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Unit – 5 : (Judiciary in U.K.) → Britain

The Separation of Power

The Rule of Law.

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The Separation of Powers

'When your time comes to sit in my Chair,
Remember your Father's habits and rules.
Sit on all four legs, fair and square,
And never be tempted by one-legged stools!'

RUDYARD KIPLING: *My Father's Chair*

THE THEORY OF THE SEPARATION OF POWERS

The theory of the separation of powers is closely associated with the name of the French political philosopher, Montesquieu, who lived from 1689 to 1755. This was a period when absolute monarchs reigned on the continent of Europe, and during the early part of Montesquieu's life the most despotic Sovereign of them all, Louis XIV, was still on the French throne. It is not surprising, therefore, that when Montesquieu visited England in 1729, he should have been struck by the high degree of political liberty enjoyed there. Indeed, so profound was his impression that he was induced to undertake a major study of the reasons for this preservation of individual freedom, and the result was his *Esprit des Lois*, 1748, a book which was widely acclaimed within two years of its publication.

Montesquieu observed that the powers of government were of three kinds — legislative, executive and judicial. Tyranny results when all three powers are accumulated in the same hands, for then a Government seeking to act despotically can pass such laws as it chooses, administer them without regard to the rights of the individual, and judge corruptly any opposition to them. Thus, in order to preserve political liberty, the constitution should ensure that the legislature, executive and judiciary are independent of each other. This did not mean that the three powers would never touch at any point, or that one could never act without the consent of the others. What Montesquieu had in mind was that each would impose restraints which would prevent the abuse of power.

England owed her political liberties, he considered, to the arrangement of her constitution in this way.

Subsequent political thinkers developed Montesquieu's analysis, but tended to emphasise the complete separation of powers. The theory exerted a dominating influence towards the end of the century when countries, newly released from oppressive governments, were seeking to ensure the preservation of their political liberties. Its practical application is evident in the constitution of the United States of America, drawn up by the Founding Fathers in 1787. Articles I, II and III begin by defining the position of the three branches of government:

> 'Article I. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.
>
> Article II. The executive Power shall be vested in a President of the United States of America.
>
> Article III. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

It then proceeds to specify the functions and relationship of these three 'Powers'. Although provision is made for resolving deadlocks between them, formally they are quite separate. Compare the following with the pattern of Britain's government:

(1) The President is separately elected for a fixed term of office of four years. His party, however, may not necessarily enjoy a majority in either House. Such a situation frequently occurs in the House of Representatives, for this has a life of only two years, and the new House, elected in the middle of the President's term of office, may indicate a swing of opinion away from his party.

(2) The President's powers are defined. While he can recommend bills to Congress, he cannot initiate them or compel their passage through either House. But he may veto legislation, in which case it can only become law by a two-thirds majority in each House. Similarly, any treaty negotiated by the President requires the consent of two-thirds of the Senate.

(3) The President appoints his own heads of the chief departments (about twelve). Like the President, the members of his Cabinet cannot sit in Congress. But since they are

responsible to him and not to Congress, they cannot be removed by an adverse vote.

(4) The legislature consists of the Senate, which is an undying House, and the House of Representatives, which is elected for a fixed term of two years.

(5) The Federal Supreme Court is not only independent of the President and Congress, but also has the power to declare laws *ultra vires*, and acts of the executive invalid, if they offend the constitution.

EVIDENCE OF THE OVER-LAP OF POWERS IN THE BRITISH CONSTITUTION

To what extent has Montesquieu's doctrine been of influence in Britain? Do persons or institutions perform functions or exercise control in more than one branch of government?

Between the *legislature and the judiciary*, there is an obvious over-lapping of powers. The Queen not only assents to bills, but all judicial work is carried out in her name. But whereas the Queen's duties are purely formal, the Lord Chancellor's functions in the House of Lords are real. He occupies the Woolsack during the legislative sittings of the House and presides when it hears appeals. In addition, the Judicial Committee of the Privy Council, the Court of Appeal and the Chancery Division of the High Court all sit under his presidency, while he recommends the appointment of judges (except the Presidents of Divisions), magistrates, etc.

