

THE RULE OF LAW AND ABSOLUTE SOVEREIGNTY (*)

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When the late Mr. Justice Owen Roberts came to Oxford in November 1951 to deliver his often cited lecture on *The Rule of Law in the International Community*, here referred to the idea of the rule of law as recognized by what he called "highly civilized nations." In the discussion which followed his lecture Roberts was asked what countries he would cover by that phrase. He replied:

"My test would be, first, a country that has a representative form of government; second, a country where individual liberty and freedom are protected by law; [and third] where there are bounds and limits to what the government can do to an individual."

* The original version of this Article was delivered in February 6, 1958, as the Owen J. Roberts Memorial Lecture under the auspices of the Pennsylvania Chapter of the Order of the Coif and the University of Pennsylvania Law School. In preparing this lecture the author has borrowed extensively from the various papers read at the conference held at the Harvard Law School in 1955 on the occasion of the bicentennial of John Marshall. They have been published in *GOVERNMENT UNDER LAW* (Sutherland ed. 1956). He has also used the papers read at Chicago Colloquium (hereinafter cited as Chicago Colloquium) in September 1957 on *The Rule of Law as Understood in the West*. Of these papers to be published in the near future, Professor C. J. Hanson's *Preliminary Memorandum* was of particular value to the author. He also is indebted to Dean Jefferson B. Fordham and Vice-Dean Theodore H. Husted, Jr. for their article *John Marshall and the Rule of Law*, 104 U. Pa. L. REV. 57-68 (1955).

It is of great importance to note that he is here referring to three entirely distinct concepts which are frequently treated as if they were part of a single one, with the result that our ideas may tend to become confused. If we talk of (a) democracy, (b) the basic rights of man, and (c) the rule of law as if they mean the same thing, and are indissolubly linked together, then we shall sacrifice the precision of thought which is so necessary when dealing with problems that may give rise to the strong emotions frequently engendered when there are divergencies of political opinion. The confusion which may arise from our failure to make a proper analysis of the various ideas which are under discussion has sometimes proved of value to those who are seeking to befog the whole issue.

In his reference to "a representative form of government" Roberts was concerned with the nature of democracy, but this question is not directly related to the nature of the rule of law as it is possible to have a democracy which is uncontrolled by law. In his famous classification of the six different types of government, Aristotle, in Book III of his *Politics*, divided them into three constitutional states—monarchy, aristocracy, and moderate democracy—and three despotic states—tyranny, oligarchy, and extreme democracy or mob rule. The first three are examples of government under law, while the second three are government by uncontrolled will. By suggesting that there is a necessary relationship between democracy and the rule of law it is possible to conceal the fact that a majority in a democratic state may be as tyrannical as any individual despot if there is no effective constitution to control the exercise of its power. This was one of the cardinal errors made by some of the political philosophers in the nineteenth century, for they suggested that by the establishment of democracies all other political problems could be solved. Bitter experience has taught us that this may not be true. It has been pointed out that Woodrow Wilson's phrase that "the world must be made safe for democracy" would have been nearer the truth if he had said that democracy must be made safe for the world. We must realize therefore that democracy and the rule of law do not mean the same thing, and that they may even be in conflict on some occasions. It is true, of

course, that we are more likely to find the rule of law in a democracy than in any other form of government, but it does not follow from this that there is an inevitable relationship between them.

Mr. Justice Roberts' second reference is to individual liberty and freedom. Here we are concerned with those rights that have been called basic, fundamental, natural, common-law, "self-evident" and "unalienable" to use the phrase from the Declaration of Independence. These basic rights include such concepts as freedom of speech and of religion, freedom from arbitrary imprisonment or arrest, and protection against the deprivation of life, liberty, or property¹ without due process of law. These are included in the first eight and the fourteenth amendments of the Constitution of the United States. Other statements concerning these basic rights can be found in many other modern constitutions such as those of Eire and India, but they are not included in the Australian or Canadian Constitutions.² Recently the Council of Europe has adopted a "Convention for the Protection of Human Rights and Fundamental Freedoms" which is now in force. A "Universal Declaration of Human Rights" has been issued by the United Nations, but it is reasonably clear that this will not be given force in the foreseeable future. Although in the past it was the practice to limit these basic rights to personal freedom and to private property, the list has widened today to include such concepts as the right to work, to education, and to a minimum standard of living.³ It is possible to debate such questions indefinitely, for no two countries have ever been in agreement concerning the nature of these basic rights, and how they can be guaranteed. It is therefore

1) The phrase "life, liberty and the pursuit of happiness" in *The Declaration of Independence* shows how vague the concept of basic rights can be.

2) 1-2 Peaslee. *Constitutions of Nations* 89, 189, 239, 315 (1956).

3) In a paper presented at the Chicago Colloquium, Mr. Ernest Angell said: "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."

of the utmost importance to keep entirely separate the idea of basic rights and the idea of government under law because the former is bound to be vague and uncertain while the latter is clear and definite. If we fail to distinguish between the two, the uncertainty of the former will infect the latter. This does not mean that the ideals which are expressed in the concept of basic rights are not of great value, but it can only lead to error if we identify them with the rule of law. The truth is that these basic rights only receive practical recognition when they are adequately protected by the rule of law. In other words the rule of law is the machinery by which effect can be given to such basic rights as are recognized in any particular legal system. If we concentrate our whole attention on the nature of those basic rights which ought to be recognized, then we may overlook the entirely separate question: In what way can effect be given to such rights when they have received recognition?

