



Key Ideas in Law

•
THE RULE OF LAW
AND
THE SEPARATION
OF POWERS
•

Jack Beatson

CONTENTS

1. Overview	1
2. Formal and Substantive Conceptions of the Rule of Law	17
3. Dicey's Rule of Law and the Twentieth-Century Critiques	23
4. Accessibility of Law	29
5. Avoiding Arbitrariness	53
6. Access to Justice	73
7. An Independent and Impartial Judiciary	97
8. The Separation of Powers and the Balance of Responsibilities.....	115
9. Enabling Majorities and Protecting Minorities in Our Democracy.....	133
<i>Acknowledgements</i>	158
<i>Abbreviations</i>	159
<i>Bibliography</i>	161
<i>Table of Cases</i>	171
<i>Table of Statutes</i>	181

essentially 'a hybrid of administrative policy and legal rules' can be seen as an example of statutory guidance because the Immigration Act 1971 does not explicitly empower the Home Secretary to make rules, it provides the statutory machinery for the Home Secretary's powers.

A clearer example of statutory guidance is that given by the Secretary of State for Health and Social Care to local authorities about what they should go about performing their care and support responsibilities under the Care Act 2014 and the regulations made under it. The Care Act requires local authorities 'to act under the general authority of the Secretary of State'. The courts have interpreted such guidance to mean that local and other public authorities should give effect to such guidance, and should depart from it only where there are good reasons for doing so but 'without freedom to take a substantially different course': see *R v Islington LBC, ex p. Rixon* (1997–98) 10 CCLR 123. In *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, Lord Bingham said that 'there is a categorical difference between guidance and instruction'.

International law derives from two sources: treaties and custom established by the general practice of states, and custom established by the general practice of states, and acceptance that such practice reflects or amounts to law. A common example into by the UK is an executive act which binds it under international law but 'is not part of English law unless and until it has been incorporated into the law by legislation': *Rayner JH (Mincing Lane)* [1990] 2 AC 418, 500. But the common law is also influenced by international law. Customary international law is a source of UK domestic law on which judges can and should rely, unless barred by statute or domestic constitutional principle: *R (Al-Jedidi) v Secretary of State for the Home Department* [2015] UKSC 69 at [10]; *R (Freedom and Justice Party) v Secretary of State for the Home Department* [2016] EWHC 2010 (Admin) at [166]. Also, a presumption that Parliament does not intend to act in breach of international law is used to resolve an ambiguity in a statute, as an aid to the development of the common law, and as a guide to public policy: for details see Crawford 2019, §§ 59–67 and 71. Moreover, even though government is not bound to comply with international law as part of their domestic law, they are duty bound to comply with international law as part of their duty under the Ministerial Code to 'comply with the law': *R (for Human Rights) v Prime Minister* [2018] EWCACiv 1855.

2

Formal and Substantive Conceptions of the Rule of Law

There are essentially two conceptions of the rule of law. One, a formal concept, is that the rule of law is concerned with how the law is made and applied and not with its content: Raz 1977. The other is that it is also about the substantive content of the law which must conform to certain fundamental values or substantive ideals: Dworkin, 11–12.

Adherents of both conceptions have a spectrum of approaches, so the distinction between the two conceptions is in practice not binary. Both attach importance to the values of reasonable accessibility and clarity, relative stability, impartiality and prospective rather than retrospective application of law. Ideally these values require a framework of general rules to be laid down in advance. A simple example is that individuals should know what the speed limit is on any road. The value of impartiality and the separation of powers mean that whether an individual has exceeded the speed limit and broken the law should be determined by an independent judge.

The key aspect of the formal conception of the rule of law is that its adherents consider that those values suffice. For them, a legal system in an undemocratic state or in a democratic state which for example permits inequalities based on race, gender or religion, and is to that extent unjust, could nevertheless in principle conform to the rule of law if its rules and principles are clear, prospective and publicly accessible: see for example Raz 1977, 211 and 221. A purely formal conception of the rule of law does not require a Bill of Rights because it only aims to eliminate the kinds of arbitrary governmental power which can unfairly upset citizens' expectations about their legal obligations and rights: Goldsworthy, 33–64. Even tyrannical laws, and the abhorrent apartheid laws in South Africa before 1994 where peoples' rights depended on their race, might satisfy the formal concept. This is not because its adherents are indifferent

to the content of the law. It is because they consider that the only one of the virtues to which the law should conform. For principles, such as fairness and equality, are independent ideas needed for the law to be good or just, and the rule of law is used to explain those principles.

