

## W201 The Individual and the State

### Study notes on the Rule of Law

#### What does it mean?

The expression the 'Rule of Law' means lots of things. This causes everybody confusion.

#### The popular meaning

Before sentencing a villain a judge will sometimes say "you have flouted the rule of law and I therefore sentence you..." A lay person would recognise this use as meaning 'the laws of the land' or even 'law and order'.

#### In constitutional law

The expression 'rule of law' still means different things in this narrower legal context.

Dicey (the late 19th century legal writer) said there were three leading characteristics of the English Constitution

- the sovereignty of Parliament
- the rule of law
- the conventions of the constitution.

Dicey then went on to say that the 'rule of law' covered three different conceptions

(i) the predominance of regular law over arbitrary power

This is based on the idea that we should be free from the fear of the 'knock on the door in the night' under a dictatorship.. An example is **Entick v Carrington** 1765 when the Lord Chief Justice ruled against arbitrary executive action which had no statutory or common law basis.

(ii) no man is above the law (or equality before the law)

This is the principle Chief Justice Coke was laying down in the **Case of Proclamations** 1611 (James 1 (newly arrived from Scotland) was attempting to rule by issuing proclamations. This power was challenged in the courts. The Chief Justice ruled that royal proclamations could not change the law or create any offence and that the king had no prerogative except that which the law allowed him.)

(iii) the existence of civil rights protected by the common law

In the late 19th century this would have included the right of public meeting recognised in **Beatty v Gilbanks** 1882 and the right to personal liberty protected by Habeas Corpus.

Subsequent legal writers have all redefined what they think the 'rule of law' means (and have all come up with something different).

## Modern examples

To guarantee the values considered important in a modern democracy (such as human rights and control of state powers through judicial review) writers and judges have argued that the concept of the rule of law has to be extended beyond Dicey's definition.

**The modern version of the rule of law therefore includes not just Dicey's basic concept but the additional ideas that the content of the law is important and that for the rule of law to exist the law must protect basic human rights and provide a check on the exercise of state power (which is the role of judicial review in the UK).**

Lord Woolf discusses the rule of law in an essay in Allen & Thompson at pages 48 and 49. He says that the rule of law depends on twin principles. First the legislative supremacy of parliament and secondly that the courts are the final arbiters as to the interpretation and the application of the law. He says that parliament could not abolish the courts' power of judicial review for example as this would undermine the rule of law on which our unwritten constitution depends. This is an example of a writer defining the concept in the modern way to include a check on the exercise of state power.

The importance of judicial review as an aspect of the rule of law was stressed by Laws LJ in **R (Xc) v Secretary of State for the Home Department** 2009 Div Ct (Government claimed judicial review was not available in terror suspect cases before the Special Immigration Appeals Commission). In ruling that judicial review was available Laws LJ said "judicial review is a principal engine of the rule of law."

The overriding importance of the rule of law has been recognised judicially by Lord Hope in **R (Jackson) v A G** 2005 Lords who stated (obiter):

"It is no longer right to say that (parliament's) freedom to legislate admits of no qualification whatever...The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."

An important UK statute the Constitutional Reform Act 2005 now recognises and refers to "the rule of law".

It is worth noting that the present trend is for parliamentary sovereignty to be qualified as a constitutional principle and the rule of law (however imprecise it may be) to be promoted to a new prominence. In the last resort this tends to favour the importance of the judges in grave constitutional matters since they decide what the rule of law means!

The concept is also acknowledged in other countries. So for example the principles on which the EU is based include "the rule of law".

"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"

Article 6 Treaty of Amsterdam 1997.

## **Points to note**

The 'rule of law' is not as precise a legal doctrine as parliamentary sovereignty.

Historically it owes its prominence in constitutional law to Dicey's writings. Today it includes the idea of protecting human rights and the control of state powers judicially (judicial review).

It includes several different ideas which are important in their own right whether or not they are called the 'rule of law'.

Examiners may ask you about the 'rule of law' or refer to it in passing in their questions. You must be ready to explain the different meanings it carries and be ready to spot **which** of the meanings is important in the exam question. Be ready to trace the development of the concept up to its present position as the 'ultimate controlling factor' of our constitution (Lord Hope).