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Literature Review – what is the Rule of Law?

Introduction

This example literature review seeks to understand how rule of law has been interpreted and described by different academic theorists in order to apply meaning to both the term itself and the concepts which it represents. It is split into three sections. First, it begins with a brief overview of why it is important to define the rule of law. Second, it briefly outlines the methodology through which a literature review of the rule of law has been conducted. Finally, in part three these frameworks are applied to a detailed review of different theorists in an effort to understand how they interact.

Although this work mainly addresses rule of law in an English law context, it is equally applicable to other common law legal systems such as Australia, Ireland, and the USA. Consequently, examples from other jurisdictions are drawn upon where appropriate.

PART ONE: The need for a definitive definition of rule of law

The most remarkable things about the rule of law is probably the fact that very few lawyers dedicate much time to understanding what it actually is. This is despite it being a ubiquitous component of legal theory which permeates all areas of law at all times. After his retirement from service as a Supreme Court judge, Tom Bingham – arguably one of the greatest and most esteemed jurists of English law in the 20th Century – reflected that although the rule of law was an expression “constantly on peoples lips,” he was never “quite sure what it meant,” despite being one of the most senior judges in the world. He further questioned whether people who used the expression were fully aware of what it meant, or whether they actually meant the same thing when they talked about it. It was this conundrum which proved to be the catalyst for his seminal work “The Rule of Law.”

On a literal level, the construction of the phrase ‘rule of law’ could be said to conjure up images of a political system whereby government is conducted via a series of rules which are legitimately prescribed by law. It is often invoked when lawyers are trying to add an element of special moral authority to a legal argument. This might sound simple enough, but the abstract nature of rule of law means that it is not hard to find examples of instances where rule of law is employed in a contradictory fashion. For example, in the Florida case of Bush v Gore – which decided the outcome of the 2000 US presidential election – the doctrine of rule of law was invoked by both sides in support of their respective cases. This led commentators such as Waldron to question whether the term rule of law is now so overused that it has effectively lost all meaningful utility. However, there is enough contemporary reference to rule of law in legislative practice that it is impossible to write it off as an empty rhetorical flourish. Rule of law’s critical importance to English law was recently renewed by the Constitutional Reform Act 2005, which codifies adherence to the “existing constitutional principle of the rule of law” as a principle of primary legislation. In contrast with Waldron’s suggestion of rule of law irrelevance, Craig concludes that means that “judges are not free to dismiss the rule of law as meaningless verbiage [...] even if they were inclined to do so.” Craig’s sentiment was underlined by Bingham. However, despite attaching considerable importance to the rule of law, the Constitutional Reform Act declines to define it. This means that although the importance of the rule of laws is underlined, its substance is deliberately left abstract.

PART TWO: Rule of Law as an Essentially Contested Concept

In his paper "Essentially Contested Concepts," Gallie famously argued that key factors governing the philosophy of social sciences – for example, law, social justice, and morality – are impossible to define, meaning that one can only discuss what they actually mean by comparing contrasting interpretations. Grey expands upon this, suggesting that it is impossible to define essentially contested concepts with the tools of "empirical evidence, linguistic usage, or the canons of logic alone." There is a degree of subjectivity in any such assessment. Garver set out a number of dichotomies which the average person would almost certainly recognise which outline a number of factors which one must consider when assessing any essentially contested concept:

Dogmatism (i.e., the idea that one person is certain that their answer is correct, and all other answers are wrong);

Scepticism (i.e., critical reasoning which seeks to ascribe elements of 'truth' or 'falsehood' to specific concepts or statements); and

Eclecticism (i.e., the idea that multiple paradigms are equally applicable in different situations without an overarching framework governing their use).

These are all useful paradigms for investigating the meaning of rule of law. It must be noted that there is no inherent contradiction between accepting the abstract nature of rule of law on one hand, while accommodating Garver's dichotomies on the other. For example, H.L.A. Hart described essentially contested concepts in the context of legal theory as being the best means by which a generally agreed objective of fairness can be realised, whilst still maintaining a dogmatic and rigid belief in his own personal theories of legal positivism. As such, the notion of rule of law as an essentially contested concept has been adopted by the author in conducting this literature review.