It is this machinery which is covered by Mr. Justice Roberts' reference to a highly civilized country "where there are bounds and limits to what the government can do to an individual." These bounds and limits are marked by the control which is exercised over the public officers of the State by means of law. It is this which constitutes the rule of law,⁴ or to use a more accurate phrase, govern-

4) It is unfortunate that so many different meanings have been attributed to the phrase "rule of law." The classic statement of the rule of law from the English standpoint is that by A. V. Dicey: "We mean, in the first place, that 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 ordinary courts of the land. We mean in the second place... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." Dicey, *Law of the Constitution* 188, 193 (9th ed. 1952).

Sir W. Ivor Jennings said: "The doctrine involves some considerable limitation on the powers of every political authority, except possibly (for this is open to dispute) those of a representative legislature. Indeed it contains ... something more, though it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but

ment under law. It is here that we find the principle which guarantees all our rights and liberties, for if these officers are not bound to recognize them then they can be disregarded at any moment. A constitution may contain a most elaborate bill of rights, but if its terms can be disregarded at will by the public officers then these provisions will be of little effect. I believe that the greatest contribution that the common law has made to the development of modern civilization is to be found in its emphasis on this machinery, while leaving to others the formulation of the general rights of man.

We must be careful, however, not to claim too much for this rule of law if we are to understand the function which it performs in a political society. The phrase "the laws of the Medes and Persians" is a warning that law may become too strict; this is true in particular when the rules that control the public officers are over-rigid, because, as a result, the government may lack the necessary flexibility. On the other hand, if they are too fluid, then they will not constitute a sufficient restraint. The problem here is a question of due proportion, as is true in the case of almost all other political antinomies. But of this we may be certain, unless there is adequate recognition of the rule of law there can be no limitation on the power of those who control the government of the State, and, therefore, no protection against despotism. Thus, we can say that although the rule of law is not by itself a guarantor of freedom, nevertheless its existence is a prerequisite if such freedom is to be established.

Confusion has been caused by the similarity between the phrases "a rule of law" and "the rule of law." A rule of law in the ordinary sense means any rule of conduct which is binding either

clear enough in their results." *Jennings*, *The Law and the Constitution* 47 (4th ed. 1952).

The International Commission of Jurists in its Rule Of Law Project defined the rule of law as: "The institutions and procedures, not always identical, but broadly similar, which experience and tradition in different countries of the world often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man."

on (a) the ordinary citizen, or (b) on the public officers of the State. It is obvious that even under the most absolute tyranny there must be laws in sense (a) binding the ordinary citizen, as it would be impossible for those in control of the State to govern in any other way. An autocrat, having absolute powers of life and death over his people, would nevertheless have to issue general laws if the administration of his government were not to disintegrate. A rule of law in sense (a) therefore exists in all States. This is not true, however, of laws in sense (b) which bind the public officers themselves, because such legal control of officials is not an inevitable part of government. In other words, the officers who govern *by* law need not also govern *under* the law.

Unfortunately the distinction between "rule by law" and "rule under the law" has been blurred by the imprecision of the language we use. It is the dual sense of the phrase "rule of law" which has enabled the apologists for the totalitarian systems to argue that they represent the rule of law more truly than do the Western States.⁵ In a Western State, they say, the individual is given undue freedom of action uncontrolled by the law, even though this liberty may be exercised to the detriment of the community; on the other hand, in the totalitarian State this individual freedom of action is strictly controlled by rules of law which have as their purpose the defense of the public interest. It follows, according to this view, that the rule of law is more fully recognized in the totalitarian countries than it is in those which place greater emphasis on the freedom of the individual. This extraordinary paradox illustrates the hopeless confusion into which we can be led unless we understand the exact sense in which the phrase "rule of law" is being used, especially when some of the disputants are deliberately taking advantage of the ambiguity.

5) See the paper by Professor G. Treves at the Chicago Colloquium on **The Rule of Law in Italy** in which he pointed out that "in its heyday [of the Fascist State] the sycophants wanted to disguise totalitarianism under a respected cloak, such as that provided by the legal state. ... Some went as far as to affirm that the Fascist state was more entitled to be called legal than the Liberal state, as more relations were regulated by the law than ever before, and that the corporate state was a refinement of the legal state."

I shall therefore use the phrase "rule of law" solely in the sense of a rule which controls the public officers of the State. I am not speaking about *rule by law* which can be the most efficient instrument in the enforcement of tyrannical rule: I am speaking about *rule under the law* which is the essential foundation of liberty. The two are totally distinct.

This is no novel idea, for it was fully recognized more than two thousand years ago by the Greeks, perhaps the most highly civilized people in all history. In his recent book, *The Greek Experience*, Sir Maurice Bowra has said: "In Greece, whatever type of government might exist, the law was still regarded as the foundation of society."⁶ This rule of law protected the people "on the one side from the claims of irresponsible monarchs," and on the other "from the claims of the unprivileged populace."⁷ In his work on *Historical Jurisprudence*, Sir Paul Vinogradoff, in speaking of the rule of law, said: "The exercise by the magistrates of their powers as determined by law was carefully watched... In Greece, the principle was rather to put the magistrates in such a position that they should always be subject to the superior authority of the community."⁸ In Book IV of his *Politics*, Aristotle emphasized that the law is the body of rules to be followed by the magistrates in performing the duties of their offices.⁹ It was this control of the *magistrates* which distinguished a constitutional state from a tyranny.

