

## THE RULE OF LAW AND THE WELFARE STATE

by

Harry W. JONES

Cardozo Professor of Jurisprudence

Columbia University

This paper is offered not as a statement of personal views but as a possible starting point for full Colloquium discussion of one issue: How, if at all, can the values associated with the Rule of Law be achieved in today's Welfare State? I have had two essential considerations in mind in casting the paper in its present form. The circumstance that our present subject is more narrowly focussed than other major headings of the Colloquium agenda requires that I put my emphasis on the respects in which the Rule of Law has a distinctively different task in the Welfare State than in a national community where the functions of the state are more or less limited to domestic law-and-order and national defense. The further circumstance that our subject is scheduled to be reached late in the sequence of Colloquium discussions means that the concept of the Rule of Law will have been explored in its general intension — and the relevant views of individual jurists like Dicey, Duguit, von Jhering, Krabbe and Kelsen considered at some length — before the Colloquium takes up the much debated question of the asserted incompatibility of the Welfare State with the Rule of Law. I shall therefore discuss the general attributes of the Rule of Law, its institutional equivalents from Western country to Western country, and the views of individual writers (only to the extent necessary to set the stage for a realistic Colloquium discussion of the impact of Welfare State developments on the Rule of Law ideal.

Ponderous definitions would be out of place here, but it is

unavoidable that I give some indication of the sense in which I shall be using the crucial terms embodied in my assigned title. "Welfare State", in this paper, is not a derogatory epithet. In any decent political philosophy, the state is not an end in itself but an instrumentality to be appraised in terms of its contribution to the welfare of the individuals who compose the national community. The minimum-functions state of the Nineteenth Century "liberal" tradition was not an anti-welfare conception; rather it was the deep conviction of the English Whigs and their European and American counterparts that the common good, the general welfare, is best promoted when state intervention in economic and social matters is kept to the lowest possible incidence. Changes in conditions and in majority political attitudes have made it the prevailing opinion today that the greater economic and social good of the greater number requires an abandonment of the "hands off" approach and the adoption of public measures directly and explicitly aimed at general economic betterment. The identifying characteristics of the Welfare State are chiefly these: (1) a vast increase in the range and detail of government regulation of privately owned economic enterprise; (2) the direct furnishing of services by government to individual members of the national community — unemployment and retirement benefits, family allowances, low-cost housing, medical care and the like; and (3) increasing government ownership and operation of industries and businesses which, at an earlier time, were or would have been operated for profit by individuals or private corporations.

How far must a particular country have gone, in one or more of the three directions just stated, before it can be characterized with certainty as a Welfare State? Are Norway and Denmark already within the Welfare State category? What of the United Kingdom, or France, or, for that matter, the United States? Clearly there is no hard and fast line; the most that can be said is that every country of the West has taken significant steps towards the Welfare State destination but that some of the countries here represented have gone considerably farther than the others in one or more of the Welfare State directions. Traditional socialist theory, with its emphasis on government ownership and operation of the

tools of production, offers the only approach to a sharper line of distinction. A "socialist" country, in which an appreciable portion of industrial enterprise is publicly owned and operated or definitely scheduled for future public management, is perhaps analytically different from a country in which movement towards the Welfare State has gone as far as rigorous regulation and extensive provision of services but not as far as rigorous regulation and extensive provision of services but not as far as substantial government ownership and operation of industries and businesses. I raise the question now for its possible relevance to a later section of this paper dealing with the political context of the contention that the Welfare State and the Rule of Law are irreconcilable.

Some explanation is imperative as to the sense in which the elusive phrase, "the Rule of Law" will be used in this background discussion. How should I describe the Rule of Law "*as understood in the United States*"? The plain fact is that no such common understanding exists among American lawyers, judges and scholars as to the meaning, the essential attributes, of the Rule of Law. We are more likely to say "supremacy of law" or — less accurately, I think — "government of laws and not of men." In an effort to arrive at something approaching objectivity in my usage, I tried the phrase, "the Rule of Law", on six of my colleagues at Columbia. Two had never heard of it in its present signification, and the other four had wildly different interpretations of its import. Available law review and university convocation publications were similarly unhelpful. When an American scholar, even a highly regarded professor of Constitutional Law, writes or speaks on our general Colloquium topic, he usually begins with a confident assertion that everybody knows what the Rule of Law is and then devotes the rest of his time to a bold and eloquent statement in favor of it.