The House of Lords, too, is not only a legislative body but the highest court of appeal. While the convention has been established that only the Law Lords can take part in its judicial proceedings, the Lords of Appeal themselves may sit both as judges and as legislators. And though the House of Commons contains no judges, it does count among its members the Government's law officers, the Attorney-General and the Solicitor-General, who give the Government legal advice and represent it in the courts.

The most important exceptions to the separation of legislative and judicial powers are, however, to be found in the judicial nature of certain functions performed by each House. Both consider private bills, where the vital part of the procedure is fundamentally judicial, and both can try and punish for breach of privilege. But since party considerations rarely enter into these matters, decisions are reached impartially. Nevertheless, there is a danger. The

House of Commons in matters of privilege is judge in its own cause and, via 'contempt' (punishable without any specific privilege being breached), has an opportunity for arbitrary extension of privilege. Impeachment, in which the Commons prosecute before the Lords, is now obsolete, but still legal. Finally, the practical effect of the supremacy of Parliament is to permit the legislature, where it does not approve of judicial decisions, to amend existing law.

A similar breakdown in the separation of powers is obvious in the relationship between the *executive and the judiciary*. Not only does the Lord Chancellor both sit in the legislature and perform judicial functions, but he is a leading member of the Cabinet. The Home Secretary, too, is acting in a legal capacity when he advises the monarch on the exercise of the prerogative of mercy, for he does this on his own responsibility and not as a result of collective decisions by the Cabinet. In addition, he has executive duties connected with the courts, such as confirming the appointment of justices' clerks, sending out circulars on sentences, and being responsible for prisons, borstal institutions, the probation service, and the release of persons from Broadmoor and similar institutions.

Although the Lords of Appeal in Ordinary sit on the Judicial Committee of the Privy Council, which is theoretically part of an executive body, their work is concerned with hearing appeals and has no concern with policy. On the other hand, some tasks performed by judges, such as the administration of estates and the winding-up of companies, are of an administrative nature, while, at the lower level, Justices of the Peace carry out both judicial and administrative duties.

Two comparatively recent developments, the growth of delegated legislation and of administrative tribunals, call for such special notice that chapters 20 and 21 are devoted to them. Through them, the administration has been given powers to make legislation and to decide disputes in individual cases.

Encroachment of the *executive on the legislature* can be observed in the functions which the Queen exercises in both, and in the growth of delegated legislation just referred to. But the most important exception to the doctrine is the whole practice of Cabinet government. Ministers, by convention, must be members of the legislature; indeed, the most important offices are filled from the House of Commons, the Chamber having by far the greater legisla-

tive authority. Even in the House of Lords, however, the position of the Lord Chancellor is particularly notable, for he not only sits in the Cabinet, giving it the benefit of his legal advice, but in the Chamber he can move out of the Chair and stand to one side of the Woolsack in order to speak on behalf of Government policy.

As early as 1867, Bagehot drew attention to the fact that, while Parliament has the supreme legal right over making law, the time-table of the House of Commons, the more important Chamber, is dominated by the executive. Whereas back-benchers have only limited opportunities for legislation, the Government can ensure, through its party majority and the Whips, that it will have time to pass the bills forming its legislative programme. At all stages, therefore, the legislative functions of Parliament are exercised under the leadership of the executive.

HOW FAR HAS THE BRITISH PATTERN OF GOVERNMENT BEEN INFLUENCED BY THE IDEA OF SEPARATION?

Clearly, then, there is no strict separation of powers in the British constitution today. Nor was there when Montesquieu wrote, for the truth is that to some extent he misinterpreted the British system. Indeed, separation could hardly be expected in a constitution which was never planned but simply developed from a position where the King held ultimate responsibility for the exercise of all legislative, executive and judicial powers.

Yet the idea has not been completely foreign to the British view of constitutional needs. From earliest times, it was recognised that the King's powers should not be used arbitrarily. On important matters of State, for instance, he was expected to consult and thus to share responsibility with the wise men of the realm, while Magna Carta itself reaffirmed the principle that all the King's acts should conform to the common law of the land.

