What's sacred about the Law?

LAND & Liberty INTERROGATION

The Rule of Law

FRED HARRISON

THE ALLIED Powers would claim that the bombing of Yugoslavia reinforced "the rule of law". In the face of corruption on a staggering scale in Russia, Western governments insist that the Yeltsin government must institute "the rule of law", a notion that is deeply embedded in western culture.

The concept is not a simple one. It incorporates spiritual values, as the Canadian Constitution Act of 1981 emphasises: "Canada is founded upon principles that recognise the supremacy of God and the Rule of Law". That is a combination which, for common law countries such as the USA, Canada and Britain, creates tensions in the administration of justice.

The contemporary relevance of the concept was highlighted in 1990, when US President George Bush justified the Gulf War to Congress. One of its objectives was to support the New World Order in which the rule of law supplanted the law of the jungle. The trans-national enforcement of this notion came with his affirmation that nations recognised the shared responsibility for freedom and justice.

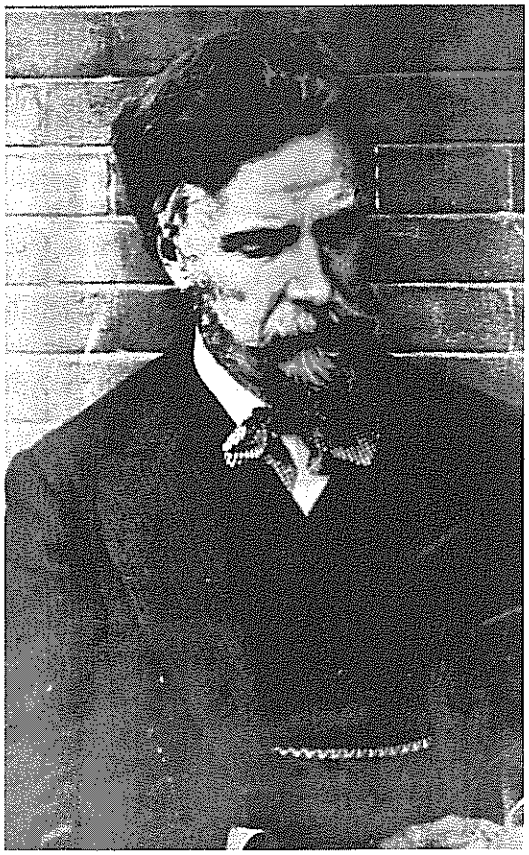
These cases illustrate the reverence in which the concept of the rule of law is held in the New World. Yet they provoke awkward questions. Is there a connection between God and the Rule of Law? Why were the Allies constrained from pushing the Gulf war through to the establishment of the rule of law? Will Yugoslavia end with a similarly inconclusive result? Is there a flaw in the philosophy that underpins the notion, which compromises governments? If so, what might the consequences be for Russia, and for Europe which is now tracking the emergence of a criminal state on its eastern fringe? Is a new approach to conflict resolution required in the 21st century, which entails an expansion of the contemporary definition of the rule of law?

THE RULE of law is a peculiarly English notion. The idea underlying it is that all are equal before the law. The US and Canada inherited this concept, chiefly through the works of Blackstone and Locke.

The concept as a legal principle was articulated by Arthur Dicey (1835-1922), an Oxford professor of law (*see Box 1*). His analysis – emphasising equality of treatment of every person before the law, and no arbitrary exercise of power by the authorities – was closely related to his doctrine of Parliamentary sovereignty. Parliament had the right to make or unmake any law whatever; and no person is recognised as having a right to override or set aside the legislation of Parliament.

The doctrine of the English Parliament as supreme legislator came about in the 16th and early 17th centuries when the common lawyers united with Parliament against the Stuarts to subordinate royal power to the law as declared by Parliament. To achieve this, however, the lawyers had to abandon the claim that Parliament could not legislate in derogation of the principles of the common law. Parliament became the sole legislator and the laws it passed could not be challenged in the courts. In this sense it was above the law. Moreover, from the passing of the Parliament Act of 1911, as regards money Bills "parliament" meant only the House of Commons.