For want of a commonly understood American version of the Rule of Law, I will hazard my own understanding of the term's connotation in American law. The Rule of Law is a tradition of decision, a tradition embodying at least three indispensable elements: *first*, that every person whose interest will be affected by

a judicial or administrative decision has the right to a meaningful "day in court"; *second*, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; *third*, that day-to-day decisions shall be *reasoned*, rationally justified, in terms that take full account both of the demands of general principle and the demands of the particular situation. This does not purport to exhaust the meaning of "the Rule of Law"; doubtless there are other essential attributes to be included in the term's full intension. But an American lawyer would say, I think, that the three features just given characterize the best of our legal institutions and the adjudicative ideal of our legal tradition.

The Colloquium discussion for which this paper is background reading will consider the impact of the Welfare State on certain essential ideals and institutions which, we believe, our several legal systems have in common. Certain broad questions come to mind at once. What are the grounds that have been set forth in support of the thesis that the advent of the Welfare State is attended by the decline of the Rule of Law? What is the political context of this foreboding thesis, and does it carry implications that go beyond the province of jurisprudential theory? Why should the task of the Rule of Law be greater or more difficult in the Welfare State than it has been in past political societies? These questions, taken together, constitute preliminary ground that has to be covered before there can be useful discussion of the prospects for the Rule of Law in the Welfare State. It is not the mission of this brief paper to provide answers, but to clarify the issues before the Colloquium and to suggest the significance of these issues in relation to certain major problems of our time.

### *Welfare State VERSUS Rule of Law?*

In Anglo-American legal philosophy at least, "the Rule of Law" is forever associated with Dicey, and it is appropriate to begin this section with some mention of that vigorous but not too

precise writer. Jean Cocteau says somewhere that Baudelaire's prose is untranslatable because it "depends on inner rhythms indigenous to the [French] language." Dicey's phrase, "the Rule of Law", is similarly untranslatable, not just because the words are English but because the very thought being communicated is inextricably tied to English institutions. There are as many versions of Dicey's "three meanings" of the Rule of Law as there are commentators on Dicey. The great ideas reflected in his "three meanings" are, I think, these: (1) in a civilized society it is unthinkable that government, or any officer of government, possess arbitrary power over the person or the interests of the individual; (2) all members of society, private persons and government officials alike, must be equally responsible before the law; and (3) effective judicial remedies are more important than abstract constitutional declarations in securing the rights of the individual against encroachment by the state. These points all seem to me as valid in the Welfare State as they were in Nineteenth Century England.

Whatever else may be read into the thought of Dicey, this sturdy foe of arbitrary power and faithful champion of the "ordinary courts" and the "ordinary law" did *not* say that the enactment of legislation designed to minimize existing economic inequalities violates the Rule of Law, and he did *not* say that the Rule of Law requires the determination of all particular controversies by essentially deductive reasoning from fixed principles. Dicey could not possibly have taken this second position, since that would have been to adopt a standard by which the common law of England would have to be found wanting. Any theory that tends to equate the Rule of Law with the formal generality of law must find other origin — as in the German constitutional theory that every law in the substantive sense must be, or have its basis in, an act of the legislature.

Friedrich A. Hayek's book, the *Road to Serfdom*, first published in 1944 is perhaps the most powerful — and certainly the most widely known — statement of the case against the government economic planning characteristic of the Welfare State. Elsewhere in this paper I shall speak of the "Hayek Theorem"

as a shorthand way of referring to the proposition that the Welfare State is incompatible with the Rule of Law. It will be objected, perhaps, that this singling out of Hayek's views for examination in some depth is unfair to others who have written to the same purpose and in the same vein. The best reason for choosing Hayek as spokesman for those distrustful of Welfare State processes is that almost every leading figure in Anglo-American legal philosophy — Stone, Jennings, Friedmann, Kelsen and Pound to name a few — has at one time or another directed his fire at Hayek's chapter on "Planning and the Rule of Law." Any target that has drawn this much bombardment must be worth shooting at.