Indeed, the rule of law is fundamentally an application of the theory of the separation of powers. Justice is regarded as an end in itself, to be determined according to the law and not dictated by the executive. To achieve this, the independence of judges is guaranteed by their high salaries, the traditions of the legal profession and, above all, their irremovability. Never again can a Lord Chief Justice be dismissed simply because his decisions are disliked by the King, as happened to Sir Edward Coke in 1617. Nor do the occasions on which powers overlap lessen the importance of the

judiciary's separation. Strange as it may seem, the Lord Chancellor finds it possible to keep his different functions distinct. He has been trained as and remains a lawyer, and the tradition of legal neutrality is so deeply ingrained in him that, when he sits as a judge, nobody would suggest that he is influenced by his activities as a politician. Similarly, at the other end of the judicial scale, the few administrative duties of J.P.s do not affect their impartiality in judicial proceedings. Moreover, as regards administrative tribunals, constant watch is maintained to see that their procedure conforms as closely as possible with the concept of 'natural justice' (see chapter 21). These points are important, for without the independence of the judiciary the rule of law would have no practical significance.

But, apart from the judiciary, the British have no strict separation of powers. Nor have they ever demanded such a severance. Indeed, in the 17th century, when the King and Parliament had attempted to go their different ways, only civil war could decide their respective powers. A complete separation of powers makes action slow and difficult, if not impossible. Suppose, for instance, that the judiciary could block every administrative measure or that the executive could never act on its own discretion but had to refer every matter to Parliament. The resulting deadlock would cause a breakdown of government. At times the American constitution has been saved from the effects of its rigidity only by elastic interpretation by the Supreme Court.

Nevertheless, although the doctrine has not been strictly implemented, it has influenced the development of our constitution. That there should be some separation is implicit in the requirements that a Member of Parliament should resign his seat on being promoted to a judgeship or on accepting certain offices of profit under the Crown, and that civil servants cannot sit in the House of Commons. But in place of the rigid separation of powers into three compartments, the British have preferred to have many divisions each providing mutual checks and balances on the other. This arrangement allows flexibility, promotes co-operation on a basis of understanding, and permits that ebb and flow of authority between the different institutions that makes efficient government possible.

The arrangement can be best seen in the close link between the legislature and the executive. In contrast to the separation of

powers, Bagehot was able to declare: 'The efficient secret of the English Constitution may be described as the close union, the nearly complete fusion, of the executive and legislative powers'. Yet even in the House of Commons there is a balancing of the legislature against the executive. The Government consists of the leaders of the majority party and through the Whips is able to ensure that the House supports its policy. On the other hand, it cannot ignore the House; it must avoid splits amongst its supporters and, more important, appreciate the likely effect of its policies on the electorate. Here, because the House wields the ultimate power of removing the Government, we see clearly the balances and checks being worked out. While supporters of the Government may be instructed as to their attendance in the appropriate division lobby, the Whip must also inform the Cabinet of their reactions. As regards the electorate, it hears the criticism of Government by the official Opposition.

The result is that Governments are responsive to the feelings of Parliament, although the balance may still be weighted too heavily in favour of the executive. What is important, however, is that the system avoids, on the one hand, the disadvantage of complete separation — the possibility of a collapse of government — and, on the other, the disadvantage of complete fusion — the risk of tyranny. Moreover, the flexibility of the British constitution is such that, where added power is given to one branch of government, a counterbalance is usually found. Examples abound: the Cabinet's growth in power has been matched by 'Her Majesty's Opposition'; the increase in the size and importance of the Civil Service has been counterbalanced by an invigorated question-time and the appointment of a Parliamentary Commissioner: the new public corporations are watched by a newly-established Select Committee of the House of Commons. And, as we shall see, even with delegated legislation and administrative justice, two instances where Montesquieu's doctrine is quite evidently violated, similar checks are being developed.

Finally, the separation of power has been achieved in ways other than those envisaged by the original theory:

(1) Executive power is not in the hands of one strong man, but is shared with about twenty ministers.

(2) The legislative power is split between the House of Commons and the House of Lords, and although the former is by

far the more influential, the Upper Chamber does permit second thoughts on measures, enables legislation to be criticised by persons who do not have to toe a party line and, in the last resort, could still act as a first check on a revolutionary Government.

(3) The House of Commons is itself divided into two parts by the distinction between Government and Opposition. Criticism of the Government is thus ensured and because the parties are large and fairly equally balanced, rather than small and numerous, the check is all the more effective.

