

THE RULE OF LAW REVISITED

Constitutional Justice: A Liberal Theory of the Rule of Law, by T.R.S. ALLAN, UK, Oxford University Press, 2001, 342 pp., Hardback, £40, ISBN 0-19-829830-7

Mr Allan, Reader in Legal and Constitutional Theory, University of Cambridge, has revisited one of the most important, yet strangely neglected areas of constitutional scholarship, with this wide-ranging study of the rule of law.

The constitutional principle of the rule of law is based upon the practice of liberal democracies of the Western world. At its simplest, it means that what is done officially must be done in accordance with law. In Europe, where an entrenched Constitution is the touchstone for legitimacy of government, there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition public authorities must point to a specific authority to act as they do. Much of the legitimacy of a political system derives from the impartiality and objectivity with which it is administered. Thus the very exercise of authority legitimates that authority.

Dicey defined rule of law to encompass the liberty of the individual, equality before the law, and freedom from arbitrary government. The scope of the concept is however rather fluid. It includes such meanings as government according to law; the adjudicative ideal of common law jurisdictions; and a minimum of State intervention and administrative power. It also includes the need for fixed and predictable rules of law controlling government action; and standards of common decency and fair play in public life. It also includes the principles of freedom, equality, and democracy.

As Allan freely acknowledges in his introduction, the concept of Rule of Law may appear to lack a denominated meaning. That is however no reason to dispense with the notion, which has a value as a governing principle for constitutional theory and analysis. He seeks to give a coherent, unified, and (in his own words) attractive account of some of the principal questions of legal authority and personal freedom. The emphasis is upon procedural fairness, but Allan rejects any rigid distinction between procedure and substance as artificial and unworkable. The rule of law is explained as a set of closely interrelated principles that together make up the core of the doctrine or theory of constitutionalism.

This is explained within a framework of liberalism, which is here utilised to comprise any modern democratic regime that protects a range of familiar civil and political liberties and in which governmental action is constrained by law, interpreted and applied by independent judges.

If a criticism might be made of the thesis of the book, it is that it is infused with the spirit of the common law. Yet, in the face of increasing pressure to allow the reception of Roman law-based laws, which the common lawyers successfully resisted in the sixteenth century, it is well to be reminded of our own legal heritage and the part it has played in preserving our freedoms.

This is illustrated in Allan's assertion that a general commitment to certain foundational values that underlie and inform the purpose and character of constitutional government, imposes a natural unity on the relevant jurisdictions is ultimately more important than presence or absence of a 'written' constitution, with formally entrenched provisions. It is the spirit of the law, rather than its form, which is the embodiment of the concept of the rule of law.

The rule of law is symbolic. It is a transcendent phenomenon in that it is almost always shorthand for some interpretation of the inner meaning of a polity. It is also highly connotative. In the fifteenth century it meant that the king was always subordinate to a higher law of somewhat uncertain provenance. After the 1688 Revolution, it became clearly associated with the idea of a Lockean ideal State. The old idea of the unity of the State dominated till the classical liberal tradition overtook the older habit of mind in the eighteenth and nineteenth centuries.

The post-Lockean version of the rule of law was associated with the views of the classical liberal theorists, who combined the concepts of legitimacy, legality and legal autonomy. The rule of law was used by the Whigs to confer legitimacy upon their dominance of politics during the eighteenth and nineteenth centuries.

In the course of his book Allan travels through the principles of constitutional law, from the Rule of Law and separation of powers, to dissent and disobedience, and equal justice and due process of law.

These principles are rarely litigated. Yet several have come to the fore in recent times. Justiciability and the reviewability of political decisions was examined in *Black v Chrétien*, an unreported judgment of the Court of Appeal for Ontario.¹

Conrad Black, a prominent publisher and businessman in both Canada and United Kingdom, submitted his name for one of the peerages to be created for the new-model House of Lords following the House of Lords Act 1999. His ennoblement was approved by the relevant British authorities, and Tony Blair, the Prime Minister, advised The Queen to confer the title upon Mr Black. However, Jean Chrétien, Prime Minister of Canada, intervened, and advised The Queen to not confer the peerage on Mr Black.

Ultimately the action was bound to fail, as the honours prerogative, and by extension the other "political" prerogatives of the Crown, is non-justiciable. But it is now rare for any governmental action to be beyond the review of the courts.

Dr. Noel Cox,

Auckland University of Technology

¹Laskin, Goudge and Feldman JJA, 18 May 2001, C33887.