It is important to bear in mind that there are different degrees of the values of accessibility, clarity and prospectivity are accessible, although the extent to which discretion in a particular case is either desirable or cannot be avoided is controversial, many of the formal concept now accept that certainty and clarity can be qualified. It is recognised that those exercising government in a modern state need some discretion in order to avoid the vices of 'legalism'. Moreover, where law is dealing with complex medical or scientific issues, there is a limit to the ability of it, whether legislators or judges, to produce language that is understood by laypeople.

The substantive conception of the rule of law regards law as simply what is enacted by the legislature or other state authority with requisite authority, according to the designated procedure and consistently observed by state officials and others implementing it. It is concerned with the content of the law and its values and ideals. In the words of Sir John Laws 2021 at 19 that the law 'be concerned with certain norms, standards or principles' to protect the individual's autonomy and to constrain 'the power of government in a democratic government'. One simple example of such substantive values is the presumption of innocence which protects a person with a crime and requires the prosecution to prove beyond reasonable doubt that that person is guilty. Referred to as 'the golden thread through the common law, the approach of the courts to statutory provisions qualifying or restricting it is discussed below at 85. The other value, that of respect for private property rights which is the right to own and not to be arbitrarily deprived of property with legal authority and without compensation, is discussed at 46.

A more complex illustration of this substantive conception of the rule of law is the United Nations' formulation of the rule of law on its website as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are equally promulgated, equally enforced and independently adjudicated, and

consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

Those who favour a conception with a substantive dimension recognise that complying with the values reflected in the formal conception gives some protection because 'even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances and inhumanities into law': Fuller, 637. But, while they see that protection as necessary, they regard it as partial and contingent.

[A] tyranny devoted to pernicious ends has no self-sufficient reason to submit itself to the discipline of operating consistently through the demanding processes of law, granted that the rational point of such self-discipline is the very value of reciprocity, fairness, and respect for persons which the tyrant ex hypothesis, holds in contempt: Finnis, 373.

Some adherents of the formal conception, including Joseph Raz, consider that those who favour a conception with a substantive dimension are using the term 'rule of law' to express several distinct and diverse principles such as democracy and fundamental human rights as well as the principles and values in the first conception. They consider that the result is to risk mistakenly ascribing a single rationale or similar importance to those principles and the principles embodied in the formal conception of the rule of law: Raz 1977, 196. Taken to extremes, the result would be one of two undesirable consequences. The first is that the rule of law would involve the identification of a complete social or political philosophy leaving no independent function for the conception of the rule of law. The second is that it would become one of those self-congratulatory and conclusory rhetorical devices or idioms, like motherhood and apple-pie, a synonym for what is 'good', the meaning of which is shot through with uncertainty: Shklar, 1.

The uncertainty is reflected in the fact that there are legitimate differences of view as to what values or ideals are fundamental and should be required, and those differences are carried into this conception of the rule of law. Uncertainty also arises because, even where it is recognised that a right, for example the right to a fair trial, is fundamental and absolute, it is accepted that different states may give effect to it in different ways: Lord Bingham in *Brown v Stott* [2003] 1 AC 681, at 702.

As to what rights are fundamental, some stress the property rights and the market; others point to inalienable rights such as the right not to be subjected to torture, to freedom of religion, liberty and equality of treatment, to freedom of religion, liberty and equality of public interest and community rights. Carrying these different conceptions of the rule of law means that its formulation is controversial or so general and vacuous as to be a vague aspiration.