This Greek conception of rule under the law found less expression in the writings of the Roman political philosophers as it obviously was in conflict with the absolute power exercised by the Emperors. It does not follow from this, however, that the idea of rule under the law did not play an important part in Roman polity, for the great corpus of the Roman law would not have attained its supreme position if those who administered it had been free to disregard its provisions whenever they thought that this was desir-

6) Bowra, *The Greek Experience* 66 (1957).

7) *Id.* at 73.

8) 2 Vinogradoff, *Outlines of Historical Jurisprudence* 113 (1922).

9) Aristotle, *Politics* (2d ed., Jowett transl. 1938).

able. The respect shown to this law was so great that it continued a life of its own after the destruction of the Empire.

After the long chaos of the Dark Ages which followed the collapse of the Empire there emerged the medieval States, and with them there came a revival of the concept of rule under the law. This was strongly supported by the Church, which claimed that within its own sphere it was not subject to control by the Sovereign. The idea that the Sovereign was above the law had not as yet been suggested, for, as has been said, "the principal foundation upon which medieval political theory was built was the principle of the supremacy of law."¹⁰ The Magna Carta, which is recognized as the foundation-stone of Anglo-American liberties, would be meaningless without this principle because it assumed that the King must be made subject to the law which he had violated in the past.¹¹

It is not necessary to trace here the development in comparatively modern times of the idea that the Sovereign cannot be controlled by the law. The doctrine that in every State there must be an allpowerful government is a nineteenth century one: it was only then, as Professor Plucknett has said, that "Leviathan had indeed come to life."¹² We are reaping some of the results of that doctrine today. Fortunately it has never been accented in the United States as it is completely incompatible with the principles on which the American Constitution is based. The most important of those principles—government under law—we owe in large part to the works of John Locke and of William Penn.

10) 5 Carlyle, *Medieval Political Theory In The West* 457 (1928).

11) See 1 Pollock & Maitland, *History of English Law* 181, 182 (1911): "That the king is below the law is a doctrine which even a royal justice may fearlessly proclaim. The theory that in every state there must be some man or definite body of men above the law, some 'sovereign' without duties and without rights, would have been rejected. Had it been accepted in the thirteenth century, the English kingship must have become an absolute monarchy, for nowhere else than in the person of the king could the requisite 'sovereignty' have been found."

12) Plucknett, *History Of The Common Law* 62 (4th ed. 1948).

THE RULE OF LAW TODAY

This brief reference to the history of the rule of law doctrine may be of some use in showing how important was the role which it played in the past, but it will not help us to understand how it works in practice today. To realize its present significance it is necessary to analyze the effect of the rule in detail, with special reference to the various branches of the government to which it may be applicable. It is obvious that under no conceivable political system can there be complete rule under the law, as a large degree of freedom of action must be left to those who exercise the power of government. On the other hand, there is hardly any political system, however tyrannical, which can function without placing some legal limitations on the powers of its officers. We cannot therefore draw an absolute line of division between those states which recognize the rule of law doctrine and those which do not, but it does follow from this that we cannot distinguish the degree to which this doctrine is recognized and enforced in each State.

Similarly, although it is not possible to draw an absolute line between the exercise of the various functions of government, there is no reason to reject for practical purposes the long-established division between legislative, executive and judicial powers. This distinction is of special importance when we consider the effect of the rule of law doctrine because it may be more fully applicable to one branch of government than it is to another. Thus, in the United States the emphasis is placed primarily on the control of the federal and state legislatures by the rule of law as expressed in the Constitution, while in Great Britain and France the interest is centered almost entirely on the control of the executive.¹³

Control of the Legislative Power

The relation between legislative power and the rule of law doctrine gives rise to a most interesting and contentious problem, because in a federal state, such as the United States, it is assumed

13) The papers read at the Chicago Colloquium strikingly illustrate this point. See in particular Le Tourner and Drago, *Principles of the Rule of Law as Seen by the French Conseil d'Etat*.

without argument that the legislature can always be limited by law as expressed in the Constitution, while in a unitary state, such as Great Britain, it is difficult for the jurists to appreciate that such a limitation is possible.¹⁴ Thus Dicey, in his classic *Law of the Constitution*,¹⁵ speaks of Parliament as "an absolutely sovereign legislature" which therefore "cannot be bound by any law." From this standpoint there is no distinction in theory between the absolutism of Parliament and that of the most despotic monarchs.¹⁶ The danger in this view is that it has enabled the jurists of the totalitarian countries to argue that the orders issued by an absolute dictator and the statutes enacted by Parliament are inherently of the same nature. Thus, when on the "night of the long knives" on June 30, 1934, Hitler ordered his Blackshirts to murder his opponents, this was justified by the Nazi legal philosophers as a legal expression of sovereign power.¹⁷ At the recent trial of ex-General Sepp Dietrich for the execution of six men held in prison at that time, Dr. Koch, who had been the prison governor, was asked if anyone had suggested that the shootings were illegal. He said: "No, no one raised that point."¹⁸ It is a point which would certainly have occurred to every prison governor in a country under the rule of law.

14) On this point Sir Owen Dixon, Chief Justice of Australia, in his paper on *Marshall and the Australian Constitution*, Government Under Law 306 (Sutherland ed. 1956) said: "For elsewhere in that world [the English-speaking world], except to students of political science, federalism seems to have been beyond comprehension; and indeed even today there is reason to think that understanding of it is denied to those who pass their lives under a unitary system of government."