There are two main counts in Hayek's indictment of the Welfare State as the deadly enemy of the Rule of Law. His first charge is that national economic planning involves a deliberate discrimination by government between particular needs of different people and that this violates the Rule of Law principle of formal equality before the law. Consider this striking passage, which seems to condemn St. Thomas Aquinas equally with Harold Laski: "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."

It is, of course, possible to reply to this argument on more or less formal or definitional grounds. One typical line of answer to Hayek is Kelsenian in terms: the Rule of Law has no reference to the relation between government and governed and is concerned only with the conformity of the law-applying function to the law-creating function. A second standard reply is that the Rule of Law has nothing whatever to do with substantive limitations on parliamentary action. Still another reply, which might certainly have been expected, is that Hayek is trying to add an ingredient, of immutable content to a formal juristic concept and so "falling into the pit of Natural Law thinking."

Replies like these seem to me rather less than satisfactory, since their cumulative effect is a very drastic narrowing of the Rule of Law concept. Although I, too, think of the concept as primarily one of procedure, I am by no means sure that a meaningful Rule

of Law, has nothing whatever to say concerning the substantive content of legally enforced principles. A good case can be made that the Rule of Law concept and the concept of Natural Rights are at least fraternal twins; I would not foreclose the possibility that they may be identical twins. Be this as it may, I would prefer to reply to Hayek on more substantial grounds: that the mature law of any country is not and never has been as heedless of distributive justice — as blind to the “particular needs of different people” — as Hayek would have it. Countless examples come to mind: the law of infants, bankruptcy legislation, homestead exemptions, water rights, individualization of punishment in criminal law, the common law’s characteristic process of distinguishing cases on their facts. The perfection of formal equality is an abstraction that practical justice blows away as it always has and must. The attainable ideal is that all laws should apply equally to all human beings unless, in Julius Stone’s sturdy phrase, “there is good reason to the contrary.”

Interwoven with Hayek’s attack on the egalitarian objectives of central economic planning is a second count of indictment, this one addressed to the crucial role of administrative discretion in the operations of the Welfare State. The argument is a familiar one in the literature of Administrative Law: government regulatory and welfare programs can be carried into effect only by the delegation of discretionary power to “divers boards and authorites,” and the possession and exercise of discretionary power contravenes the Rule of Law. Hayek’s objections to discretionary power are in part theoretical and in part practical. Broad administrative discretion threatens the Kantian ideal that “Man is free if he needs to obey no person but solely the laws” — an argument strikingly reminiscent of the contention often heard in the United States that discretionary administrative powers undermine a fundamental concept of “government of laws and of men.” In addition, and less philosophically, Hayek develops the charge that the possession of discretionary power destroys the predictability of decision which he sees as a major value of the Rule of Law. “The important question”, says Hayek, “is whether the individual can foresee the action of the state and make use of this knowledge as datum in forming his

own plans..." The paradox suggested is that discretion, without which government economic planning is unworkable, prevents reliable planning by the individual.

Since an entire session of the Colloquium is to be given to the specific and profoundly important question of the role of discretion in the Rule of Law, I would be crossing the bounds of my own assignment if I were to comment at length on this aspect of Hayek's analysis. I will content myself with three points, each of them necessary, I think, to a full understanding of the Hayek Theorem. (1) In Hayek's analysis, as in almost all of the writings condemnatory of administrative processes, discretion is equated with arbitrariness; there is no concession that discretionary power may be exercised in other than an arbitrary way. (2) Hayek's counsel is one of despair and gives little attention to instruments of control that might be devised to prevent, or at least to minimize, the arbitrary exercise of discretionary power. (3) Hayek's entire chapter, and particularly his point that discretion destroys predictability, proceeds from the premise that discretion, leeway and choice are far less significant in judicial administration of the "ordinary law" than Legal Realism has shown them to be.

There is reason to devise and perfect safeguards against the always present danger or abuse of administrative power. Meaningful statutory standards, realistic procedural requirements, and discriminating techniques of judicial review are among the tools of control well along in course of development. Nor is to be assumed that administrative officers are themselves alien to the tradition of honest judgment and fair decision embodied in the Rule of Law. Perhaps enough time has been given to the mournful inquiry: Can the Rule of Law survive the rise in administrative power characteristic of the Welfare State? The more rewarding question is the constructive one: are there means by which the Rule of Law can be made to prevail throughout the entire range of administrative functioning?