(4) The elected Chamber consists not of a few but of 630 members. Each represents a different district and, though subject to strong party discipline at Westminster, is still expected to advocate his constituency's interests. There is thus a balance between the different localities of the country.

(5) There is separation between central and local government. While all local powers are derived from Parliament, our system of local government is very different from a mere decentralisation of power through regional offices. Councils are directly elected by local people, raise their own rates, appoint their own officials, and enjoy considerable discretion in administering their services. Hence, their loyalties and responsibilities are directed towards the local electorate rather than to Whitehall. Moreover, this balance between central control and local independence makes it less likely that bureaucrats will neglect the interests of remote areas or introduce schemes which will not work under varying local conditions.

(6) Division of power between the executive and the State's industrial activities ensures that political and industrial functions are not entirely in the same hands. Public corporations, and not government departments, were specifically set up to administer the nationalised industries in order to avoid political interference.

(7) Industrial power is held by both the State and private enterprise. This facilitates flexibility of decision in different parts of the country and, by encouraging competition among alternative producers, promotes 'consumer's sovereignty'. Complete State monopoly of production would not only add greatly to the power of the executive, but deny the citizen that

freedom of economic choice which is almost as important as the political preference expressed through the ballot box.

(8) In the economy of the country, the Government exercises its planning functions to secure full employment, stability of prices in general, and improved living standards, but it leaves individuals free to make their own economic decisions such as what shall be produced, where they shall work, whether to do over-time, etc. Economic, as well as political freedom, is an aspect of democracy.

(9) Most important of all, there is separation between the Government and the expression of opinion. Despotism would result, as it does in present-day dictatorships, were the Government the sole source of influencing opinion. In Britain, different views are expressed openly and assessed freely. The Press, for instance, covers a wide variety of political outlooks, and even where a newspaper has a broad sympathy with a particular party, it is still likely to have its own individual approach to many problems. Nor does the Government control the B.B.C. or the I.T.A., and both are under a legal obligation to maintain strict political neutrality. Finally, no attempt is made to influence the political views of young persons either in State schools or in universities. The University Grants Committee is as independent as the judiciary.

Thus the exercise of power is widely diffused throughout the community by various forms of separation which are no less significant in preventing the growth of tyranny than the separation between the legislature, executive and judiciary.

Nevertheless, while no open attempt to concentrate power in the hands of one group is likely, some critics fear that the executive may extend its authority gradually, unplanned and unobserved, by means of delegated legislation and administrative justice. It is to a consideration of these that we now turn.

SUGGESTED READING

Sir Carleton K. Allen, *Law and Orders* (3rd Ed., Stevens, 1965), Chapter 1.
Sir Ivor Jennings, *The Law and the Constitution* (4th Ed., University of London, 1955), Chapter 1, Section 3, Appendix I.
E. C. S. Wade and G. G. Phillips, *Constitutional Law* (7th Ed., Longmans,

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The Rule of Law

> 'Ancient Right unnoticed as the breath we draw —
> Leave to live by no man's leave, underneath the Law.'
> RUDYARD KIPLING: *The Old Issue*

THE BROAD MEANING OF THE RULE OF LAW

The problem of government which the constitution seeks to solve is, as we have seen, how to give sufficient power to the country's rulers to allow them to govern efficiently and yet be assured that they will not encroach unreasonably on the fundamental liberties of the individual by seizing more power than was intended, or interfering arbitrarily in his way of life. The granting of sufficient power is achieved through 'parliamentary sovereignty' — the legal right that Parliament enjoys of passing any law it likes. Individual liberty is said to be protected by the 'rule of law' — the restriction of government action to that authorised by law. As indicated in chapter 2, however, there are obstacles to the full acceptance of this theory, and it is these which must now be examined.

The law has two purposes. On the one hand, it restricts the actions of individuals. On the other, it protects the individual by defining the powers granted to those in authority. Both ideas were recognised in Greek and Roman times. St. Paul, for instance, while submitting to the law, stood firmly on the rights which the law afforded him. 'Is it lawful for you to scourge a man that is a Roman, and uncondemned?' he demanded of the centurion (*Acts*, ch. 22, v. 25). Later, before the Jewish Council, he rebukes Ananias: 'God shall smite thee, thou whited wall: for sittest thou to judge me after the law, and commandest me to be smitten contrary to the law?' (*Acts*, ch. 23, v. 3).