15) Dicey, *Law Of The Constitution* 39, 40 (9th ed. 1952).

16) *Id.* at 80.

17) In his address on July 15, 1934, to the German people, Hitler said: "In this hour I was responsible for the fate of the German nation, and in these twenty-four hours I was therefore the supreme court of the German nation in my own person." In an editorial in the *London Times* on July 16, 1934, it was said that this "shows how completely the present rulers of Germany have thrown aside all the principles of law and justice which distinguished a modern Western state from an Oriental despotism. ..."

18) *Manchester Guardian*, May 7, 1957, p. 7, col. 2.

Dicey's failure to distinguish between a statute of Parliament and the order of a despot is based on his conclusion that both Parliament and the despot can be described as *absolutely* sovereign. But is this true? A despot can only be described as an absolute sovereign if his will, however it may be expressed, must be obeyed. He is not an absolute sovereign if his will must be expressed in a particular manner, *e.g.*, if it must be issued under the Great Seal, or if it must have the concurrence of others. It is true that Louis XIV said that "l'État c'est moi," but this was a misinterpretation of the constitutional position, as is shown by his conflicts with the Parlements.¹⁹ His successors realized how great this error was. In the case of Hitler there was such absolute sovereignty, for no restraint of any nature was placed on the expression of his will. On the other hand, there is no such absolute sovereignty in the case of Parliament, because there are fixed rules that must be followed before the expression of its will can be obeyed. It is axiomatic that if the Monarch, the House of Lords, and the House of Commons were to meet as a single body and unanimously agree on a particular statute, their action would not have any validity as it would be contrary to the British Constitution. Similarly, the House of Commons can only act by a majority of the elected members; therefore, if a minority were forcibly to exclude from the Parliament Chamber the duly elected majority, it is clear that the courts would not recognize this action as valid.²⁰ It can there-

19) On this point Professor **Tunc** has said: "The kings had excessive powers, yet the negative powers of the Parlements prevented them from introducing desirable reforms and answering popular desires. ... The Revolution at certain stages, and Napoleon, established governments more absolute than had ever been experienced." *Government Under Law* 420-21 (Sutherland ed. 1956).

20) It is true that the two prints of an act which are signed by the clerk of the Parliaments become the official copies of the act and that printed copies of them are accepted as evidence in the courts, but this does not mean that the courts will be precluded in all circumstances from a consideration of the validity of the certification. In **May, Parliamentary Practice** 600 (16th ed. 1957), it is said that: "Although a departure from the usage of Parliament, during the progress of a bill, will not vitiate a statute, informalities in the final agreement of both Houses have been treated as if they would affect its validity."

fore be said that no person or body of persons can be described as absolutely sovereign if they are bound by rules of procedure. It is true, of course, that in the case of Parliament it would be possible for the three elements which constitute the Queen-in-Parliament to alter the constitution by setting up a dictator, but they would have to follow the present constitutional procedure if their act were to have validity. Dicey therefore failed to give a true picture of the British Constitution, because he failed to draw a distinction between those rules of law which may govern the constitution and procedure of a legislative body on the one hand, those which may control its substantive powers on the other. By procedural rules I mean those rules which establish how those who hold the legislative power are determined and what steps they must follow in exercising this power, while the substantive rules are concerned with the subject matter which can be dealt with by the legislative body.

In the American Constitution we find a striking illustration of both types of these rules of law. It divides the legislative power between the President, the Senate and the House of Representatives, and it is axiomatic that no court would recognize as valid a statute which had not been enacted by the two branches of the legislature, or which had been vetoed by the President. These are procedural rules of law. But the Constitution also contains rules strictly limiting the subject matter which falls within the jurisdiction of the federal government; any statute enacted by Congress which does not fall within this jurisdiction, or which conflicts with the bill of rights amendments will be held by the courts to be null and void. The American rule of law governing legislative power is therefore twofold in character in that it established on the one hand how this legislative body is chosen and how it can act, and, on the other hand, it limits the subject matter with which the legislature can deal.

When we turn to the constitution of Great Britain we find a system under which there are binding procedural rules, but where the existence of rules of law limiting the subject matter with which Parliament can deal is doubtful. It has sometimes been said that there is no constitutional law in the true sense in Great Britain

because the provisions of the constitution can be altered at any time by the Queen-in-Parliament,²¹ but it is equally true that the American Constitution can be altered at any time if the proper procedure is followed. The fact that it is far easier to alter the British Constitution than it is to amend the American one does not affect this point. Nor is it relevant that the dominant power of government is in the hands of the House of Commons, because the House of Lords must still play its proper part in the legislative process. Until a change has been made in a constitutional manner the established rules must be obeyed; it is here that one of the essential distinctions between despotism and government under law is found.