A general principle of respect for private property, more, might be seen as a worthy aspiration. But deciding what qualify as property rights, for instance whether interests under contracts, and entitlements to work in a profession, is likely to be controversial and to depend on the social position. So is formulating the extent to which of these rights as property rights are fundamental and must be secured under which individual rights may be interfered with in the public interest, for example, in order to build a hospital, a road, or to deal with a pandemic, and the question of compensation for interference are also likely to be controversial. Interfering with individual rights and values in the interest of those of the community is typically a decision for the democratically accountable institutions of the state: see 66–67 and 126–29.

Some of those who favour a conception of the rule of law with a substantive dimension consider that the formal conception is deployed to legitimise substantive inequalities. Linsenmeyer (1988) Others consider that adherents of the formal conception give too much weight to the fact that their focus on clarity, prospectivity and stability is not enough. They reject making a hard distinction between formal and the substantive foundations such as moral principles. The formal is itself based on substantive foundations. They argue that the formal conception can achieve 'precision and coherence' but is necessary and cannot exclude substantive factors. They argue that the advantage of 'definitional certainty' but claim the practical advantage of 'definitional certainty' which is not suitable for legal decision-making: Allan 1993, 20–21, 26–28. Allan regards the rule of law as primarily an ideal of procedural fairness but one with important implications for the permissible content of law: Allan 2001, 1 and Allan 2013, 100.

Lord Bingham recognised the logical force of the distinction between the content of the law and the way it is enacted. But he considered that

a state which savagely represses or persecutes sections of its people cannot ... be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed: Bingham 2011, 67.

How then to escape from a conception of the rule of law which requires the identification of a complete social or political philosophy? One might look, for example, to international instruments such as the Universal Declaration of Human Rights and the ECHR which protect the equality and dignity of individuals and have already started to shape the development of the international rule of law: Crawford 2014, §§488–89.

For Sir John Laws 2021, 17–19 and 23, the formal conception, which he calls 'the thin theory' is 'more than it seems' because the independent and impartial mechanism for law enforcement applies objective standards lying beyond the unqualified interests of the legislator and which import constitutional norms reflecting the values of the system. He points to the statement of Dicey set out at the end of the next chapter. The constitutional norms and values relied on by our system are discussed in chapters four to nine.

Dicey's Rule of Law and the Twentieth-Century Critiques

The major influences on the understanding of the rule of law in the UK are the accounts in Dicey's *An Introduction to the Law of the Constitution* in 1885, and the twentieth-century critiques of him, most recently that in 2011 by Lord Bingham. Dicey attempted to reconcile the principles of the rule of law and the fact that Parliament is sovereign, and can make and unmake any law whatsoever, by stressing the independent position the courts enjoy under the constitution: Dicey 1885, 413–14 set out below at 28. But his analysis did not reflect the reality of our constitution at the end of the nineteenth century and, as the twentieth century progressed, it became even less valid.

Dicey did not find reconciliation between the principles of the rule of law and parliamentary sovereignty in the operation of constitutional conventions. He stated that conventions are not rules of law which will be enforced in the courts. They are generally rules for determining the exercise of the prerogative by the executive to ensure that Parliament gives effect to the will of what he regarded as the true political sovereign, the majority of the electors: Dicey 1885, 24, 429, 439–40. By 1914 he had revised his position to the extent of recognising that although not rules of law, conventions are obeyed 'by the force of law' because breaches of convention would almost immediately lead to conflict with the law and the courts: Dicey 1885, 445–46. The flaw, as ECS Wade observed in his introduction to the tenth edition, is that it is possible to enact a convention in statutory form and yet exclude it from enforcement in the court: Dicey 1885, xxix. *Miller 1* discussed at 12 and 124–5 is a striking modern illustration of the fact that a convention is not justiciable and enforceable in the courts even if, as the Sewel convention in that case was, it is enshrined in statute.

