RULE OF LAW[*]

Constitution of India: *Article 14. "Equality before law*. – The State shall not deny to any person equality before law or equal protection of laws within the territory of India."

Dicey's *Rule of Law*[**]

Dicey said:

> "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (*droit administratif*) or the 'administrative tribunals' (*tribunaux administratifs*) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the Government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs."

According to Dicey, the Rule of Law, as he formulated it, was a principle of the English Constitution. The preface to the first edition says that the book "deals with only two or three guiding principles which pervade the modern Constitution of England," and the book shows that the Rule of Law is one such principle. This is important, for the modern version of that rule does not assert that it is a principle of the English Constitution, but that the rule is an ideal by reference to which that Constitution must be judged.

Dicey's "Rule of Law" has been criticised by eminent writers. I will, however, make certain observations about Dicey's "Rule of Law" which would be generally accepted today.

(a) Dicey wrote in the hey-day of *laissez-faire* and he dealt with the *rights of individuals* not with the *powers of the administration.*

(b) It is tempting to say that the welfare state has changed public law, and consequently delegated legislation and the exercise of judicial functions by administrative bodies have increased. But the true view is that Dicey's Rule of Law, *which was founded on the*

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[*] H.M. Seervai, "The Supreme Court of India and the Shadow of Dicey" in *The Position of the Judiciary under the Constitution of India*, pp. 83-96 (1970).

[**] A.V. Dicey, *Law of the Constitution* (1885).

separation of powers, fixed public attention on administrative law and delegated legislation. Dicey dealt with individual liberty and criticised administrative discretion. But he did not deal with the administration as such, and he failed to distinguish between discretion given to public officials by statute and the arbitrary discretion at one time claimed by the King.

(c) Administrative law existed in England when Dicey's book was published in 1885. the "prophetic vision" of Maitland saw in 1887 that even as a matter of strict law it was not true the executive power was vested in the King. England, he said, was ruled by means of statutory powers which could not be described as the powers of the King. All that we could say was that the King had powers, this Minister had powers and that Minister had powers. In oft quoted words, Maitland said that England was becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which had been committed to them by modern statutes. And Prof. Wade has come to the same conclusion in his appendix to the ninth edition of Dicey's *Law of the Constitution*.

(d) In his *Law of the Constitution*, Dicey did not refer to the prerogative writs of *mandamus*, prohibition and *certiorari* by which superior courts exercised control over administrative action and adjudication. These writs belong to public law and have nothing to do with private law, and had he noticed those writs he could not have denied the existence of administrative law in England.

(e) Dicey's picture of the Englishmen protected by the Rule of Law, and the Frenchmen deprived of that protection because public authorities in France enjoyed privileges and immunities is now recognised as a distorted picture. This recognition is not confined to academic lawyers. An eminent judge, Lord Denning, has said that far from granting privileges and immunities to public authorities, the French Administrative Courts exercise a supervision and control over public authorities which is more complete than which the Courts exercise in England. And that is also the view of leading writers on Constitutional and Administrative Law today. Dicey himself showed "a change of heart" in his long Introduction to the eighth edition of the *Law of the Constitution*. There, he doubted whether law courts were in all cases best suited to adjudicate upon the mistakes or the offences of civil servants, and he said that it was for consideration whether a body of men who combined legal knowledge with official experience, and who were independent of government, would not enforce official law more effectively than the High Court. It is a measure of Dicey's intellectual integrity that he abandoned the doctrine of a lifetime and recognized official law, and a special tribunal substantially on the lines of the *Couseil d'Etat*, as better suited to enforce that law than the High Court. It is unfortunate that Dicey did not re-write the book in the eighth edition, but contended himself with a long Introduction which marked a real change in his thinking. The text remained unchanged, and the Introduction was forgotten or ignored, so that an intemperate judge like Lord Hewart L.C.J. could speak of "the abominable doctrine that, because things are done by officials, therefore some immunity must be extended to them." Coming from a Lord Chief Justice, these words seen ironic, for, on grounds of public policy, the most malicious words of judges of superior courts in the discharge of their judicial duties enjoy absolute immunity. But Lord Hewart would have been shocked had anyone spoken of

"the abominable doctrine that because things are done by judges in their judicial capacity, therefore, some immunity must be extended to their most malicious words."

(f) When Dicey maintained that the Rule of Law required "the equal subjection of all classes to the ordinary law of the land administered by ordinary courts" and that the Rule of Law was inconsistent with administrative law and administrative tribunals, he created a false opposition between ordinary and special law, and between ordinary courts and special tribunals. The two kinds of laws existed even in his day, and ordinary courts, as well as special tribunals, determined the rights of parties. His antithesis was false in fact and untenable in principle. A law administered by the courts and by special tribunals is equally the law of the land; the determinations of courts and of special tribunals are determinations *under* the law. As we have seen, Dicey himself came to recognise that it may be necessary to create a body of persons for adjudicating upon the offences or the errors of civil servants as such adjudication may be more effective in enforcing official law. This effectively destroyed the opposition between ordinary law administered by ordinary courts and special law administered by special tribunals. As Devlin J., speaking of England, put it, it does not matter where the law comes from: whether from equity, or common law or from some source as yet untapped. And it is equally immaterial whether the law is made by Parliament, or by judges or even by ministers, for what matters is "the Law of England."

That courts alone are not the best agencies for resolving disputes is shown by the history of the Commercial Court in England. When it was established, it first proved popular and succeeded in arresting the trend in favour of arbitration. After the First World War two judges were sitting full time on the Commercial List. In 1957, out of twenty-six cases only sixteen were actually tried, the rest being stayed, withdrawn or settled, and the question arose whether there was any point in retaining the Commercial Court. In 1960 the Lord Chancellor took an unusual step – he called a Commercial Court Users' Conference. The Conference presented a Report which is important because it shows why people preferred arbitration to adjudication by the Commercial Court. Mr. Justice Megaw, who was appointed to the Commercial Court, gave a practice direction which went back to an earlier and simpler procedure. The calling of the Commercial Users' Conference, and the emphasis in the practice direction on the *service* which the court rendered, is a timely reminder that judicial power is not property which *belongs* to the law courts and which therefore can be "usurped" by others, but that judicial power exists to render a service, and if the service is not good enough it will be ignored.

Prof. Robson has given an even more striking example. Before the Committee on Ministers' Powers evidence was given by the National Federation of Property Owners and Ratepayers representing the owners of more than £1,000 million capital invested in industrial, trading and residential property throughout the United Kingdom. The Federation demanded that the appellate jurisdiction of ministers and their departments should cease. But the Federation did not demand the transfer of such jurisdiction to ordinary courts of law but to a special tribunal consisting of a full-time salaried legal member appointed by the Lord Chancellor, and two part-time honorary members who could bring administrative experience to bear on administrative matters. The Federation also suggested that the special tribunal should also take over the jurisdiction of the country court judges and the courts of summary