#### *The Political Context of the Hayek Theorem*

This Colloquium is a conference of legal theorists and not



of politicians. But it would be absurdly unrealistic not to recognize that the issue now under consideration has its political as well as its theoretical dimension. As Kelsen remarks with his usual clarity of analysis, the contention that the Rule of Law cannot be maintained in a Welfare State, is, in one aspect at least, part of a specific political thesis: that socialism is incompatible with democracy. The famous Chapter VI (Planning and the Rule of Law) of Hayek's *The Road to Serfdom* is not an exercise in pure jurisprudential theory but an integral part of a comprehensive and effectively wrought argument designed by the author to establish a necessary connection between democracy and capitalism. Professor Hayek would not, I am sure, quarrel with this characterization.

The extensive polemical literature on administrative powers — my reference is chiefly to American and British Commonwealth authors since I am not familiar with the writings elsewhere — reflects this same harnessing of theoretical arguments to an ultimate political purpose; at least the net impact of these assaults on administrative functioning operates against the substance as well as the procedure of the Welfare State. If the only means by which a thing can be done are forbidden means, it follows inevitably that the thing cannot be done at all. If administrative discretion is an indispensable instrument in economic regulation and planning, a charge that discretion in public officers is unacceptable to a free people is another way of saying that government must not do those things that can be accomplished only by the proscribed discretionary instrument.

We are now very near the essence of the matter before us, and I would not be misunderstood on the point I am trying to make. One can doubt — as I do — the proposition that the expansion of government regulatory and service functions is inevitably fatal to the Rule of Law and yet recognize, at the same time, that the growth of governmental power is attended by dangers and problems of which the citizens of a Welfare State must take account. My own convictions on the tendency of power to corrupt the powerholder are almost identical with those expressed in Lord Acton's letter to Bishop Creighton. But it is one thing to recognize that

discretionary power has dangerous potentialities against which the Welfare State must be alert to provide and quite another thing to proclaim that the exercise of discretionary power in the Welfare State is a cancer against which no precaution can prevail.

A second clarification to avoid possible misapprehension. To observe that the Hayek Theorem is part of a political thesis is by no means to prejudge the issue of its accuracy. A political theory — the constitutional theory of the Federalist Papers, for example — can be both politically motivated and profoundly true. Many of Dicey's present-day detractors are guilty of the loosest kind of reasoning when they attempt to refute Dicey's principles in terms that do little more than attack his Whig motivation. Similarly, it is entirely possible that one who does not share, say, Hayek's "liberal" ("conservative" in American usage) political orientation may nevertheless have to agree, however reluctantly, with the truth of his analysis. The rub is that one who concedes the truth of the Hayek Theorem but also subscribes to the objectives of the Welfare State has an ugly alternative thrust upon him: Is the Rule of Law so precious to us that we must give up the social objectives of the Welfare State? Or, are the objectives of the Welfare State so just and compelling that they must be pursued even at the cost of sacrificing the Rule of Law?

We have now reached the most controversial — certainly the most potentially divisive — issue of this Colloquium. In discussions prior to this one, the Colloquium's participants will have brought the insights of Comparative Law to bear on the Rule of Law as understood in the West. Comparative method will have warned us against a too close identification of the essential concept, "the Rule of Law", with particular national institutions and special historical developments. We are, after all, seeking a higher unity — the *essential* attributes of the Rule of Law — that transcends national and institutional differences between Norway and Italy, England and West Germany, France and the United States. The very terms of our jurisprudential assignment — "as understood in the West" — postulate some area of agreement among us. The contention that the Rule of Law cannot survive in a Welfare State

strikes at the heart of that area of agreement. For this contention would identify the Rule of Law with one institution, enterprise capitalism of more or less undiminished vitality, and that is an institution which some of the countries here represented have retained and others abandoned. If Hayek & Co. are right in their analysis, it is unrealistic to speak of the Rule of Law as (commonly) understood in all the countries of the West. The Rule of Law must be dead or *in extremis* in those countries of the West that have already gone over to economic planning or, at least, the Rule of Law must mean something quite different there than in other countries of the West which have retained the substance of a capitalist economy.