PART THREE: Contrasting Definitions of Rule of law

Concepts that would be readily recognised in contemporary settings as rule of law date back to the dawn of civilisation. In ancient Greece, Aristotle described the idea that "law should govern" above all else, including man. One can only really understand the significance of this principle when it is juxtaposed against the doctrine of the divine right of kings. In 1609, King James of Scotland told Parliament that "The state of monarchy is the supremest thing upon earth, for kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God himself they are called Gods." In other words, Aristotle forwarded a concept of law which was superior to everyone and everything and applied equally, whereas King James was advocating a system of law whereby arbitrary outcomes based on the whims of societies leaders were justified because he considered their authority to emanate from a higher religious power.

A.V. Dicey and Rule of Law in the Contemporary Age

The term rule of law was popularised by A.V. Dicey in 1885. In his book "An Introduction to the Study of the Law of the Constitution" he stated that rule of law was one of the two main lynchpins of the UK's uncodified constitution (alongside parliamentary sovereignty). Dicey outlined three elements which he considered to comprise the meaning of the rule of law in the English context:

"No man is punishable or can be made to lawfully suffer [...] except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;"

"No man is above the law" meaning that "every man, whatever his rank or condition, is subject to the ordinary laws of the realm [and] the jurisdiction of the ordinary tribunals;"

"...The constitution is pervaded by the rule of law" as "a result of judicial decisions determining the rights of private persons in particular cases brought before the courts" (i.e., rule of law is a right that exists independent of any laws).

Dicey's work built upon pre-existing theories, and provides a useful context for understanding subsequent developments. For example, the first of his three rules clearly borrows from clause 3 of the Magna Carta – "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land." It is also evident throughout the Bill of Rights 1689, for example via the prohibition on the monarch enacting law without the consent of parliament. Furthermore, historic judicial decisions such as Entick v Carrington, established the notion that the members of the executive (i.e., government), are not above the law, and can only take actions against citizens which are prescribed by law.

The DNA of Dicey principle are also clearly evident in many aspects of healthy legal systems and legal treaties. Examples include the Fifth and Sixth Amendments of the US Constitution (setting out the right to due process in legal proceedings and right to a fair trial respectively), Articles 6 and 7 of the European Convention on Human Rights (i.e., the Right to a fair trial and a prohibition on retrospective punishment), and Article 9 of the United Nations Universal Declaration on Human Rights (No one shall be subjected to arbitrary arrest, detention or exile).

Although Dicey's work is useful in grounding an analysis of the rule of law (not least because he coined the term), his description of the concept is by no means universally received by other theorists.

Critiques of Diceyan Rule of Law

There are a number of definitions of rule of law which are at odds with Dicey's conceptualisation. While virtually all theorists agree that the rule of law requires consistent and clear rule making which is free from arbitrariness, they tend to disagree on how to define such a concept. For example, Austin splits law and morality, suggesting that "the existence of the law is one thing its merit or demerit is another." This means that laws which are poorly drafted, unjust or immoral cannot be said to be failing to adhere to the principles of the rule of law, as long as they are clearly defined and clearly defined. The natural conclusion of such a train of thought is to dismiss the notion that rule of law has to protect human rights and civil liberties at all. This seems counter intuitive given the influence that concepts of rule of law has had on the development of modern democratic societies, and its modern invocations. But, in the words of Cottrell, "there can be nothing inherently sacred about civil or political liberties" because law is merely an act of government.

