



The Rule of Law (+ essay plan)

‘Our parliamentary democracy is based on the rule of law. One of the twin principles upon which the rule of law depends is the supremacy of Parliament in its legislative capacity. The other principle is that the courts are the final arbiters as to the interpretation and application of the law. As both Parliament and the courts derive their authority from the rule of law so both are subject to it and can not act in a manner which involves its repudiation.’ (Lord Woolf, 1995) Explain and discuss. 1. The traditional British Constitution assumed:

Parliament would protect freedom and take into account the rule of law in its legislative capacity. It would be therefore, be self-controlling. The courts through their commitment to the rule of law would assert the importance of freedom against the exercise of executive power and the making of legislation. 2. Parliamentary democracy is based upon the rule of law. [Needs expansion] Parliamentary democracy = the government is voted into power by the people in order to represent the interests of the people. 3. The rule of law can only exist if Parliament recognizes it and adheres to its principles in its legislative capacity. There is a conflict between the two fundamental constitutional principles; the sovereignty of Parliament and the rule of law. If the conflict is not resolved, a constitutional crisis will arise. (Bogdanor) In the UK, Parliament has no legislative superior.

The essence of parliamentary sovereignty has been expressed by Bogdanor as “what the Queen in Parliament enacts is law”. Similarly, Dicey has stated, “it is a fundamental principle... that Parliament can do everything but make a woman a man, and a man a woman.” if Parliament in its legislative capacity can choose to violate the rule of law. The issue is therefore, whether Parliament can legislate in a manner, which infringes the rule of law. NB: This issue only arises if one adopts a ‘thick’ definition of the rule of law (as Bingham does), as parliamentary supremacy is consistent with a ‘thin’ definition of the rule of law. Bingham suggests that there should be a codification of rules, which no government should be free to violate without legal restraint. However, he notes that to substitute the sovereignty of a codified and entrenched Constitution for the sovereignty of Parliament is a major constitutional change, which can only be made by the British public. Moreover, the fact that the principle of the rule of law is unwritten allows judges to rule on what the term means if and when the question arises for decision. This would mean that the definition is not forged in abstract but with reference to particular cases, giving it more precision. Furthermore, the fact that it is unwritten allows the concept to evolve over time in response to new views and situations. It is evident Dicey’s understanding of the rule of



law differs highly from the modern day understanding. 4. The rule of law can only operate if the courts are the final arbiters as to the interpretation and application of the law. [Needs expansion] The rule of law concerns the relationship of the government to the law. 5. As both Parliament and the courts derive their authority from the rule of law so both are subject to it and can not act in a manner, which involves its repudiation. Parliament derives their authority from the rule of law because [...] The courts derive their authority from the rule of law because [...]

Class

Questions

How does Dicey account for the rule of law? Now: compare that account with the reasoning of the courts in Entick v Carrington and IRC v Rossminster against Dicey's understanding. How do they differ?

What is the main issue that the House of Lords was asked to resolve in the Corner House case?

a. What importance is awarded to the rule of law in reasoning of the court? b. Do you agree with the Attorney General that public interest (i.e. 'British lives on British streets') should be an overriding factor in a case such as this?

Rule of Law – Tom Bingham

A. Dicey's Rule of Law

No man can is punishable or can 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. No one is above the law and everyone is subject to the same law administered in the same courts. The rule of law pervades the British constitution, yet it is not a written grand declaration of principle.

B. A modern day understanding of the Rule of Law

The difference between Dicey's understanding of the Rule of Law and a modern day understanding of the Rule of Law is evident through comparing Entick v Carrington and IRC v Rossminster. Entick v Carrington (1765)

Case Facts: The King's messengers had a warrant from the Secretary of State (a) to arrest the plaintiff, Entick, who was alleged to be the authort of seditious writings and (b) to seize his



books and papers. They broke into his house and took away his papers.

Entick sued the officers for trespass to his house and goods. The defendants sought to justify the legality of the warrant, however, they were unable to find a legal authority supporting their claim and therefore, relied upon: (a) the fact that such warrants had been issued frequently in the past and executed without challenge, and (b) the power of seizure was essential to government. Principle: A public officer must show express legal authority for any interference with person or property of the citizen. Rationale:

Lord Camden: “If it is law it will be found in our books. If it is not to be found there, it is not law.” The fact that this form of trespass was a common practice by the officers cannot bury the body of public law that has been enacted by Parliament, noted in the books and settled by the courts. However, in *IRC v Rossminster Ltd* (1980) the principle in *Entick v Carrington* was limited. Case Facts: The Taxes Management Act 1970 authorised officers of the Board of Inland Revenue, acting under a search warrant, to enter premises and seize anything whatsoever reasonably believed to be evidence of an offence involving serious fraud and tax. In *Rossminster*, the warrant failed to specify what particular offence was suspected. Held: there was nothing in the statute that required the particular offence to be stated in the warrant. Issue I: Was there a violation of the principle of *Entick v Carrington* and further, a violation of Dicey’s understanding of the rule of law (i.e. that express legal authority must be shown for interferences with individual rights)? Formally, there has not been a violation of the principle of *Entick v Carrington* as the statute had been complied with. In substance, there has been a violation as the legal power conferred to the officers of the Board of Inland Revenue are very wide/do not have to be particularized before the power is used against the individual. Similarly, the Security Service Act 1996 in effect, created executive discretion to issue warrants, without any judicial safeguard, in relation to the detection or prevention of “serious crimes”. Tantamount to a repeal of *Entick v Carrington* (Duffy and Hunt). Another limitation of Dicey’s Rule of Law is represented by *R (on the application of Corner House Research and Others) v Director of the Serious Fraud Office* (commonly known as the Corner House case). A wide margin of discretion was given to the Director of the Serious Fraud Office, contrary to the first limb of Dicey’s theory i.e. that adherence to the rule of law = persons in authority should not have wide, arbitrary and discretionary powers. Case Facts: The issue was whether, in discontinuing the investigation, the Director of Serious Fraud Office had unlawfully “surrendered to a threat”. The threat in question was relayed to the Director by, in particular, the UK Ambassador to Saudi Arabia and the Prime Minister. The Prime Minister’s view was that, unless the investigation was dropped, there was an immediate risk of a collapse in UK/Saudi



security, intelligence and diplomatic co-operation, which was likely to have serious consequences for national security. Principle: National security always trumps the rule of law. The implications are clear: under UK law, a supposedly independent prosecutor can do nothing to resist a threat made by someone abroad if the UK government asserts that the threat endangers national security. In a case touching foreign relations and national security the duty of decision on the merits is assigned to the elected arm of government. Even when the court ensures that the Government complies with formal requirements and acts rationally, the law accords to the executive an especially wide margin of discretion. Rationale:

The issue was whether or not the Director was lawfully entitled to make the decision, not whether or not his decision was right or not. The powers are conferred to the Director in very broad and un-prescriptive terms therefore; his decision was a lawful one, within the boundaries of his powers. Do you agree?

The judges did not award much importance to the rule of law in their reasoning. The substance of the decision in *Entick v Carrington* is also disregarded. This is significant because it represents a shift in attitude in this area of the rule of law.

C. Defining the Rule of Law – Bingham

1. All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made taking effect (generally) in the future and publicly administered in the courts. The content of the law should be accessible to the general public. Statute Law: Legislative hyperactivity has become a permanent feature of governance, making it more difficult to assimilate and comprehend the law. Common Law:

The principle laid down in the judgment must be clear. Judges may not develop the law to create new offences. EU Law:

It is not always possible from a straightforward reading of a text, to be sure how it is intended to apply in a given case, given that EU law is uniformly applicable in all member states, which have very different institutions and traditions. Decisions made by the European Court of Justice are written in a single judgment, however, accommodating for the diversity of the judiciary's opinions can lead to a blurring of lines and render obscure the issues. 2. Question of legal right and liability should be resolved by application of the law and not the exercise of discretion.



Decisions should be based on state criteria and should be amenable to legal challenge. This does not mean there should be no discretion at all; the baseline is that discretion should not be unconstrained so as to be potentially arbitrary. This applies also to the exercise of judicial discretion.

3. The laws of the land should apply equally to all save to the extent that objective differences justify differentiation. 4. Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers (principle of ultra vires) and not unreasonably. Enforced by judicial review

It is an irrebuttable presumption that decisions should be made in accordance with the law. 5. The law must afford adequate protection of fundamental human rights Dicey gave no such substantive content to his rule of law concept; this is Bingham's 'thick' definition of the rule of law. 6. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve Aim to provide expeditious and affordable resolution of civil disputes. 'UK court is open to all, like the Ritz hotel'.

7. Adjudicative procedures provided by the state should be fair. Independence of judicial decision-makers.

Standards of fairness acceptable in court are an evolving concept. Fairness must be accorded to both sides.

Also protected by the European Convention of Human Rights.

8. The rule of law requires compliance by the state with its obligations in international law as in national law.