Ironically, Dicey's formulation, and the supremacy of Parliament, came at a time when both doctrines were about to be overtaken by a major change of opinion and of law. Parliament was to delegate legislative power to ministers. And in recent times, Parliamentary control was superseded by European legislation from Brussels.



A.V. Dicey

SERIOUS TENSIONS flowing from the character and administration of the law surfaced in the 20th century.

The specialists in jurisprudence and philosophy had detached their subjects from the doctrine of natural law. Because Parliament was sovereign, there was no independent authority to which a citizen could appeal for the resolution of conflicts. This emerges when examining the views that Dicey was to express in his attempt to influence two crises that ruptured British politics at the end of the 19th century. Before examining these, to test the relevance of "the rule of law" in people's everyday lives, it is first necessary to review the antecedents to this debate.

The 18th century philosophers of the Enlightenment articulated the rules that were appropriate for the modern age. They related those rules to natural law. An important intellectual breakthrough was in the realm of economics. French and Scottish philosophers defined economics to provide governments with practical policies that conformed to universal principles such as justice. They classified the component parts of the economy – land, labour and capital – and they elaborated the two distinct sectors – the private productive sector, and the public social service sector – in terms of property rights.

The two sectors had to be linked to produce an integrated whole, which – if the philosophy was to be holistic – had to be synthesised with the natural environment. The bridge to the three parts – the individual, society and the natural habitat – was public finance. But the way government raised revenue was not to be on the basis of an arbitrary exercise of police power. The intrusion of the public sector into people's private lives had to be determined by principles of justice and efficiency. Philosophers like William Ogilvie and Adam Smith identified the fiscal policy which would serve citizens, society and nature well. They identified the working rules that protected private property, which had to be roped off from the rights and obligations of the supporting public sector. The Enlightenment philosophers bequeathed what amounted to a Manifesto for Modern Man.

HOW did Dicey's reading of the "rule of law" measure up to this manifesto? He brought to his analysis the skills of

stressed equality of treatment and the absence of arbitrariness as components of the rule of law. How did he translate this knowledge into advice on the burning issues of the day?

In Ireland, the law fostered discrimination in the distribution of land. Land was owned by Protestants and worked by Catholics: 20% of the population owned 80% of the land.

In the 1880s the peasants revolted with rent strikes and the withdrawal of their labour. They tried to force a change in the law. They argued that, when their leases were terminated by landlords they should receive compensation for the capital which they had invested on the land. Leases did not provide for compensation. Capital which they laboured to create was treated as the property of landowners. According to their sense of natural justice, they ought to be compensated. Not in the view of Prof. Dicey. He regarded the rent strikes as a threat to the British state. He wrote:

> The movement rested on an agrarian agitation against payment of rents, for the purpose of impoverishing and expelling from the country the Irish landlords....the object of the principal founders of the Land League was to bring about the absolute independence of Ireland as a separate Nation.

Independence was anathema to Dicey, action in favour of which was offensive to his "rule of law". And contracts were sacred; they had to be championed by the law, even if they offended people's sense of justice.

In England and Scotland, a campaign was mounted from the late 1880s for justice based on a new approach to sharing not the land itself, but the rent of land. This culminated in the 1909 constitutional crisis, and the People's Budget of 1910. There was an overwhelming democratic mandate for changes to the tax system based on a new philosophy. In terms of fair play, the majority of citizens recognised that fiscal reform was consistent with natural justice. Dicey branded it as a species of collectivist action. He wrote of the People's Budget:

> "It imposes specially heavy taxes upon the rich, and upon landowners. It is also an Act passed not for the mere purpose of raising needful revenue, but with the aim of promoting social or political objects. Undeveloped land duty, for example, is imposed, partly at any rate, for the purpose of compelling or inducing a landowner to erect dwelling-houses or buildings which may be useful as habitations or places of business, though he might himself prefer to leave his land open as a field or garden. ...This feature in the Act....sets a precedent for the use of taxation for the promotion of political or social ends. Such taxation may easily become the instrument of tyranny. Thus revolutionists bent on the nationalisation of land might, by heavy taxation, beat down its value in the hands of a private owner till he is willing to sell it far below its real worth. Revolution is not the more entitled to respect because it is carried through not by violence, but under the specious though delusive appearance of taxation imposed to meet the financial needs of the State".