Whether there can be said to be any rules of law limiting the substantive powers of the British Parliament is a more doubtful question. The answer depends on our definition of law. Dicey defined state law as "any rule which will be enforced by the courts,"

21) In his interesting book *The Law And The Constitution* (4th ed. 1952), Sir W. Ivor Jennings has said: "The only fundamental law is that Parliament is supreme. The rest of the law comes from legislation or from those parts of judge-made law which have not been abolished by legislation. Strictly speaking, therefore, there is no constitutional law at all in Great Britain; there is only the arbitrary power of Parliament." *Id.* at 64. With great respect this statement is of doubtful validity. To say that Parliament is supreme is insufficient unless we know what is meant by Parliament. To explain what Parliament is we must state the fundamental rules which govern not only its three constituent elements of Monarch, House of Lords and House of Commons, but also their relationship to each other. It is true that these elements and their relationship can be altered by any existing Parliament, but until that is done the present rules constitute part of the fundamental law, i.e., the constitutional law of Great Britain. This point is of great importance because there is a vital constitutional difference between a British statute which will only be valid if it has been enacted by a majority vote of those present in the House of Commons, a majority vote of those present in the House of Lords, together with the consent of the Monarch (even though this has now become automatic) and, on the other hand, the command of a despot such as Hitler or Stalin. To describe both the statute and the command as the expression of "arbitrary power" suggests that there must be an error in the original premise.

and he therefore reached the conclusion that all rules, however obligatory their nature might be, which were not subject to the ordinary judicial process must be regarded as non-law.²² He therefore held that international law was a branch of public ethics and was "miscalled international law."²³ Similarly, any rules concerning the administration of government which were not subject to legal enforcement in the ordinary courts were "miscalled constitutional law" as they were a part of "political ethics."²⁴ Dicey's definition was accepted in the United States by Professor John Chipman Gray.²⁵ This Anglo-American interpretation places the main emphasis on recognition by the courts because they have always played such a dominant role in the systems of government in those countries. In recent years this definition has, however, been under increasing criticism on the ground that it gives a misleading picture, due to the failure to recognize the modern development of the administrative process.²⁶ Thus Lord Hewart's reference²⁷ to the administrative tribunals as a form of "new despotism" was based on the view that these tribunals, not being ordinary courts of law, could not be said to be administering law, even though they followed established rules in reaching their decisions. This ignores the fact that recognition by such a tribunal that a rule is obligatory will be just as effective as a similar recognition on the part of a judge. It is true, of course, that, in general, more discretion is given to an administrative tribunal than to an ordinary court of law, but it does not follow from this that the tribunal can disregard the law that binds it.

A second objection to the Dicey definition is that it is only applicable, if at all, to Anglo-American law. The Continental jurists have never attributed such importance to the judicial process

22) Dicey, *op. cit.* supra note 15, at 40.

23) *Id.* at 22

24) *Ibid.*

25) Gray, *Nature And Sources Of The Law* (2d ed. 1921).

26) See in particular Wade's introduction to Dicey, *Law Of The Constitution* (9th ed. 1952); Jennings, *The Law And The Constitution* (4th ed. 1952).

27) Hewart, *The New Despotism* (1929).

alone.²⁸ They point out that judicial recognition of the law would be completely ineffective unless similar recognition were accorded by the executive whose function it is to enforce the law. Nor do they regard a constitutional provision which limits the powers of the legislature as nonlegal merely because there is no power in the courts to disregard a statute which may be in conflict with such a provision. Professor Tunc has pointed out that in fact the French legislature regards itself as bound by such constitutional provisions, and that there has been no instance in which they have been disregarded.²⁹ Under the Continental interpretation of law any rule is to be regarded as a part of state law if it is recognized as being obligatory by any one of the three branches of government. I believe that this wider interpretation is more satisfactory than the limited Anglo-American one which places overemphasis on the judicial process. It is generally accepted today that recognition by the administrative officers that a rule is obligatory entitles the rule to be classified as legal in nature; it is suggested that the same principle of classification should be followed when a legislative body recognizes that it is bound by certain fundamental principles.

The American Constitution provides in express terms that the courts shall be independent, and that there shall be no arbitrary imprisonment or interference with freedom of speech or of

28) See paper by Professor Nils Herlitz at the Chicago Colloquium on *The Critical Points of the Rule of Law as Understood in the Northern Countries*, in which he referred to the meaning attached to the word "law" in the Northern countries: "When we use it, our thoughts do not go immediately to the courts; the rule of law does not necessarily imply the Justizstaat, though, of course, the courts are a very essential element in our system."

29) "The French authors consider that there is a much greater need for control of executive or administrative action than for control of legislative action. ... I must say that I have tried to find some examples in which judicial review of legislative action would have been useful in France. I failed to see even one case where it was reasonably clear that the legislature had disregarded the constitution and where it would have been important for the courts to declare the statute inoperative." *Government Under Law* 43, 74 (Sutherland ed. 1956).

religion. These express principles of the American Constitution have been derived from the principles which have long been recognized as an essential part of the unwritten British Constitution. To deny that they are obligatory under the British Constitution, while recognizing their legal nature under the American one, is to place all the emphasis on form and none on substance. It is to disregard the character of English constitutional history with its great landmarks³⁰ that have established those fundamental rights which no Parliament can reject except in time of war. I believe that it is true to say that the legislative powers of Parliament are limited by certain fundamental principles which are universally accepted even though there is no other body in the constitution which can prevent Parliament from exceeding these limitations. It is in defense of such principles that men have been prepared to die in the past and will be prepared to die in the future.

When we turn to the totalitarian systems of government we find that the legislative power is vested in an individual who is uncontrolled by procedural rules of law. Under such a system there must, of course, be one basic rule which is recognized as vesting this absolute uncontrolled legislative power in the individual, but after that the law is silent. An illustration of this can be found in the Nazi system, under which the uncontrolled will of Hitler was sufficient to determine matters even of life and death. The same was true, as we know, in the case of Stalin. The exercise of such arbitrary will, whether expressed in the form of a general order or in a particular command, is despotism. This has been admirably stated by Professor McIlwain in his *Constitutionalism: Ancient and Modern*:

"[I]n all its successive phases, constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law."³¹

30) Magna Carta, The Bill of Rights, The Petition of Right, The Habeas Corpus Act, The Act of Settlement.