Englishmen, too, have always put a large measure of faith in the law, expecting it to be applied, but demanding that it shall be as binding on the authorities as on the individual. The general

complaint of the barons at Runnymede was the failure of John to observe the ancient customs of the realm (what today would be referred to as the 'common law'), and the real significance of Magna Carta is that it embodied the idea of a law which was supreme over the King himself. The Petition of Right, 1628, followed the same line of thought, being a petition to the King to observe the existing law of the land, which was as binding on him as on his subjects. In 1763 the idea was tested before the courts. John Wilkes, a Member of Parliament and publisher of the 'North Briton', was arrested on a general warrant (that is, one not specifically describing the place to be searched or the persons or things to be seized) because he had attacked the King's speech. His award of £1,000 damages against the Home Secretary for wrongful arrest demonstrated that Government officials were not shielded from the ordinary law of the land.

Thus our constitution has grown up recognising a rule of law. When the man in the street, aggrieved by some act of his neighbour, says, 'I'll have the law on you,' he is merely expressing his faith that the Law 'rules' and, in doing so, endorses a sentiment which goes back at least a thousand years. Or, as George Orwell puts it, in England 'the totalitarian idea that there is no such thing as law, there is only power, has never taken root' (*England Your England*).

DICEY'S 'RULE OF LAW'

Towards the end of the 19th century Professor A. V. Dicey, developing this idea, spoke of the 'rule of law'. He considered it to be *the* fundamental principle of the British constitution, and in order to give it precision, he resolved it into three distinct propositions.

(1) '*No man is punishable or can be lawfully made to suffer in body or goods, except for a distinct breach of the law established in the ordinary legal manner before the ordinary courts of the land.*'

This emphasises the supremacy of the law, and that penalties can only be imposed by the judiciary in a prescribed manner. Every citizen has the right to personal liberty unless: (*a*) he has broken the law; (*b*) this breach has been proved according to the procedure which the law stipulates; (*c*) the proof has been established in the *ordinary courts of the land*. All three conditions must apply at one and the same time.

While these requirements seem fairly commonplace today, we

need only look back a comparatively short period in our history to see that they have not always applied. Under James I, Sir Walter Raleigh was imprisoned in the Tower of London without any definite charge being preferred against him. In 1627 the judges of the King's Bench themselves upheld that it was sufficient return to a writ of habeas corpus to certify that the prisoner was detained by 'special order of the King'. No wonder then that the second clause of the Petition of Right declared that all arbitrary imprisonment without cause shown was illegal. Similarly, during the same period, extraordinary tribunals outside the ordinary courts of the land were in existence. These were the Court of Star Chamber and the Court of High Commission, both of which were under the authority of the King. Although these Courts had just been abolished, the Grand Remonstrance, 1641, put on record its protest against the injustices perpetrated by them.

Much was done in the later Stuart period to secure the liberty of the subject. The Petition of Right's declaration against arbitrary imprisonment and the abolition of the two prerogative Courts were the first steps. In 1679 the Habeas Corpus Act provided a further safeguard, for it laid down a specific procedure which could be followed by a detained person. Finally, by the Act of Settlement, 1701, judges were removed from the control of the executive.

(2) '*Not only is no man above the law, but every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.*'

Here Dicey draws attention to the fact that, not only does the law make no distinction between different classes of persons, but it applies as much to the official as to the ordinary person, both having to obey it. Moreover, any dispute between the private person and the official is decided in the ordinary courts of law, unlike France whose system of 'droit administratif' decides such a case in an *administrative* court.