In *An Introduction to the Law of the Constitution* (1885), A.V. Dicey offered what proved to be an influential definition of "the rule of law":

> **When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.**
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> **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. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.**
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> **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.**
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> **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.**

Thus, Dicey defied what another constitutional historian, Blackstone, regarded as the third feature of the doctrine of law: "render a person [his] due" (the other two principles were "live honestly" and "hurt nobody").

Because of his ideology, Dicey could not see that rent is not a price paid to a person for something that is due to him. The claimant of land-rent gives nothing – he adds not one iota to the total common wealth – yet the laws of the land allowed him to claim a portion of total wealth as his own. By doing so, the landowner steals that which is not legitimately his – according to natural law. And yet, to Dicey, this was a respectable preoccupation: consistent with the law which he championed.

Not surprisingly, therefore, he condemned the social legislation at the beginning of the 20th century – such as old age pensions and unemployment benefit – as forms of collectivism.

WITH SUCH a pedigree behind the modern concept of the rule of law, then, we are driven to ask a question which Dicey would presumably regard as seditious: Whose law is it?

How can the right-minded individual's instinct for justice be reconciled with the religious concept of natural justice, or natural law, or a law above the law, or the view that the whole universe is governed by law (*see Box 2*)?

Spiritual leaders like Thomas Aquinas had said that there is an eternal law to which all things are subject. But he added that natural law is not something different from the eternal law, but is a participation in that eternal law. By the light of natural reason we discern what is good and what is evil. Thus each one of us is able, to the extent that we receive that imprint, to participate in Divine Law, and be "right-minded members of the community". To most ordinary people this imprint will appear simply as Common Sense.

Injustices remain in the world, notably in the distribution of income and the way in which we savage nature in the course of everyday life. How can the laws of mankind be corrected to comply with eternal norms of justice? When Mr Bumble sees the law to be unjust – "an ass" – how can it be rectified? History answers by pointing to the abolition of slavery, of the corn laws, of press censorship, of hanging, whipping, etc. It was a change in public opinion which brought about the legislation required to abolish these evils. It entailed a considerable swing of opinion, initiated by a few – a Wilberforce, or a Cobden – but gathering momentum as the full horror, or absurdity, of the situation came to be understood. What is vital, therefore, is popular education to override ignorance.

An example is the distribution of income. A perceptive account of how the laws of economics conform to natural justice was provided by American social reformer Henry George, who exposed the way in which man-made laws deviated from what he called the universal law. He contributed to the mass education of the public through his major work, *Progress and Poverty* (1879), in which he wrote:

> "The tax upon land values....falls only upon those who receive from society a

THE rule of law has human and supernatural sources. There are traces of it in early Eastern societies. Ancient Greek philosophers distinguished between government under law, and tyranny in which the government makes what laws it pleases. This notion guided European thought until the end of the 18th century.

In the 3rd Century BC, Platonic philosophy met Judaic Old Testament learning in Alexandria when scholars translated the Jewish scriptures into the Greek version (the Septuagint). The union of the two traditions worked well. Roman writers such as Cicero imitated the Greeks.

Christianity absorbed much of the Greek and Roman learning. As the Western Roman Empire declined, the Church became the depository of all the ancient learning of the West. Here was the ideal opportunity for a rule of law deriving from a supernatural source, to be linked with man-made law through the conjunction of the *Torah*, Neo-Platonism. and the teaching of Christ. But the Church, having become the official religion, failed to conform to the teaching of the scriptures. Historian A.H.M. Jones records:

> There was waste and corruption. The Church imposed a number of idle mouths on the resources of the empire. By the sixth century the bishops and clergy had become far more numerous than the civil service of the empire. A large number of hermits and monks lived on the alms of the peasantry. These unproductive classes lived better (mostly) than the peasantry, and all drew the bulk of their income from the land by way of rent, taxes and first fruits. The burden was too much. The peasants had too little left to rear children. The number of producers gradually shrank.*

Asceticism and poverty were coming to be regarded as a religious virtue, with many – the desert fathers – retiring into solitude in Egypt. Meanwhile:

> The peasantry had not enough left to rear sufficient children to counterbalance the high death rate. The sale of new born infants was common. There were laws in Constantine's time 'to withhold parents' hands from murder'. In times of famine the peasantry flocked to the towns for bread. The condition of the urban poor was no better. They too were driven to sell their children. They had to be supplied with cheap bread by the city authorities. There was not enough employment even for a shrinking number of workers.