31) McIlwain, *Constitutionalism: Ancient And Modern* 21-22 (rev. ed. 1947).

It is essential that this distinction between despotic rule uncontrolled by procedural or substantive limitations, and legislative rule controlled by law should be clearly realized, for again there has been an attempt made by totalitarian apologists to argue that there is no essential difference between government under law and government under arbitrary will.

Control of the Executive Power

When we turn from the control of legislative power by the rule of law to the control of executive power we are on less controversial ground because all jurists—certainly in the Western countries—agree that this is an essential part of government under law.

Before discussing the machinery which can make this effective, a preliminary point of the greatest importance must be emphasized. There can be no such effective control if the executive officers are also vested with full legislative power, for in such circumstances every executive act can immediately be given legal validity, either before or after it has been done. The principle of separation of powers is of the utmost importance here, and it was for this reason that the authors of the United States Constitution were so insistent that the exercise of legislative and executive powers should be in separate hands. But, it may be asked, how can this principle be reconciled with the parliamentary system that exists in Great Britain and almost all other Western countries, as under it the heads of the chief departments of state, such as the Treasury, the Foreign Office, etc., must also be members of the legislature? In Great Britain these officers constitute the Cabinet, which, for all practical purposes, controls *while it is in office* all legislation enacted by Parliament. I have emphasized the words "while it is in office" because it is in them that we find the guarantee of the rule of law. Every cabinet officer is responsible to Parliament not only for his own acts, but also for those of his subordinates, and if he fails to satisfy Parliament that he has acted in a proper manner then the government can be defeated by an adverse vote. It has therefore been said with truth that the hour of Question Time, which is the first business of most parliamentary days, is the most

effective machinery that has ever been devised for the control of the executive by the legislature. The exact opposite situation can be found in a totalitarian country, because under that system the executive has full legislative powers. The German jurists who served under Hitler were therefore justified in holding that no act which had been authorized by him could be regarded as illegal. Where they were misleading was in their argument that such a system could be in accord with the doctrine of the rule of law.

Executive government under law therefore means that an administrative officer functions under rules which contain specific provisions controlling his actions, or under rules which give him a legally controlled discretion. It is necessary to distinguish between the two because no modern system of government could function if the administration had to be conducted in all circumstances according to fixed rules. There must frequently be a degree of flexibility supplied by administrative discretion, but this discretion is not arbitrary in nature; it must be exercised in good faith and within the limits set by the legislature. "Discretionary power does not carry with it the right to its arbitrary exercise."³²

When we consider in greater detail control by rule of law of the executive function, we find that the major problems today concerns the division between administration according to strict rules, and administration under controlled discretion. Until a century ago the emphasis was in great part on administration under fixed rules because the functions of the State were regarded primarily as negative. Thus it may be said that the maintenance of internal order by the police, and of external order by the army and navy, and the collection of taxes are of a negative character. These functions can in large part be controlled by strict and precise rules as the degree of discretion that is required is of a limited character.

Of equal importance is the consideration that strict control of those who maintain order, and of those who are concerned with the revenue is essential if political liberty is to be maintained. It has been said that the two foundation stones on which the Anglo-

32) *Shachtman v. Dulles*, 225 F. 2d 938, 941 (D.C. Cir. 1955).

American system of government is based on protection of individual freedom, and the control of taxation. In both instances the maximum protection is given by the rigid control exercised over the public officers. Personal liberty, as everyone knows, is guaranteed by the Writ of Habeas Corpus because in every case imprisonment must be strictly justified under the law. Lord Denning in his book *Freedom Under the Law*³³ has described this as the most famous writ in England. As he has pointed out, "whenever any man in England is detained against his will, not by sentence of the King's Courts, but by anyone else, then he or anyone on his behalf is entitled to apply to any of the judges of the High Court to determine whether his detention is lawful or not."³⁴ The police must, within twenty-four hours, bring any person they have arrested before a magistrate, who must then decide whether the prisoner shall be further detained pending trial, or let out on bail. It has been said that each sentence of this writ is of more value than a library of books written in praise of freedom. Every step taken by a public officer in arresting or imprisoning a man is rigidly controlled by precise and strict rules. When we turn to the control of taxation we find a similar strictness of procedure. As Professor McIlwain has pointed out, political liberty was established in England through control of the purse by Parliament.³⁵ It is a basic principle of the British Constitution that no impost should ever be collected that has not been specifically authorized by Parliament, and this is enforced by the strict rule that any attempt by the officers of the State to raise money in other ways such as requisitions is illegal. This was the principle established by the courage of John Hampden in his resistance to the imposition of ship money in 1637. Edmund Burke's famous words in his *Speech on American Taxation* given in 1774 have often been quoted: "Would twenty shillings have ruined Mr. Hampden's fortune? No! But the payment of half twenty shillings, on the principle it was demanded, would have made him a slave." It would be a gross violation of a basic cons-

33) Denning, *Freedom Under The Law* (1949).

34) *Id.* at 6.

35) McIlwain, *The High Court Of Parliament And Its Supremacy* (1910).

titutional principle if Parliament were to give any Minister discretion in a matter relating to taxation.