Many consider that the twentieth-century critiques mean that Dicey's approach no longer warrants detailed analysis: see for example De Smith,

at 30. But the way it, and the responses to it, have shaped our understanding of the rule of law means that a brief summary of both is a useful backdrop to the discussion in the other chapters of this book. Dicey recognised that the terms 'rule of law', 'government', and 'supremacy of law' are full of vagueness and ambiguity. He dealt with this by stating that, when applied to the British constitution, these terms have three meanings. They are:

1. Supremacy of Regular Law Established in Ordinary Courts as Opposed to Arbitrary Discretionary Power

No man is punishable or can lawfully be made to suffer in his person or property except for a distinct breach of law established in the ordinary courts before the ordinary courts of the land. (188)

Dicey later summarised this first meaning in the following way:

[The rule of law] means ... 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 powers on the part of the government. (202)

2. Equal Subjection of All to the Ordinary Law of the Land, the Jurisdiction of the Ordinary Courts, and No Exceptional Powers for Officials

Dicey stated that:

[n]o man is above the law, [and] (what is a different thing) whatever be his rank or condition, is subject to the ordinary law, and amenable to the jurisdiction of the ordinary tribunals. (188)

His later summary of this was that the rule of law means:

equality before the law, or the equal subjection of all classes to the law of the land administered by the ordinary law courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals. (202-03)

3. The General Principles of the Constitution are the Result of Judicial Decisions Determining the Rights of Private Persons in Particular Cases Brought Before the Courts and Not a Written Constitution

[T]he constitution is pervaded by the rule of law on the general principles of the constitution (as for example the right to

liberty, or the right of public meeting) are with us as 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. (195-96)

The main elements of the twentieth-century critique of each of these three meanings of the rule of law in the British constitution, from those by Sir Ivor Jennings 1933 and William Robson 1928 to the more recent ones such as those by Craig 1990, Loughlin 1992, Bingham 2011, and Sedley 2015, chapter 14, can be summarised as follows:

- The first meaning reflects Dicey's failure to recognise the existence of the discretionary power which existed in his day or to consider the legal limitations on such power. Discretionary power became much more pervasive during the twentieth century as the modern state (to a greater or lesser extent) regulated the economy and provided social services. These involved the delegation to ministers and officials of wide powers including the ability to make policy choices limited only by an increasingly skeletal legislative framework. The consequence is that Dicey's analysis, always incomplete, is now even less comprehensive.
- As to the second meaning, it may be the case today that no individual or official is above the law, and no one should be penalised save for a breach of the law. But when Dicey 1885 stated (at 202-03) that the principle 'excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens', he grossly underestimated the problems of a British citizen seeking redress against the government even in private law matters: see Bingham 2002, 51. Many of the impediments were only removed by the Crown Proceedings Act 1947, which first sought to subject ministers and government departments to the rules of liability governing citizens and non-governmental entities. Even then, some differences remained, notably the prohibition of injunctive relief against the Crown in civil proceedings. It was only in 1993 that it was held that injunctions could be granted against ministers and other officers of the Crown in judicial review proceedings: *M v Home Office* [1994] 1 AC 377.

- The second meaning also overlooked the fact that prerogative give governmental and other bodies powers individuals do not have, such as the right to arrest, to enter premises, and to regulate business and professional conduct. A different from the law to which others are subject. We have seen that the first and second meanings also reflect Dicey's distinction between public law and private law. The latter is concerned with individual liberty, property rights and personal private law matters, as a result of civil wrongs or breaches of contracts, as a result of the defendant's unjust enrichment. They fail to account for the differences between the role of the courts in determining the merits of disputes between private persons and entities and the more limited supervisory role of the courts in private law matters, and their more limited supervisory role in the acts and omissions of governmental and other public bodies. Thus, Dicey fails to take account of administrative law even as late as the end of his life.
 - The third meaning neglects the extent to which rights are protected by legislation and qualified by legislation.
 - More fundamentally, the third meaning is difficult to reconcile with a purely formal interpretation of Dicey's account of the sovereignty of Parliament, the other pillar of Dicey's theory. As seen in Craig 1997, 470 and Allan 2001, 13 & 20, and 2013, 168, that sovereignty means, as Lord Bingham 2011 at 168, 'that legislation incompatible with, for example, personal freedom of expression can be enacted and, unless insufficiently justified, must be enforced by the courts, even if retrospective. As early as 1701, Dicey saw the limits on Parliamentary sovereignty as political, that is ultimately political rather than legal. This was not true for common law rights such as rights of access to a court, the right of expression, the first two having their origins in clause 29 of the Magna Carta of 1215. They were regarded as common law rights in his time and are today often described as common law rights. The HRA, for example, is not a common law right but a constitutional right and is among the rights protected by the ECHR.
- For Lord Bingham (see 174) the rule of law is an ideal worth striving to secure good governance, rather than a fixed set of principles. He accepted that Parliament can legislate in a way that infringes its principles.

