

Whether the two central doctrines of constitutionalism – ‘the rule of law’ and ‘the separation of powers’ – allow law to control politics

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I. Definitions

Before one can find out whether the statement “the rule of law and the separation of powers allow law to control politics” is correct or not, one has to be clear about what these principles mean exactly.

1. The rule of law

The rule of law is fundamentally important for our understanding of a democratic government and state. The historical development of this essential principle of constitutionalism¹ begins with the theories of the old Greek philosophers like Aristotle². However, to examine the statement above, the focus will be on the doctrines of Albert Venn Dicey, who was a British jurist and constitutional theorist³. His theories are the ones British authors usually refer to and probably the most important ones when it comes to the rule of law in the UK: In Dicey’s opinion, the rule of law means the absolute supremacy of ordinary law and the absence of any arbitrariness. Nobody can be punished without having broken the law⁴. Additionally, everybody is equal before the law – consequently, people who make the law are subject to it, as well. This Dicean meaning of the rule of law was the subject of the case *M v Home Office*⁵. The question here was whether injunctions by the courts are possible against an officer of the crown. Though dismissed in the first instance, Lord Donaldson of Lynton MR said, that “it would be a black day for the rule of law... if the first instance judge has correctly interpreted the law”⁶. Another meaning of this principle is that everybody needs to have the same access to the ordinary

courts⁷. Therefore, the citizens of a state, which honours this cornerstone of constitutionalism, are ruled by law, not by people and arbitrariness⁸. The basic notion of the rule of law is “that no one can exercise power, unless that power has been granted to him by law”⁹. That notion is what is desirable about the rule of law for John Griffith¹⁰. In his opinion, everything what goes beyond that is the pure imagination of “Liberals of the old school ...”¹¹. To sum it up, the rule of law’s purpose is to constrain governmental power. A power which “has the ability to overwhelm any of us with physical force”¹².

2. The separation of powers

The separation of powers is another very important principle of constitutionalism. This doctrine states, that power should not be concentrated in one person or group of people. This would be a threat to any democratic government¹³. Therefore, the three branches of government, the legislative, the executive and the judiciary, ought to be separated and there should be a system of checks and balances to control each other’s activities¹⁴. The independence of the judiciary is particularly essential to the principle of the rule of law¹⁵. The idea of the separation of powers was developed by John Locke and Montesquieu¹⁶. Montesquieu especially insisted on distinguishing between legislative and executive powers and on the independence of the judiciary¹⁷. This principle is tightly bound with the rule of law, as this system of controlling each other makes sure that power, which is vested in members of the government, cannot be used for personal advantage: “The ...

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¹ Bradley/Ewing: (2003) “Constitutional and Administrative Law”. 13th Edition. Harlow, Pearson Education, p 93.

² Bradley (note 1), pp 91-92.

³ A.V. Dicey Encyclopedia: <http://avdiceyencyclopedia.blogspot.de/2009/09/av-dicey-biography.html> (last access: 5th of January 2013).

⁴ Dicey: (1959) “Introduction to the Study of the Law of the Constitution, with Introduction by E. C. S. Wade”, 10th Edition. London. The Macmillan Press Ltd., p 202.

⁵ *M v Home Office* [1992] 2 WLR 73,80, CA.

⁶ *M v Home Office in Fenwick/Phillipson*: (1997) “Sourcebook on

Public Law” London, Cavendish Publishing Ltd., p 69.

⁷ Turpin/Tomkins: (2010); “British Government and the Constitution, Text and Materials” 6th Edition. Cambridge, Cambridge University Press, p 88. Also: Dicey, *ibid.* p 202-203.

⁸ Dicey (note 4), p 202.

⁹ Fenwick (note 6), p 67.

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¹¹ Loughlin: (1992) “Public Law and Political Theory”. New York, Oxford University Press, p 198.

¹² Waldron: (1990) „The Law“ cited in Fenwick (note 6), p 67-68.

¹³ Bradley (note 1), p 78.