Until the nineteenth century the rules governing executive interference with private property were almost as strict as those relating to taxation or to interference with personal liberty, but with the development of the activities of the modern State, and especially of the welfare State, it has been found impossible to control executive action in such an absolute way. In place of strict provisions there has been a substitution of executive discretion in an ever increasing number of fields, but it is essential to remember that this is never regarded as an arbitrary discretion to be used in a tyrannical manner.

The control of this discretionary power by the rule of law is a problem which has not as yet been adequately solved either in Great Britain or in the United States.³⁶ In the case of strict rules which bind the public officer; there is obviously no difficulty in providing that any dispute concerning their interpretation and application should be decided by the ordinary courts of law. But when the proper exercise of the executive's discretion is the point at issue then the regular legal procedure is hardly suitable as it would be difficult for the judges to decide questions which tend to be of a technical nature. There has therefore been strong support for the suggestion that administrative courts on the French model should be established,³⁷ but this has been opposed in England on two grounds. The first objection is that if appeals to the ordinary courts were provided in all cases in which discretionary executive acts were in dispute, the courts would become clogged, and the administrative machine would not be able to function efficiently. The second objection is that such legal control would run counter to the English doctrine

36) The most recent attempt to solve some of the problems has been made by the committee under the chairmanship of Sir Oliver Franks in its *Report on Administrative Tribunals and Enquiries*, Comnd. No. 218 (1957). See Wade, *Administration Under the Law*, 73 L. Q. Rev. 470 (1957).

37) See Hamson, *The Conseil d'Etat* (1954); Robson, *Justice And Administrative Law* (1928)

of ministerial responsibility under which the Minister must be prepared to answer to Parliament for any action taken by one of his subordinates, as it would lead to hopeless confusion if the Minister took one view and the judge took another. It is impossible to foretell what solution to this problem will eventually be found, but it must be acknowledged that until a more efficient method of controlling executive discretion has been devised there will be some ground for the view that in this regard the rule of law occasionally proceeds in a halting manner.

In the United States similar problems relating to the exercise of executive discretion have arisen, but I do not wish, even if I were competent to do so, to add to the vast literature on this subject.³⁸

When we consider the control of the executive by rule of law under the totalitarian systems we find a different picture. It would, of course, be incorrect to suggest that no such control exists, because it would be impossible to administer a great modern State if the public officers were not required in general to follow established rules. There is, however, a fundamental distinction in the nature of these rules and the degree to which they are enforced. This is true in particular in the matter of personal liberty. Perhaps no other fact marks in so dramatic a way the difference between the meaning attached to the phrase "rule of law" in totalitarian and in Western countries as does the position of the executive in relation to imprisonment. If the executive can send men and women to a concentration camp without due process of law then it is futile to speak of government under law, for all other rights must disappear under such circumstances. It is significant that the French Revolution began with an attack on the Bastille where a few prisoners were held under *lettres de cachet*, for this was the visible symbol of arbitrary government.

Control of the Judicial Power

So far I have been speaking of the rule of law which may

38) See Stasen, Administrative Discretion — A Critical Contemporary Problem, Chicago Colloquium.

control those who exercise the legislative and the executive powers of the State. Is it possible to speak in similar terms of a rule of law that controls those who exercise the judicial power? At first sight it would seem to be incorrect to suggest that the judges can be controlled by the law as it is they themselves who administer the law; but this, I believe, is to misunderstand the nature of law. It is because the judges recognize that they are bound by certain rules that we can distinguish between justice administered by discretion and justice administered under the law. A People's Court which decides each case as it sees fit may be administering justice, but it is certainly not administering law.

This distinction is of the utmost importance, because if the judges are free to reach any conclusion which they regard as desirable then they become the arbitrary rulers of the nation. In such circumstances we have what has been described as *Cadi* justice and not law. The confusion between the two has been of help to those who have established despotic government. An illustration of this can be found in the unfortunate history of the "Free Law" doctrine which flourished in Germany at the beginning of the twentieth century.³⁹ It was incorrectly interpreted in the sense that judges were not bound by established rules, but were free to reach any conclusion which they regarded as in accord with the public interest. When the Nazi regime came into power this doctrine was used to give respectability to the claim that the courts were entitled to disregard the long-established law. Judicial absolutism was established in the name of "the public interest." In the United States the short-lived Realist School seemed to accept the view that the judges could not be bound by strict rules as it was always possible for these rules to be interpreted in any sense which the judges desired to attribute to them, but fortunately this view is no longer accepted.

The rules of law that control judicial power are of various kinds. The first and most obvious type consists of those statutes that have been validly enacted, for there is no court which would deny that it is bound to follow them. The fact that under the

39) See preface to Kantorowicz, *The Definition Of Law* (1958).

American Constitution a statute which is in conflict with "due process" is held to be invalid cannot be regarded as a contradiction of this principle. The second type consists of the rules established by precedent cases. This rule of law is more rigid in the British courts than it is in the American ones as is shown by Mr. Justice Roberts' dissent in *Smith v. Allwright*.⁴⁰ He felt that the lack of consistency in the opinions of the Supreme Court was weakening the authority of the law. On the other hand, the absolute doctrine of precedent in Great Britain, established comparatively recently, has been subject to some criticism on the ground that it is over-rigid, and that it denies to the legal system that degree of flexibility which is desirable if the law is to accord with modern needs.⁴¹ When considering precedent law it is important to remember that it may constitute a protection against tyranny, for it will enable the judge to resist pressure on the part of the executive. Thus Lord Chief Justice Coke appealed to the authority of the common law when he opposed the Stuart autocracy. It is true, therefore, to say that the judge is bound by the law so that he may be free. The independence of the judge from outside control or influence means independence to obey the law. The third type of law consists of those general principles which the judge accepts as a guide when deciding a case of first impression, for his decision must never be an arbitrary one. If there is no statutory or precedent rule of law directly applicable to the facts of the case the judge must create such a rule for himself so that his decision can be founded on law and not on will.

