found in any express provision of these constitutions but evolved by the judges themselves, to find that a legislative enactment or an act of the executive

branch or a decision of an inferior court contravenes a particular prohibition or command of a constitution. The enactment, executive act or court decision subject of such a pronouncement of contravention is thereby declared and thereafter held to be null and void, of no legal effect. Suit lies to restore the aggrieved complainant, as nearly as is practicable, to his prior status.

The dual sovereignty scheme of American government created the need for some mechanism by which jurisdictional disputes between the national government and the states over allocation of constitutional exercise of power might be resolved with finality. The Constitution is silent. The judge-made doctrine of judicial review filled the gap. Chief Justice Marshall of the United States Supreme Court wrote in 1809: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all** ."

Judicial review is also exercised for somewhat different historical reasons over legislative, judicial and executive acts *within* the same unit of sovereignty, where there is no issue between federal and state governments. The federal Constitution expresses the command that it "shall be the supreme Law of the Land." Early in our history the claim of the courts to be the final authority of determination was asserted and has long been accepted. This implements the command of the Constitution that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the Contrary notwithstanding"