(3) '*With us, the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source, but the consequence, of the rights of individuals as defined and enforced by the Courts.*'

Dicey means by this that our freedom is not preserved by any general principles embodied in the constitution, like the 'Declara-

tion of Rights' in America. With us, the rights of the individual transcend the constitution, existing before it and not being guaranteed by it. What these rights do depend on is the law of the land. Freedom of the person, freedom of speech, freedom of public meeting have not had to be declared; they exist simply because they do not offend the law, though it is quite usual to speak of them as 'common law' rights. Because the right to personal liberty was being set aside by the Stuarts, Parliament had to provide the means, through habeas corpus, by which the individual could vindicate it, and followed this later by allowing him to sue for damages upon wrongful arrest or false imprisonment and for assault where illegal restraint is alleged to have been imposed. The freedoms of speech and of public meeting are not thwarted by the laws concerning libel, slander, sedition, blasphemy and unlawful assembly, for these merely aim to stop abuse of them. Moreover, disputes between the private person and the official have been decided in the courts, which have simply extended the principles of law (that is, have implemented the 'rule of law') to determine the respective rights of the citizen and the Crown.

Hence, the constitution is the result of the ordinary law of the land, for its general principles have evolved from the rights of individuals as upheld by the courts in specific cases. This is in marked contrast with many a written constitution in which the rights of the individual are declared. But such rights are no less secure in Britain. In fact, as Dicey points out, at the height of the Revolution in 1791, when the French constitution proclaimed liberty of conscience, freedom of the Press and the right of public meeting, the people of France found them to be extremely precarious.

RECENT CRITICISM OF DICEY'S EXPOSITION

In recent years there has been some controversy as to whether the 'rule of law' ought to be accepted as an essential principle of the British constitution. The chief critic has been Sir W. Ivor Jennings (*The Law and the Constitution*), who attacks Dicey's views on two main grounds.

(1) *The analysis over-stresses the importance of individual rights*

Although Dicey's *Law of the Constitution* is a scholarly work, its interpretation tends to be subjective. A *laissez-faire* philosophy still

prevailed when the first edition was published in 1885. Dicey himself was a Liberal, and also a lawyer steeped in the principles of the common law. The whole background of his thinking, therefore, tended to emphasise the importance of the individual, the holder of certain unalienable rights which the Government should not infringe. His exposition would have placed less stress on individual rights had he allowed for the possibility of a new political philosophy which considered that the State should undertake public service functions, and not merely those of public control.

A planned economy and a 'Welfare State' necessitate the grant of discretionary powers to government officials. A tenant, for instance, in the interests of efficient husbandry, may be dispossessed of his land, while, in order to build schools and hospitals, construct new roads, clear slums, and plan the lay-out of towns, houses and shops may be compulsorily acquired from the owners and then demolished. Government officials, moreover, come into much more frequent contact with the individual, and persons are naturally prone to question the decision of the authorities when they feel it has affected them adversely. To settle these disputes it has been necessary, as we saw in chapter 21, for Parliament to establish a complex system of administrative tribunals outside the system of the ordinary courts and following a different procedure. As regards the second proposition in particular, Jennings takes Dicey to task for failing to recognise that administrative law, although relatively insignificant in comparison with the comprehensive system of 'droit administratif' in France, did exist and had existed for many centuries in England. In Henry VIII's reign, the Statute of Sewers had permitted various Commissioners for Sewers to make rules and to try offenders in their own courts. Even before Dicey was writing, these powers were beginning to increase, such bodies as railway companies and municipal authorities exercising the right to make their own bye-laws and regulations. The Public Health Act, 1875, for example, gave the urban and rural sanitary authorities many powers to coerce, provisions which had considerable significance for the age of the 'public service' State which it inaugurated.

(2) *The assertion of the third proposition that the constitution depends on the law is unjustified*

If we were to ask the question, 'On what does democracy depend

in the British constitution?' Dicey would reply that it rests on the rule of law, since this means that the courts will apply remedies to ensure that no authority can continue to exceed the powers granted to it by the law. Sir Ivor Jennings disputes this, arguing as follows. Obviously, the rule of law does not mean simply that there is law and order, for this existed, for example, under Louis XIV, an absolute monarch. The courts merely enforce the law as it exists, but there is no guarantee that it will be 'good' law. In Britain, because Parliament is sovereign, it can make any laws it likes. Extensive powers can be granted to the Government to order the individual's way of life and to appropriate his property. This was done, in fact, in both World Wars, by the Defence of the Realm Act, 1914, and the Emergency Powers Act, 1939. Parliament could even strike a mortal blow at democracy by abolishing free elections. Moreover, where it does not like the way the courts interpret its statutes, it can pass further legislation. No rule of law can restrain Parliament, and hence there would be more justification in regarding the supremacy of Parliament as *the* fundamental principle of the constitution. In any case, Dicey's propositions encounter so many difficulties that any attempt to give a precise definition to the term 'rule of law' is undermined. The most we can do is to indicate certain notions which it implies. These are that governmental powers must be distributed and determined by reasonably precise laws, and that in matters of government there must be liberty and equality for all citizens. In essence, however, this represents little difference from an analysis of 'democracy'. Neither the 'rule of law' nor the 'separation of powers' guarantees democracy; they are simply the concomitants of it. Dicey's argument gets nowhere, since the way in which he attempts to separate the law and the constitution is quite impossible.