Is it exaggeration to suggest that a point of jurisprudential theory has brought us to the threshold of an incomparably greater question, the basis of the unity of the non-Communist countries of the Western world? Several of the countries of the West are far along on the road to socialism; two or three are already essentially socialist, either avowedly or by the standards of Nineteenth economic theory. Belgium, Italy, the United States and certain other countries of the West are still essentially capitalist or, whatever the extent of their adoption of Welfare State measures, still think of themselves as essentially capitalist. What — apart from a common fear of Soviet imperialism — do the socialist countries of the West springs from a shared dedication to certain processes and values symbolized by the phrase, "the Rule of Law". It is an unexpressed premise of Western unity that a socialist democracy has far more in common with a capitalist democracy than it has with a socialist dictatorship and that a capitalist democracy has far more in common with a socialist democracy than with a capitalist dictatorship. To suggest the incompatibility of freedom and socialism — of the Rule of Law and the Welfare State — denies the validity of that unifying premise.

The foregoing states the political dimension of the present issue in blunt terms. To suggest the potential divisiveness of the issue for a colloquium of scholars from many countries is, again, not to prejudge it. But an awareness of the issue in its full politi-

cal dimension will make the thoughtful legal philosopher seek for alternative hypotheses before he accepts even the most persuasive attempt to demonstrate that the Rule of Law and the Welfare State are forever and implacably opposed.

### *The Widening Task of the Rule of Law*

The national state's minimum functions are the preservation of domestic order and the defense of national interests and integrity. If the state did no more, there would be relatively infrequent occasions for direct confrontation between the state's officials and its private citizens. Only a few in any national society have their plans actively interfered with by policemen, and fewer still come into direct touch with diplomatic officials or, in peace time, with officials of the military establishment.

In the Welfare State, public power becomes an instrumentality for the achievement of purpose beyond the minimum objectives of domestic order and national defense. It is not enough that the national community be secure against internal disorder and external aggression; a society can be so secure and well ordered and yet lack the attribute of distributive justice. But as social justice becomes a conscious end of state policy there is a vast and inevitable increase in the frequency with which ordinary citizens come into a relationship of direct encounter with state power-holders. The citizen's significant encounter now is not with the policeman or the criminal magistrate but with the official representing a regulatory authority, an administration of social insurances, or a state-operated economic enterprise. It is this dramatically increased incidence of encounter that sets the task of the Rule of Law in the Welfare State.

At the first stage of the Welfare State, old rights are subjected to new forms of limitation. Property and contract are the most obvious cases in point. It is not that the right of property or the right to contract were ever absolute; the maxim *sic utere* and the rule that courts will not enforce contracts against public policy are sufficient reminders that every legal system has put outside limits on the autonomy of property owners and contracting parties. But

these outer bounds keep moving in as the area of individual decision in property and contractual matters is narrowed in the Welfare State. The state's commands must constantly be consulted when the individual is determining the use or disposition of his property, and many matters once left to private bargaining are now foreclosed by public statute or regulation. The doctrines and procedures of what Dicey called the "ordinary law" may give little specific help in working out the ultimate pattern by which old rights are to be adjusted to the social interests given preferred place in the Welfare State. If the Rule of Law is to be fully meaningful in the contemporary setting of detailed regulation, there must be new acts of legal construction as momentous as those undertaken and performed by the great civil law codifiers and the great common law judges.

In any society, individuals will differ in natural gifts and economic position. Increased regulation of the stronger or more fortunate does not necessarily bring about a reduction in the net balance of individual self-assertion. In the Welfare State — if and so long as it can be kept true to its avowed purposes — regulation is not an end in itself but a means of securing a greater measure of economic equality. A statute providing against the forfeiture of premiums paid on a lapsed life-insurance policy diminishes freedom of contract only in the doctrinaire sense that insurers no longer can impose forfeiture clauses on a "take it or leave it" basis. Because of the inequality of bargaining power, such clauses were never the subject of genuine negotiation between insurer and insurance applicant. Similarly, it would be wildly unrealistic to see in a minimum wage law only an interference with the individual employee's right to contract for less than subsistence wages. What has happened in these and like instances is that areas of decision formerly subject to the rule of superior economic power have been brought, wisely or unwisely, within the reach of the Rule of Law. But whether looked at from the perspective of the persons regulated or from the perspective of those benefited by the regulation, there has been an increase in what I have called the incidence of encounter between the individual and the state power-holder and, with that increase, an expansion in the task of the Rule of Law.