The rules which control the judicial power relate both to substantive and to procedural law. The substantive law is, of course, infinite in nature, while the procedural law is far more limited. It is therefore only to the procedural law that I can refer to here. A failure to reach a proper standard in procedural law is usually described as a failure to do natural justice. The attempt to state a universal minimum standard has, however, been handicapped

40) 321 U.S. 649, 666 (1944).

41) See Goodhart, *Precedent In English And Continental Law* (1934).

by the inevitable tendency, shown by the jurists of each country, to assume that the rules of procedure to which they are accustomed must be regarded as an essential part of natural justice. Thus, it is difficult for a common-law lawyer to believe that a proper trial can be held without oral evidence which is subject to cross-examination, while many lawyers on the Continent have grave doubts concerning the value of this procedure.

There is, however, one principle on which all Western jurists are agreed, *i.e.*, that the judge must be fair and unprejudiced, and must recognize that his primary and inescapable duty is to obey the law. It was for this reason that the famous Act of Settlement in 1701 provided that the tenure of all superior judges should be during good behavior. If, on the other hand, a judge accepts the view that he must disregard the provisions of the law whenever these conflict with the views of public policy as expressed by the executive, then there is an obvious denial of the rule of law.

THE RULE OF LAW IN ACTION

In conclusion I must say a few words concerning the rule of law in action. For here Dean Pound's famous dichotomy between law in the books and law in action is peculiarly apposite. A constitution may embody a lengthy statement containing the most noble sentiments concerning the protection which is to be given to its citizens against tyranny on the part of the officers of the State, but unless life is given to these principles they will be nothing but a dangerous sham. In some modern instances it cannot even be said that these constitutional provisions are an expression of good intention; they have been adopted as a form of window-dressing to hide the fact that the shop behind them is empty.

To bring the rule of law to life three things are necessary. The first is that in general there must be adequate procedure by which the rule can be enforced. This is true especially in those cases where the rule of law controls executive action. It will not help a man who has been unlawfully imprisoned to know that the constitution contains a provision that no one must be deprived of liberty without due process of law; what he requires is some machinery

which will guarantee that his unlawful imprisonment will be brought to an end.

The second essential is that the public officers of the State should recognize that they are bound by the law, because if they fail to do so then the whole system may break down. We all remember President Andrew Jackson's comment on the Supreme Court decision in *Worcester v. Georgia*: "John Marshall has made his decision: now let him enforce it."⁴² This is a particularly striking illustration because the repudiation was made by the Chief Executive of the State, but the same principle is at issue whenever a public officer, however unimportant he may be, repudiates the obligations which he has accepted when assuming his office. It is not unreasonable therefore for us to judge the quality of the rule of law in any State by asking whether the police themselves obey the rule of law.

The third essential, and by far the most important, is that the community as a whole should recognize that the existence of the rule of law depends on the will of each man and woman. Perhaps we can find a simple illustration of this in the jury-box. It is here that the question will be decided whether a police officer who has illegally assaulted a prisoner shall be held responsible for his act. If the jury, speaking for the community, is prepared to excuse such unlawful behavior on the ground that the act was committed for the laudable purpose of obtaining a confession, then the rule of law is brought into jeopardy. It has been said with truth that the doctrine that the end justifies the means is the negation of government under law; it is also a denial of the basic principle on which the American Constitution was based by the Founding Fathers.

Perhaps the Greeks recognized even more clearly than we do today this universal duty which lies on all of us to see that the rule of law is properly enforced. Vinogradoff has emphasized that "the most usual means of keeping the magistrates in order was provided by the right of every citizen to attack and arraign a magistrate

42) 31 U.S. (6 Pet.) 515 (1832)

who had actually broken the law,"⁴³ even though he himself was not directly affected. This was "one of the fundamental principles of the Athenian Constitution [and] ... it is apparent throughout the whole Greek system that its importance was enormous."⁴⁴ The Greeks realized the fundamental truth that it is not enough to protest when our own interests are adversely affected, for we are equally concerned whenever a breach of the rule of law affects our fellow men. In the last analysis, the rule of law, which is one and indivisible, depends on the determination of each individual citizen that it must be obeyed not only to protect himself but also to protect his neighbors. You may remember John Donne's famous words: "Any man's death diminishes me, because I am involved in Mankind; And therefore never send to know for whom the bell tolls; It tolls for thee."⁴⁵ It is perhaps fitting that in this city, Philadelphia, where the strokes of the Liberty Bell were the first to welcome freedom, we should remember that any man's loss of liberty diminishes all of us, because we are involved in mankind. At a time when tyranny and arbitrary government are threatening to spread throughout the world, this is a lesson which we must not forget.

43) 2 Vinogradoff, *Historical Jurisprudence* 114 (1922).

44) *Id.* at 115.

45) He was a reader in divinity to the Benchers of Lincoln's Inn from 1616 to 1622. Fourteen of the sermons he preached at Lincoln's Inn are extant.