THE RULE OF LAW TODAY

Dicey's analysis of the rule of law failed, Jennings considers, because he was subjective in his approach, his propositions merely formulating a 'rule of policy for Whigs'. Yet we cannot take this criticism as the last word. Jennings too was writing in a special period, the first edition of *The Law and the Constitution* appearing in 1933, before the real meaning and consequences of government by dictatorship had been fully appreciated. His criticism of Dicey's first two propositions shows that there are difficulties in trying to

give too much precision to the rule of law. On the other hand, vagueness is no proof of non-existence. To accept Jennings' views in their entirety is almost equivalent to saying that the principle of the rule of law has had no great practical effect on the development of our institutions and that it has similarly little influence on the constitution today.

But this is not so. Modifications may have to be made to Dicey's propositions to allow for the development of the modern State, but the basic ideas which they express have been, and still are, very real in their influence on government. As regards the first proposition, ordinary civil and criminal law procedure continues to follow a pattern consistent with his description, and it would be intolerable if it were otherwise. In these matters, no person is allowed to act arbitrarily, and punishment can only follow a breach of the law established in a prescribed manner in accepted courts of law. Personal liberty is protected by the writ of habeas corpus, by the possibility of seeking damages for false imprisonment or of prosecuting for illegal restraint, and by the right to ask an appeal court to set aside a judgment which has not been arrived at according to the prescribed procedure and the rules of 'natural justice' — open hearing before known judges, equal opportunities for each side to state its case, the application of established principles in reaching a decision.

But while civil and criminal law are administered in the same spirit as they were in Dicey's day, the acceptance of government planning and the Welfare State has led to departures from Dicey's proposition. Criticisms of delegated legislation were made in chapter 20. The essence of Dicey's rule of law is certainty for the individual, but the number, complexity and frequency of change of orders and regulations make it difficult for the individual to know exactly what the law is and thus to plan his actions so as not to break it. Special tribunals have also been developed and the discretionary powers of government departments extended in order to assist the administration of the public service State (see chapter 21).

Yet these developments do not invalidate Dicey's first proposition. In fact, they make its recognition even more essential, compelling it to be used as a yard-stick of their ultimate desirability. Thus it was the spirit expressed by the rule of law which led to the passing of the Statutory Instruments Act, 1946, and the setting up of the Franks Committee, 1955. It was this same spirit which

allows and requires the Courts, when examining the actions of the executive, to look further than mere superficial legality and to decide whether the procedure has been carried out fairly and, indeed, as in the Enfield School affair, 1967, with due propriety of motive. Concern for the maintenance of the rule of law also lies behind the watch which is kept on Parliament's grant of discretionary powers in order to ensure that the parent Act lays down the general lines upon which they shall be exercised so that the courts can restrain any attempts to exceed them.

In the same way, there are exceptions to Dicey's second proposition. There can be no complete equality before the law while rich persons are able to engage a better counsel than poor persons, though here again the Legal Aid scheme has done something to remedy this defect. Nor is everybody amenable to the ordinary courts. Both Houses of Parliament punish for breach of privilege. Foreign diplomats are exempt from the English courts. Separate callings, such as the Law, Church, and Armed Forces, have their own procedures. Moreover, such officials as the police, health inspectors, and local authority welfare officers, have rights not possessed by other persons. These raise no constitutional difficulties, and Dicey was merely emphasising that they were liable to the courts for any excess use of their power, though, as Jennings observes, this is but 'a small point on which to base a doctrine called by the magnificent name of the "rule of law" '.