Despite his concern at the way the checks and balances in the constitution have been undermined by the rise in executive power, he rejected the argument that in exceptional circumstances the courts could modify the principle of Parliamentary sovereignty, see chapter one at 9. His critique of the formal conception of the rule of law is discussed in chapter two at 20–21. His analysis also sought to address the criticism that the principles as stated by Dicey and others were too uncertain. He did so by identifying the ingredients of the over-arching and otherwise over-general principle more precisely. He considered that those ingredients included the following eight sub-principles:

- (1) The law must be accessible and so far as possible intelligible, clear and predictable.
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of 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, and not unreasonably.
- (5) The law must afford adequate protection of fundamental human rights.
- (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.
- (7) Adjudicative procedures provided by the state should be fair.
- (8) The rule of law requires compliance by the state with its obligations in international law as in national law.

Lord Bingham accepted that others would come up with different principles or would, as I seek to do in the remainder of this book, express them differently.

For Sir John Laws 2011, at 16, Lord Bingham's list of substantive requirements 'are, in truth, a suggested list of the virtues of a decent nation', but the list 'fails to capture the distinct quality or characteristic which the law – the Rule of Law – provides or contributes'. He considered Lord Bingham's statement, set out above at 21, as just 'an assertion'. For Sir John, the distinct quality or characteristic is the independent and impartial mechanism for law enforcement, applying objective standards.

The difference may reflect a difference between an analysis hea-
enced by the evidence of history, as Lord Bingham's is, and one
influenced by philosophy, as Sir John Laws's is. Both are impor-
tant to our understanding of our position today. Sir John invokes implicit
Dicey 1885, who at 413–14, stated:

Parliament is supreme legislator, but from the moment Parliament
its will as lawgiver, that will becomes subject to the interpretation
by the judges ... who are influenced ... by the general spirit of the
law, are disposed to construe statutory exceptions to common law
in a mode which would not commend itself either to a body of officials
the Houses of Parliament, if the Houses were called upon to inter-
pret their own enactments.

Notwithstanding the powerful critique of Dicey's approach, we
see that this part of what he said chimes with the approach of
the principles of procedural fairness and legality mentioned in
one and discussed at 34 and 83–95 and in chapters five, eight and

4

Accessibility of Law

To be able to comply with the law, individuals, companies, officials and
public bodies must know or be able to find out what is required, and
what their rights and duties are. Otherwise the law will not be capable
of guiding their behaviour. Where a provision restricts a person's rights
under the ECHR, it must be 'prescribed by' or 'in accordance with' law,
which means that it must be accessible in the sense that the individual or
entity has an adequate indication of the legal rules applicable to a given
case and that it is formulated with sufficient precision to enable them to
regulate their conduct: *Sunday Times v UK* (1979) 2 EHRR 245 at [49].
There are thus two overlapping components, accessibility and reasonable
certainty.

This chapter considers how the rule of law values of certainty and
predictability are protected by requiring law to be accessible to ordinary
individuals or their advisers before they commit themselves to a course
of action. Accessibility can be broken down into four components: pub-
lication, clarity and intelligibility, a large degree of prospectivity, and rea-
sonable stability. These components do not operate identically for the
different sources of law discussed at 13–16. As there is a close link between
accessibility and the principle of open justice whereby court hearings and
decisions must generally be in public, and information about the court
system, their volumes of work and costs should be accessible, this chapter
also deals with that principle.

The key factor in the accessibility of law is the ability to find out what
the law requires. In some cases, there will be a general awareness of what
is required even if not of the detail. Most people know that assault and
theft are criminal offences. But they may not know that assault includes
any conduct which intentionally or recklessly causes another person to
apprehend immediate and unlawful personal violence, or how courts
have interpreted the requirements of intention and recklessness. They
may also not know that, under section 1(1) of the Theft Act 1968,