

## Rule of Law

By SRI M. P. TANDON, M.A., LL.B.

Deputy Registrar, High Court, Allahabad

The expression 'Rule of Law' connotes in its popular meaning the paramount of law over Governments.

In his classic work, "Introduction to the Study of the Law of the Constitution", Dicey, who by his masterly exposition of the subject, aroused the interest of students of law and politics to the study of public law and government, observes that the two features which have at all times since the Norman conquest characterised the political institutions of England are (i) the sovereignty of Parliament, and (ii) the Rule or Supremacy of Law. He has considered the expression 'Rule of Law' from three distinct though kindred points of view.

In the first place, it means that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the normal legal manner before the ordinary courts of the land. It, thus, means that there is an established predominance of the regular law over the exercise of arbitrary power. Dicey contends that discretionary authority vested in the Government is incompatible with individual liberty—the more there is of the one, the less there will be of the other. The right of personal freedom of speech and of public meetings, the liberty of the press, freedom from arbitrary arrest and the right to enjoy one's own property are all a direct corollary to the application of the Rule of Law. He observes that in that sense this was a peculiarity of the English institutions as against almost every Continental country where the executive enjoys far wider discretion in the matter of arrest, temporary imprisonment, expulsion from its territory, etc.

In the second place, he understands the "Rule of Law" to mean equality of all people in the eye of the law of the land. In this sense, every man, irrespective of his rank or station in life, is subject to the common law and amenable to the jurisdiction of the ordinary tribunals. He observes that, in England, every official, from the Prime Minister down to the police constable or the collector of taxes, is equally responsible for every official act done without legal justification. Of course, the Prime Minister, or, for that matter, even a policeman, can lawfully do certain things which private individuals cannot; but, if they abuse their powers and act illegally, their official position cannot protect them; and the law will punish them like any other delinquent. Nor can the mere emanation of an illegal direction from the Crown afford them adequate defence if they execute it. Dicey points out that, in Continental countries like France, the officials, acting in their official capacity, are exempt from the ordinary law courts and are governed by *droit administratif* or administrative law, i. e. the law administered by the Administrative Tribunals. He disapproved of the administrative law and administrative tribunals existing in France which oust the jurisdiction of ordinary courts with respect to affairs or disputes in which the Government or its servants are involved. According to him, this aspect is utterly unknown to the law of England and indeed is fundamentally inconsistent with the English traditions and customs.

Lastly, he visualises the expression "Rule of Law" as a formula for expressing the fact that with Englishmen the law of the Constitution and 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. He shares the view that the constitutional law of England is the result of the ordinary law of the land and is based upon the fundamental rights and liberties of the individual, i.e., the right to personal liberty, or the right of public meeting, which are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts. These rights of the individual, according to him, do not, as in many countries which have a written Constitution, flow from the Constitution but the Constitution itself is virtually the culmination of such rights and is based on them.

Dicey's work upon the Constitution, which first appeared in 1885, provoked vigorous criticism. His notions were derived from an age of *laissez faire*, which zealously protected individual liberty against encroachment by the State and regarded any discretionary authority vested in the State as dangerous to individual liberty. That was an age of State paternalism, the State not interfering with individual liberty and confining its functions to foreign relations, maintenance of law and order and defence against foreign aggression. That concept of the "Rule of Law" has rapidly changed in subsequent years. England and most of the States of the world have drifted from individualism to collectivism and the conception of the social welfare State. This change was visible even in his lifetime; for Dicey very clearly perceived in his later days that the doctrine of *laissez faire* had lost its hold upon the English people, and his critics point out that even in 1885 there were plain signs of the existence of administrative law in England, and in the next half century the growth of administrative law in England was continuous.

The first meaning of the "Rule of Law", namely, the absence of arbitrary power to arrest or punish, is as true today as it was in 1885. But Dicey went further and asserted that the "Rule of Law" in that sense excluded the existence of wide discretionary authority in the Government. In this respect there has been a change. Today the Government have wide and important discretionary powers. Parliament itself confers extensive powers on Government to make rules and regulations. The State today regulates the national life in myriad forms and protean shapes. The British Constitution is not concerned wholly with the rights of the individual and Dicey failed to observe that the wide powers of the administration or its officers flow from the law of the land and are limited by law. Dicey confused discretionary power with arbitrary power, i. e. the power exercised by an agent responsible to none and subject to no control. His contrast between the "Rule of Law" and any system based on "the exercise by persons in authority of wide . . . discretionary powers" has, therefore, lost much of its force today.

As regards the second meaning assigned by Dicey to the "Rule of Law", viz. equality before the law and the absence of the administrative law or Administrative Tribunals in England, it might only be observed that all public officials and authorities have powers, rights and duties which the common person does not possess. The law of the United Kingdom in common with all the sovereign States affords immunity to the persons and the properties of other States, their rulers and diplomatic agents. Further, the Crown still enjoys certain privileges, although their scope has been greatly curtailed by the Crown Proceedings Act, 1947. This only shows that equality of rights and powers does not exist in the sense contemplated by Dicey.

As regards the last meaning assigned by Dicey to the expression "Rule of Law" that the Constitution is the result

of the ordinary law of the land based upon the determination of the rights of the individual by judicial decisions, it might conversely be said that the law of the land is the result of the Constitution. In India, for example, the Constitution ensures the fundamental rights and those rights can be deemed to be directly accruing from the Constitution.

It might, however, be said to the great credit of Dicey that even though the concept of the Rule of Law expounded by him has undergone material changes, it remains of great historical importance, because of the influence which it has exercised upon modern constitutional development. The principles enunciated by him stand prominently in the world politic of today. In the sense of the supremacy of law over Governments, the Rule of Law is taking shape institutionally in the comity of nations.

The fundamental principle enunciated by Dicey in his concept of the "Rule of Law" envisages the absence of arbitrary power in any authority; and an official who abuses his power is answerable for his conduct in the court of law. The International Law Commission of the United Nations, at its second session in 1950, while formulating a set of principles of law based on the Nuremberg judgment, followed, in the main, the above concept of the Rule of Law and laid down, *inter alia*, that the fact that a person, who committed an act which constitutes a crime under the International Law, did so as the Head of a State or responsible Government official does not absolve him from responsibility under the International Law; and that the fact that a person carried out the order of his Government or of a superior does not relieve him from responsibility under the International Law, provided a moral choice was in fact available to him. The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on the 10th December, 1948, lays down the rights which should be granted to all persons, without distinction of any kind, and affords equal protection of the law.

In case of a dispute the contending nations never deny the existence of the rule of law governing nations but recognise it, endeavouring to interpret it so as to justify their conduct. The Israeli aggression on Egyptian territory towards the end of October 1956, followed by an Anglo-French invasion of that territory, constituted a flagrant violation of the law of nations; its position was however rehabilitated by the various resolutions of the United Nations General Assembly, which vacated aggression and restored peace. The U. S. S. R., too, had to respond - though slowly - to the strong protest of the world organization against interference in Hungary's internal affairs. Similar was the result in respect of the armed intervention by U. S. A. in the Lebanon and that by Great Britain in Jordan in the middle of July, 1958. Even with regard to the violation of the Soviet territory by U-2 flight on the 1st May, 1960, the United States of America had to concede that flights similar to those of U-2 would not be repeated and that there would be no more violation of Soviet air space. That is the triumph of the Rule of Law in international affairs.