

# THE RULE OF LAW AND BASIC FREEDOMS

The idea that lies at the centre of the institution known as the rule of law is a very simple one. It is the idea that governments, whether popularly elected or not, should be controlled by law when their actions may affect the basic liberties of their subjects. When the rule of law prevails in a society officials of government may not take away or restrict basic freedoms at will and without legal responsibility for their actions. The rule of law means that there will be clear legal rules that will specify in what circumstances a person's freedom may be curtailed and that there will be a legal remedy if government officials do not act in accordance with those rules.

A helpful way to explain precisely what the rule of law means is to contrast a society in which it is observed with its opposite — the lawless society. In a lawless society people may lose their liberties and even their lives simply because someone in authority has so determined. For example, a policeman acting under directions from higher authority, or of his own accord, may imprison a subject or kill him and remain (together with the superior who may have ordered the action) unaccountable for action he has taken. The unaccountability of the authorities also means that the victim of the action (or relatives in the case of death) have no remedy for what has been done. In a lawless society, therefore, officials may act virtually as they wish with no fear that they will be made to account for the harm they have caused. On the other hand, if the society in question is characterised by the rule of law, the actions in question (imprisonment or killing, for example) will only be justified if permitted by the law; and where they fall outside the law, the victim (or his relatives) will have legal remedies to secure release from unlawful imprisonment and damages for wrongful arrest or killing. When the rule of law prevails, officials are held to account for what they do; where it does not, they may harm subjects without fear of punishment.

There are some societies in which at certain times the rule of law has suffered total extinction. The prime examples are Nazi Germany and Uganda under Idi Amin. These regimes were characterised by the rule of brute force, not of law. These extreme examples may be contrasted with societies like the United States of America, Canada, Australia, New Zealand and other countries in which there is substantial, if not complete, adherence to the rule of law. Many other societies lie somewhere between the examples just given since they have neither abolished the rule of law nor do they comply fully with it. Examples of the "in-between" cases are Israel and British rule in Northern Ireland. These are countries in which the legislature has decided, in the interests of security, that officials should be freed of legal controls in certain instances to enable them to deal with security threats. Though South Africa represents one of the intermediate cases, it stands far closer to the rule of brute force than do countries like Israel and Northern Ireland. South African security law, and especially the current emergency law, enables government officials and members of the security forces to take many forms of drastic action against citizens without any effective legal control over what they do. For example, under the emer-

gency regulations, a member of the security forces is authorised to shoot and kill persons in dispersing gatherings or in securing compliance with orders **if he believes** that such action is necessary. In this instance the law does not control the behaviour of members of the security forces (by informing them of the precise conditions under which they may shoot to kill); it allows them to make their own rules for the use of deadly force. Another example of such freedom is the power of the Minister of Law and Order to ban meetings. This power may be exercised whenever the minister thinks fit and the courts have no effective jurisdiction to control his decisions.

These two examples taken from South African security law are instances of complete denial of rule of law requirements. Using these two examples, we can illustrate more clearly what it means to observe the rule of law in the exercise of power over citizens. If the rule of law did prevail in relation to the security force's right to kill, the relevant statute would specify objective criteria for the use of deadly force; for example, that such force may be used when the conduct of the person in question endangers the life of the policeman or someone else in the vicinity and when other means could not prevent the threatened harm. Under such a provision there would be clear criteria against which the authorities, the citizens and the courts could judge the legality of the policeman's conduct and remedies would be available if the criteria of the law were not met in a given case. Similarly, in relation to the banning of meetings, adherence to the rule of law implies that criteria be specified for the exercise of the power to ban — for example, that there is a well-grounded fear that disorder will break out if the meeting is held and the police reasonably believe that they will not be able to control the disorder. There would then be clear criteria against which a court could judge the validity of a banning order.

The examples just given now enable us to spell out exactly what it means to govern in accordance with the rule of law. In the first place, it **does not** mean that the authorities may not take action which will affect the lives or liberties of their subjects. Secondly, what it **does** imply is that the taking of such action will be limited and controlled according to criteria specified by the law in such a way that the authorities cannot act arbitrarily, spitefully or foolishly; or, as an American constitutional lawyer has said, the rule of law serves "to channel governmental interference with individual liberties within predictable and well-established constitutional principles". Thirdly, there must be some independent body (usually the courts) which can judge whether the official in question has acted properly and which can grant the appropriate remedy where the action is unlawful. It follows that a citizen's rights may be curtailed by officials in a rule-of-law society but that this takes place **under the control of the law** and with due regard to the requirements of procedural justice.

