

# PART I



# I

## The Importance of the Rule of Law

Credit for coining the expression ‘the rule of law’ is usually given to Professor A. V. Dicey, the Vinerian Professor of English Law at Oxford, who used it in his book *An Introduction to the Study of the Law of the Constitution*, published in 1885. The book made a great impression and ran to several editions before his death and some after. But the point is fairly made that even if he coined the expression he did not invent the idea lying behind it. One author<sup>1</sup> has traced the idea back to Aristotle, who in a modern English translation<sup>2</sup> refers to the rule of law, although the passage more literally translated says: ‘It is better for the law to rule than one of the citizens’, and continues: ‘so even the guardians of the laws are obeying the laws’. Another author<sup>3</sup> points out that in 1866 Mr Justice Blackburn (later appointed as the first Lord of Appeal in Ordinary, or Law Lord) said: ‘It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause . . .’<sup>4</sup>. The same author<sup>5</sup> points out that the expression ‘The Supremacy of the Law’ was used as a paragraph heading in 1867. So Dicey did not apply his paint to a blank canvas. But the enormous influence of his book did mean that the ideas generally associated with the rule of law enjoyed a currency they had never enjoyed before.

Dicey gave three meanings to the rule of law. ‘We mean, in the first place,’ he wrote, ‘that no man is punishable or can lawfully be 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.’<sup>6</sup> Dicey’s thinking was clear. If anyone – you or I – is to be penalized it must not be for breaking some rule dreamt up by an ingenious minister or official in order to convict us. It must be for a proven

breach of the established law of the land. And it must be a breach established before the ordinary courts of the land, not a tribunal of members picked to do the government's bidding, lacking the independence and impartiality which are expected of judges.

Dicey expressed his second meaning in this way: 'We mean in the second place, when we speak of "the rule of law" as a characteristic of our country, not only that with us no man is above the law, but (which 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.'<sup>7</sup> Thus no one is above the law, and all are subject to the same law administered in the same courts. The first is the point made by Dr Thomas Fuller (1654–1734) in 1733: 'Be you never so high, the Law is above you.'<sup>8</sup> So, if you maltreat a penguin in the London Zoo, you do not escape prosecution because you are Archbishop of Canterbury; if you sell honours for a cash reward, it does not help that you are Prime Minister. But the second point is important too. There is no special law or court which deals with archbishops and prime ministers: the same law, administered in the same courts, applies to them as to everyone else.

Dicey put his third point as follows:

There remains yet a third and a different sense in which 'the rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.<sup>9</sup>

Dicey's dismissive reference to foreign constitutions would now find few adherents. But he was a man of his time, and was concerned to celebrate, like Tennyson,

A land of settled government,  
A land of just and old renown,

Where Freedom slowly broadens down  
From precedent to precedent. (‘You ask me, why . . .?’)

Thus he had no belief in grand declarations of principle (and would, I think, have had very mixed views on the Human Rights Act 1998<sup>10</sup>), preferring to rely on the slow, incremental process of common law decision-making, judge by judge, case by case.

Dicey’s ideas continued to influence the thinking of judges for a long time,<sup>11</sup> and perhaps still do, but as time went on they encountered strong academic criticism. His foreign comparisons were shown to be misleading, and he grossly understated the problems which, when he wrote, faced a British citizen seeking redress from the government.<sup>12</sup> As the debate broadened, differing concepts of the rule of law were put forward until a time came when respected commentators were doubtful whether the expression was meaningful at all. Thus Professor Raz has commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system.<sup>13</sup> Professor Finnis has described the rule of law as ‘[t]he name commonly given to the state of affairs in which a legal system is legally in good shape’.<sup>14</sup> Professor Judith Shklar has suggested that the expression may have become meaningless thanks to ideological abuse and general over-use: ‘It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter.’<sup>15</sup> Thomas Carothers, in 2003, observed that ‘There is also uncertainty about what the essence of the rule of law actually is’.<sup>16</sup> Professor Jeremy Waldron, commenting on the decision of the US Supreme Court in *Bush v Gore*<sup>17</sup> – the case which decided who had won the presidential election in 2000, and in which the rule of law had been invoked by both sides – recognized a widespread impression that utterance of those magic words meant little more than ‘Hooray for our side’.<sup>18</sup> Professor Brian Tamanaha has described the rule of law as ‘an exceedingly elusive notion’ giving rise to a ‘rampant divergence of understandings’ and analogous to the notion of the Good in the sense that ‘everyone is for it, but have contrasting convictions about what it is’.<sup>19</sup>

In the light of opinions such as these, it is tempting to throw up one's hands and accept that the rule of law is too uncertain and subjective an expression to be meaningful. But there are three objections to this course. The first is that in cases without number judges have referred to the rule of law when giving their judgments.<sup>20</sup> Thus in one case, concerned with an effective increase made by the Home Secretary in the term to be served by a young convicted murderer, Lord Steyn, sitting in the House of Lords, said: 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.'<sup>21</sup> In a very different kind of case concerned with appeals against decisions made on issues of town and country planning, Lord Hoffmann, also sitting in the House of Lords, said: 'There is however another relevant principle which must exist in a democratic society. That is the rule of law.'<sup>22</sup> Statements of this authority, and many others like them, cannot be dismissed as meaningless verbiage.