Nevertheless, although the rule of law may not exist in the form of Dicey's static doctrine, the term gives expression to a concept which is generally accepted by people irrespective of personal political views. The idea is best defined in the following conditions:

(1) *The freedom of the individual must be restrained only under the authority of the law*

The Government and its officials are no more free to act outside the law than anyone else. Parliament can change the law, but this does not violate the principle, provided that the individual, through his legal adviser, can be reasonably aware of what the law is. He can then plan his conduct accordingly and seek to modify the law if he so wishes.

Moreover, a distinction must be drawn between arbitrary and discretionary powers. The former are a complete violation of the rule of law, for those administering the law are then also responsible

for making it and punishing breaches of it. Discretionary powers are, however, necessary to some degree in all societies and, in the modern State, are vital. Thus, if Parliament entrusts a minister with the task of providing for the defence of the country, it must allow him discretion in acquiring land for rocket sites, training areas, etc. The result may be that individuals cannot make plans with complete certainty, but should the Government be unable to promise them defence against enemy attack, they have no guarantee in any case of what may lie ahead. The essential meaning of the rule of law is maintained if discretionary powers are felt to be reasonable, to be clearly defined as to the manner in which they shall be exercised, and to give due consideration to the rights of the individuals likely to be affected. Thus Parliament must have adequate control over delegated legislation (for the courts can invalidate only those acts which are *ultra vires*), and individuals must receive fair compensation when their property suffers through the use of discretionary powers.

(2) *Justice must be regarded as an end in itself*

In the ordinary courts, it is clearly recognised that decisions must be given in accordance with the law and not the needs of policy. To this end, judges have been made independent of politicians and administrators. But a strict watch must be kept on administrative tribunals. While they need not follow the exact procedure of the ordinary courts, they must inspire confidence in their impartiality by having neutral judges and observing the rules of natural justice. Generally they work well and, as we saw in chapter 21, reforms have been made to secure greater adherence to these principles.

One final question concerns Dicey's third proposition. Is there any justification for his assertion that the constitution is the result of the protection given by the law to the rights of individuals? Or is Jennings' opinion correct, that our constitution is not dependent on the rule of law but on the prevailing political philosophy of the British people? Here again, we consider that the weight of argument still rests with Dicey. Jennings is right in that, in the final analysis, the attitude of the British people is the ultimate guardian of their freedom. No institutional arrangements, such as Parliament or elections, can guarantee it, for unless citizens are prepared to resist, unscrupulous Governments can amend the law to abolish

Parliament and elections. The rule of law itself is valueless if the laws made are not consonant with what the people really want. As Judge Learned Hand, the American lawyer, says: 'Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it' (*The Spirit of Liberty*).

But Jennings' weakness rests in his failure to stress that a part of the philosophy of the British people is fundamental and enduring. When we reflect on what every man really holds dear — the right to plan and live his own life free from undue interference — the change to the public service State which Jennings emphasises can be regarded simply as progress towards this main aim and, in any case, merely as marginal. At heart the British, indeed all peoples of the free world, feel deeply regarding the importance of the individual. This is a principle which goes far back into their history. It is central to the Christian religion, upon which they have been nurtured. It is implicit in the maintenance of human dignity, to which they firmly adhere. It is essential to their concept of civilisation, for a civilised man must be able to cultivate some independence of spirit and be secure in the freedom to observe, read, think and speak.

The true philosophy, Lord Lindsay considers, is illustrated in Colonel Rainsborough's observance in 1647: 'I think the poorest he that is in England hath a life to live as the richest he.' Upon this Lord Lindsay's comment is: 'That seems to me the authentic note of democracy. The poorest has his own life *to live*, not to be managed or drilled or used by other people. His life is his and he has to live it. None can divest him of that responsibility' (*The Essentials of Democracy*).

So long as men accept this as the aim of democracy, they will cherish certain fundamental rights, and it is upon these that the constitution will be built. Neither the rule of law, nor any other principle of the constitution — free elections, the supremacy of Parliament, the separation of powers, the right to criticise the Government — can, on its own, guarantee the preservation of democracy against arbitrary government. But, in conjunction with these, the rule of law, by its insistence on governmental powers being defined, affords that certainty to the individual which is essential if he is to be free to lead and plan his own life.