As indicated above, there are a great many societies in which the rule of law is only partially adhered to. This is particularly true of conflict societies — that is, societies characterised by serious social conflict. It is not surprising

that the rule of law has been slackened in countries where social conflict is endemic and such a slackening may have to be tolerated for the duration of the conflict. However, it is totally unacceptable that the rule of law should be abolished, on a permanent basis, even in those societies that are troubled by internal conflict. Where this has happened, as it has in South Africa, we can be confident that the objectives of the ruling party have little to do with

securing law and order and a great deal to do with maintaining power and suppressing dissent to official policies. The more-or-less permanent abolition of the rule of law means that those in power have substituted despotism for political freedom and that they have equated opposition with disorder. The degree of adherence to the rule of law is a reliable guide to the degree of freedom enjoyed in modern society. □

---

by Michael Cowling

# LIBERALISM AND A BILL OF RIGHTS

1. Operating on the basic assumption that liberalism is premised upon securing the greatest amount of freedom for individual members of society, it becomes vital to examine exactly how such freedom can be secured within the confines of social and political co-existence.

2. Within a social context liberalism is achieved by defining and establishing a number of fundamental civil liberties that balance the rights and duties of the various individual members of a given society.

3. Within a political context it is necessary to secure these fundamental rights and liberties in favour of the individual against the government of the day.

4. This is achieved by ensuring the greatest possible number of checks and balances on the exercise of governmental powers without undermining the ability of the government to operate effectively.

5. This has traditionally been achieved by separating power so that those institutions who wield it are able to act as checks upon each other.

6. This idea of separating power is one of the cornerstones of democracy and usually takes the form of dividing up power between he who makes the law (the legislature), he who carries out the law (the executive) and he who applies the law (the judiciary).

7. If one were to assume a situation where all these powers were concentrated in a single person such as, for example, an absolute monarch, it would not be possible to guarantee fundamental human rights and liberties. This is because, even if this particular monarch is genuinely committed, from a practical point-of-view, to the protection of the individual's human rights, there is nothing in theory to prevent him from changing his mind at a later stage. Thus, one cannot talk of human rights where the same person who makes the laws is responsible for carrying them out as well as applying them.

8. Thus, any constitution must aim towards some form of separation of these basic powers viz legislative, executive and judicial. It thus becomes necessary to examine how this is achieved in practice.

9. In this regard there are two basic constitutional models that fall to be examined viz those modelled along the lines of the UK Westminster system (incorporating the Rule of Law) and those modelled along European or US lines (incorporating a Bill of Rights).

10. These two models have, in a very general sense, the same broad objectives viz protecting fundamental rights and liberties of the individual by separating the three tradi-

tional constitutional powers and the institutions that wield those powers. Each will be examined in turn, although it is conceded that the models will only be described in highly superficial and rudimentary terms.

11. The Rule of Law approach proceeds on the basis of three separate but interrelated principles viz (a) the predominance of law — which incorporates the notion that all are subject to the law — even the lawmakers — and hence no person (or government official for that matter) may act outside the law. (b) The notion of equality before the law in the sense that the law should be applied in an equal and general manner. This presupposes that no-one is automatically exempted from the operation of the law — including the government and government officials. (c) The third principle is concerned with the question of remedies and holds that fundamental human rights and liberties are most effectively protected by an impartial judicial body (i.e. judges and the courts) applying the ordinary law of the land.

12. Overall these three principles imply that the government is subject to the ordinary laws of the land and that the latter are clear and pre-announced. Further, the characteristic of generality of law and the fact that rules of law must be objectively and impartially applied by independent courts is seen as a means of excluding arbitrary power on the part of the government over the individual. This is because the Rule of Law demands that the government should treat its subjects in accordance with clearly-established pre-announced laws and not simply as it pleases.

13. How does this operate in practice? Each of the various arms of government will be dealt with in turn:

(a) **the executive** — in regard to the executive arm of government, the rule of law presupposes that government officials may exercise only those powers which have been conferred upon them by law. Thus they do not enjoy any inherent or automatic rights or privileges merely by reason of the position they occupy. As a result the courts are charged with carefully scrutinising government action and may set aside any act that is not lawfully authorised;

(b) **the judiciary** — judges must be seen as the vehicles by which the rule of law can be effected. They must enjoy independence of influence from the other two arms of government and must apply the law in an impartial and objective manner;