The most renowned proponent of this of this point of view is probably Raz. He is perhaps the leading scholar of the 'thin' rule of law school of thought. He suggests that rule of law is a label which is limited to the management and arbitration of law, rather than their content. He was of the opinion that "the denial of human rights, extensive poverty, racial segregation, sexual inequalities, religious persecution" and even slavery could exist within a legal system without violating the rule of law, on condition that such laws were applied uniformly and consistently. Raz was at pains to stress that he was not advocating such features in a legal system. His argument was more that "the promiscuous use" of the term rule of law threatened to deprive it of any potency. Craig walks a middle line, stating that "laws under which people are condemned should be passed in the correct legal manner and that guilt should only be established through the ordinary trial process." He accepts that a distinction can be made between the morality and the application of the law, but he rejects the notion that such a split is capable of resulting in a legal system which adheres to the principles of the rule of law if either component is missing.

The position of Austin, Allen and Raz is vehemently opposed by champions of 'thick' rule of law, who argue that no distinction can be made between law and morality; law without human rights and civil liberties is simply not law, and a system with such characteristics cannot be said to adhere to the principles of rule of law. Dicey and Bingham fall into this category. Bingham in particular invokes powerful emotive examples in support of his position. For example, during the German Nazi regime, "the transport of the persecuted minority to the concentration camp [was] the subject of detailed laws duly enacted and scrupulously observed" but should not be considered to adhere to principles of rule of law due to the obvious gross injustice which they facilitate. He further reiterated this point by arguing that "a state which savagely suppressed or persecuted sections of its people cannot in my view be regarded as observing the rule of law."

The Application of Theory to Practice

On one hand, proponents of 'thin' rule of law such as Raz discount the notion that human rights is an intrinsic element of the rule of law. Obviously, this position is disputed on conceptual grounds by the likes of Dicey and Bingham. However, the problem with presuming that subjective values such as human rights are an intrinsic part of the construction of rule of law are not merely conceptual; in England and Wales, they are practical too.

In the decision of *Marbury v Madison*, the United States Supreme Court concluded that it had the right to strike down primary legislation as unconstitutional where it was considered to conflict with human rights and civil liberties guaranteed under the US Constitution. The doctrine of Parliamentary Sovereignty means that nobody other than the Parliament at Westminster has the power to make or unmake laws which are enforced in the UK. The absence of a written constitution means that the UK courts lack a similar mechanism to that found in the US for striking down legislation which might be considered to run contrary to the rule of law. Indeed, the supremacy of parliament is such that Wade & Forsyth assert that of the judiciary flies too high in challenging the authority of the legislature, "Parliament might clip their wings" by enacting new laws to curtail such powers. Allan has countered such arguments by suggesting that if a legislative breach of human right principles was sufficiently serious, then the courts would be freed from the usual confines of Parliamentary Sovereignty. In fact, he asserted that the UK courts would be under an obligation to do so. However, older cases such as *Madzimbamuto v Lardner-Burke* suggest that where such a moral dilemma to present itself, the court would uphold Parliamentary Sovereignty at the expense of human rights, adopting a 'thin' construction of rule of law:

If Parliament chose to do [moral or unjust things] the courts could not hold the Act of Parliament invalid."

However, more recent developments such as the Human Rights Act 1998 and the Constitutional Reform Act 2005 seem to suggest that there has been a constitutional shift since the *Madzimbamuto* decision, although modern authorities are relatively slim. At best, modern cases suggest that any such discussion about whether or not the UK courts could – or would – be prepared to challenge the supremacy of Parliament in the event of legislation which runs contrary to human rights, ergo 'thick' rule of law, is likely to remain academic for the foreseeable future.

Conclusion

These might be highly conceptual situations which rarely arise in the normal interaction between citizen and state, but they are still unresolved anomalies which outline some of the challenges in identifying clear definitions and lines of demarcation for the application of rule of law. This harks back to the manner in which the rule of law could be described as an 'essentially contested concept.' It is impossible to clearly define without referring to different concepts which are occasionally contradictory and woolly around the edges. However, this should not preclude an attempt at analysis, nor should it diminish the importance of rule of law as a guiding principle via which executive, judicial, and legislative actions can be critically appraised and assessed. In short, there is no 'correct' or clearly defined definition of the rule of law. One must merely be aware of the different means by which it can be construed, before tailoring it to specific scenarios where appropriate.

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