The second objection is that references to the rule of law are now embedded in international instruments of high standing. Thus the preamble to the Universal Declaration of Human Rights 1948 – the great post-war statement of principle associated with the name of Mrs Eleanor Roosevelt – described it as 'essential, if man is not to be compelled to have recourse, as a last result, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. The European Convention of Human Rights 1950, of which the UK was the first signatory, referred to the governments of European countries as having 'a common heritage of political traditions, ideals, freedom and the rule of law . . .'. Article 6 of the Consolidated Version of the Treaty on European Union, to which the UK is also a party, provides: 'The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.' Thus there is a strong international consensus that the rule of law is a meaningful concept, and a rather important one at that. The 1996 Constitution of South Africa, declaring in clause 1 the values on which the Republic is founded, lists the 'Supremacy of the Constitution and the rule of law'. Although 'the rule of law' is,

obviously, an English expression, familiar in the UK and in countries such as Ireland, the United States, Canada, Australia and New Zealand, whose law has been influenced by that of Britain, it is also meaningful in countries whose law is influenced by the jurisprudence of Germany, France, Italy, the Netherlands and Spain. In Germany, for instance, reference is made to the *Rechtstaat*, in France to the *État de droit*, which, literally translated, mean ‘the law-governed state’.

The third objection is that reference is now made to the rule of law in a British statute. The Constitutional Reform Act 2005 provides, in section 1, that the Act does not adversely affect ‘(a) the existing constitutional principle of the rule of law; or (b) the Lord Chancellor’s existing constitutional role in relation to that principle’. Under section 17(1) of the Act the Lord Chancellor must, on taking office, swear to respect the rule of law and defend the independence of the judges. So there we have it: the courts cannot reject as meaningless provisions deliberately (and at a late stage of the legislative process) included in an Act of Parliament, even if they were to sympathize with some of the more iconoclastic views quoted above, as few (I think) would.

The practice of those who draft legislation is usually to define exactly what they mean by the terms they use, so as to avoid any possibility of misunderstanding or judicial misinterpretation. Sometimes they carry this to what may seem absurd lengths. My favourite example is found in the Banking Act 1979 Appeals Procedure (England and Wales) Regulations 1979, which provide that: ‘Any reference in these regulations to a regulation is a reference to a regulation contained in these regulations.’ No room for doubt there. So one might have expected the Constitutional Reform Act to contain a definition of so obviously important a concept as the rule of law. But there is none. Did the draftsmen omit a definition because they thought that Dicey’s definition was generally accepted, without cavil, and called for no further elaboration? Almost certainly not: parliamentary draftsmen are very expert and knowledgeable lawyers, whose teachers would have expressed scepticism about some features of Dicey’s analysis. More probably, I think, they recognized the extreme difficulty of devising a pithy definition suitable for inclusion in a statute. Better by far, they might reasonably have thought, to omit a definition and leave it to the judges to rule on what the term means if and when the question arises for decision. In

this way a definition could be forged not in the abstract but with reference to particular cases and it would be possible for the concept to evolve over time in response to new views and situations.

Once the existing constitutional principle of the rule of law had been expressly written into a statute, it was only a matter of time before it was relied on by a litigating party. This duly occurred, perhaps sooner than anyone expected, in a case challenging a decision of the Director of the Serious Fraud Office to stop an investigation into allegedly corrupt payments said to have been made by BAE Systems Ltd. to officials in Saudi Arabia. His decision was held by one court to be contrary to the rule of law, although the House of Lords ruled that it was not, and therefore did not have to rule on what the rule of law meant in that context.<sup>23</sup> But the question is bound to arise again, and the task of devising at least a partial definition cannot be avoided indefinitely. So I think we must take the plunge.

The core of the existing principle is, I suggest, that 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. This statement, as will appear in Chapters 3–10, is not comprehensive, and even the most ardent constitutionalist would not suggest that it could be universally applied without exception or qualification. There are, for example, some proceedings in which justice can only be done if they are not conducted in public, as where a manufacturer sues to prevent a trade competitor unlawfully using a secret and technical manufacturing process. But generally speaking any departure from the rule I have stated calls for close consideration and clear justification. My formulation owes much to Dicey, but I think it also captures the fundamental truth propounded by the great English philosopher John Locke in 1690 that ‘Wherever law ends, tyranny begins’.<sup>24</sup> The same point was made by Tom Paine in 1776 when he said ‘that in America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.’<sup>25</sup>

None of this requires any of us to swoon in adulation of the law, let alone lawyers. Many people on occasion share the view of Mr Bumble in *Oliver Twist* that ‘If the law supposes that . . . the law is a ass – a

idiot.’ Many more share the ambition expressed by one of the rebels in Shakespeare’s *Henry VI, Part II*, ‘The first thing we do, let’s kill all the lawyers.’ Few would choose to set foot in a court at any time in their lives if they could avoid it, perhaps echoing an Italian author’s description of courtrooms as ‘gray hospitals of human corruption’.<sup>26</sup> As for the judges, the public entertain a range of views, not all consistent (one minute they are senile and out of touch, the next the very people to conduct a detailed and searching inquiry; one minute portgorged dinosaurs imposing savage sentences on hapless miscreants, the next wishy-washy liberals unwilling to punish anyone properly for anything), although often unfavourable. But belief in the rule of law does not import unqualified admiration of the law, or the legal profession, or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle I have stated than in one which does not. The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric judges and greedy lawyers.