In a situation not unlike that of today,

> The codes are full of laws to combat the veniality of provincial governors and officials and to curb the inordinate growth of bureaucracy. The emperors and their officials were so snowed under with papers that they signed without reading them, and the clerks of the central ministries could thus put through for those prepared to pay for them illegal grants of land, privileges, titles and immunities.

What then of the metaphysical inspiration to support the rule of law on the lines of Moses, Plato and Christ? Where could one find any law deriving from a universal natural law that reflected the cosmic order? By the 18th century Gibbon was able to argue that Christianity had sapped the morale of the empire and deadened its intellectual life.

IN SETTLED tribes it was an essential requirement that the family units should have homes and a means of livelihood. To this end a proper distribution of land was essential. Otherwise, those left out must either perish, or be an incubus on the rest of society, supported by charity, or by the state.

Earlier forms of society were not troubled with this problem, because all families were provided with land. This was the law (*Torah*) of the Old Testament. The injunctions of God to Moses, and later to Joshua, were that the promised land had to be divided amongst the families by lot. After every seven Sabbaths of years the land had to be redistributed in the jubilee year, in order to set right the inequalities which had crept in during that time. Christ affirmed that he had come to fulfil the *Torah*, and in the beatitudes spelt out the dependence on the earth of the poor and oppressed.

Sir Henry Maine, writing in *Ancient Law* (1861), refers to Russian villages (*mirs*), which were naturally organised communities where private rights were only theoretically complete:

> After the expiration of a given...period, separate ownerships are extinguished, the land of the village is thrown into a mass, and then it is redistributed among the families composing the community, according to their number.

Maine also referred to "Servia, in Croatia, and the Austrian Sclavonia, [where] the villages are also brotherhoods of persons who are at once co-owners and kinsmen".

The Church in the early middle ages could hardly be expected to take the Torah, the teaching of Christ, or the co-ownership of land seriously. At that time literate people were to be found only in the Church, and kings recruited them to serve in public administration. Consequently, churchmen were responsible for the finances of nations; they acted as ministers; they were civil servants, lawyers, professors, writers, and schoolmasters. Accordingly much of the Church consisted of worldly men, often wealthy, some of whom owned immense estates. The record of many of the popes and bishops was at times sordid. Many were corrupt. The one institution which might have provided the metaphysical background to the law from the study of scripture, was found wanting. So far as equal sharing of the access to the earth's resources is concerned, it is still wanting, except for a dim realization of the necessity for all to have land in the "liberation theology" in South America, of which Rome has expressed disapproval.

*A.H.M. Jones (1973), *The Later Roman Empire 284-602. Vol. II The Decline of the Empire*, London: Basil Blackwell.

peculiar and valuable benefit, and upon them in proportion to the benefit they receive. It is the taking by the community, for the use of the community of that value which is the creation of the community...When all rent is taken by taxation for the needs of the community...no citizen will have an advantage over any other citizen save as is given by his industry, skill, and intelligence; and each will obtain what he fairly earns. Then, but not till then, will labour get its full reward, and capital its full return.... "It is not enough that men should vote; it is not enough that they should be theoretically equal before the law. They must have liberty to avail themselves of the opportunities and means of life; they must stand on equal terms with reference to the bounty of nature...This is the universal law."

Such a philosophy originally informed at least one modern constitution, that of the USA. The Articles of Confederation (1777), Article VIII, stated that "a common treasury...shall be supplied by the several states, in proportion to the value of all land within each state..."

Unfortunately, the USA – in common with other countries that honour the rule of law – has succeeded in deviating from the rules that would deliver justice. It seems, therefore, that countries which are reconstituting themselves for a new future in the new millennium need to view with suspicion the advice that they ought to adopt the West's version of the rule of law.

Sources

A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), and *Law & Public Opinion in England* (1917), London: Macmillan.