Even more important than the regulatory aspect of the Welfare State is its office as the source of new rights; for example, the expectations created by a comprehensive system of social insurances. I see no reason why the word "rights", with its unique emotive power, should be deemed inappropriate for these new expectations and preempted for use only in connection with such traditional interest as those in tangible property. Take the situation of the typical American citizen of middle income. Studies tell us that he reaches retirement age with a whole bundle of interests and expectations: as home-owner, as small investor, and as social security "beneficiary". Of these, his social security retirement benefits are probably his most important resource. Should this, the most significant of his rights, be entitled to a quality of protection inferior to that afforded to his other interests? It becomes the task of the Rule of Law to surround his new "right" to retirement benefits with protections against arbitrary government action, with substantive and procedural safeguards that are fully as effective as the safeguards enjoyed by traditional rights of property in the best tradition of the older law.

To suggest, as I have, that the reasonable expectations of a social service beneficiary are as meaningful for the Rule of Law as the interests of an owner of investment securities or real property is in no way to urge a lowering of the standard of protection now extended by law to the more traditional interests. The goal — substantial parity of treatment — can be pursued by levelling up as well as by levelling down. The new expectations progressively brought into existence by the Welfare State must be thought of not as privileges to be dispensed unequally or at the arbitrary fiat of government officials but as substantial rights in the assertion of which the claimant is entitled to an effective remedy, a fair procedure, and a reasoned decision. Anything short of this leaves one man subject in his essential interests to the arbitrary will of another man who happens to partake of public power, and that kind of unequal and demeaning encounter is repugnant to every sense of the Rule of Law.

These comments unavoidably, are impressionistic rather than

exhaustive, but they should have given at least some idea of the magnitude of the task ahead for the Rule of Law. For centuries our several legal orders have pursued the ideal that individual rights be kept secure from infringement by other persons and, above, all, from the arbitrary exercise of government power. Our concepts and procedures, in their best manifestations, furnish a surer protection than ever before to the essential rights that are first in any hierarchy of individual and social interests: freedom of religion, speech, suffrage and press and the related freedom from arbitrary detention. Beyond this, our legal orders have achieved a reasonable effective procedure for the vindication of such other traditional interests as property rights, contract rights, and rights to compensation for injury caused by another's fault. Now the Welfare State brings its staggering volume of additional grist to the mills of justice: new rights in vast number and infinitely more widely dispersed among citizenship than the old rights ever were. In the scale of legal valuation, these new and more widely asserted rights are outweighed only by the essential civil liberties; they are certainly as dear to their possessors as contract and property rights are to those who possess them.

Mass-produced goods rarely have the quality of goods made in far smaller quantity by traditional hand craftsmanship. An analogous problem challenges the Welfare State. In an era when rights are mass produced, can the quality of their protection against arbitrary official action be as high as the quality of the protection afforded in the past to traditional legal rights less numerous and less widely dispersed among the members of society? Dicey accurately saw its as a great strength of the Rule of Law in England that most questions of individual right came for decision to a small and homogeneous group of dedicated men, the judges of the "ordinary law." A hundred times as many deciding officers are needed to settle the issues presented by claimants of the new and more widely held rights of the Welfare State. Is it beyond hope that this vast new company of officials can, in time, develop a tradition of decision worthy of being called, in Pound's fine phrase, an "ethos of adjudication"?

In the Welfare State, the private citizen is forever encountering public officials of many kinds: regulators, dispensers of social services, managers of state-operated enterprises. It is the task of the Rule of Law to see to it that these multiplied and diverse encounters are as fair, as just, and as free from arbitrariness as are the familiar encounters of the right-asserting private citizen with the judicial officers of the traditional law.

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