¹⁴ Turpin (note 7), pp 103-112.

¹⁵ Bradley (note 1), p 78.

¹⁶ In John Locke’s “Second Treatise of Civil Government” (1690) and Montesquieu’s “The Spirit of the Laws” (1748).

¹⁷ Turpin (note 7), p 103.

rule by men is replaced by the impersonal rule of rules”¹⁸. In the UK, the separation-of-powers-doctrine is not really part of the legal and political system - not in the sense of Locke and Montesquieu¹⁹ - as there are many overlaps between the three branches²⁰. The government (executive), for example, is part of the parliament and therefore part of the legislative. Additionally until the Constitutional Reform Act 2005, judges actually sat in the Upper House of Parliament²¹. Nevertheless, the principle of the separation of powers plays a role in British constitutionalism as it is linked with the rule of law²².

II. The control of law over politics

As already stated above, the separation of powers as a principle of constitutionalism does not really exist in the UK. Consequently, to analyze the relationship between law and politics, one has to concentrate on the Rule of Law.

This doctrine has found its way into many (written) constitutions around the world. The German constitution, for example, states in Art 20 (3): “The law-making body is bound by the constitutional order, the executive and the judiciary are bound by law”²³. Other constitutions, including the Polish and Czech constitutions contain similar provisions²⁴. These formulations indicate that law controls politics. But must it not be taken into account that it is the legislative (and the executive, as it sits in parliament in many countries) that is making the law? Does that not mean that it is actually the other way around, that politics control law? And of course when one thinks about the supremacy of parliament in the UK, that the parliament is not bound by anything and that it can do anything it wants (at least legally)²⁵ – it does not sound like law is ruling us, but rather a group of people.

But those people are elected and the elections follow rules. Art 20 (2) of the German basic law states that all sovereignty is vested in the people. In the UK the sovereign is the –elected- parliament. When one looks closely, one does not find a big difference between the two systems. The parliament – which is composed of ordinary people, who were democratically elected by the citizens, – may make the law, but it does not control it, as it follows rules in doing so. Legally, it might not be bound by anything, and if it wishes it could abandon the rule of law. But politically it is bound by that principle, as it could not survive if it would ignore this basic doctrine of constitutionalism.

Additionally, under the Rule of Law and under the separation-of-powers-doctrine, the judiciary needs to be independent. It must have the “independence in order to apply the law without fear or favour”²⁶, which again ensures, that politics are not to interfere with enforcing the law. In conclusion, law sets a framework in which politics operate. In the conception of law as custom, that does not mean law establishes the political order²⁷. In the conception of law as right, however, politics is regarded as “dangerous and potentially destructive”²⁸ and law is needed to restrain political power to ensure that the power is not abused²⁹.

As a result, just because politicians make the law (statutes), it does not mean they control it completely. Politicians have to honour the law in order to make politics. This is insured by the rule of law³⁰. And therefore this fundamental principle of constitutionalism together with the separation-of-powers-doctrine allows law to control politics. Or to say it with the words of *Immanuel Kant*: “[P]olitics must bend the knee before right”³¹.

¹⁸ Loughlin: (2000) “Sword and Scales. An Examination of the Relationship between Law and Politics” Oxford, Hart Publishing, pp 3-4; Loughlin (note 11), p 183.

¹⁹ Turpin (note 7), pp 103-106.

²⁰ Fenwick (note 6), p.70.

²¹ Turpin (note 7), p 125.

²² Loughlin (note 18), pp3-4.

²³ www.dejure.org/gesetze/GG/20.html (translated by author).

²⁴ Loughlin (note 18), pp 3-4.

²⁵ Dicey (note 4), pp 39-41.

²⁶ Loughlin (note 18), p 185.

²⁷ Loughlin (note 18), p 218.

²⁸ Loughlin (note 18), p 223.

²⁹ Loughlin (note 18), p 185.

³⁰ See above on page 1.

³¹ Cited in: Loughlin (note 18), p 224.