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# Regulation by Law and Regulation by Government in the Rule of Law and the Technical Theory of Jurisprudence

## *1. Exposition*

The law is law and policy is policy. In realistic sense, what the law and the policy is almost changing day in day out. Nowadays, all over the world, a modern State is a *political* state. Public policies are prevailing *decisions* mostly of a state regarding those activities that societies will undertake, permit, or prohibit. These policies are characteristically made explicit in declarations, laws, regulations and judicial decisions: but they are also, and perhaps more significantly, implicit in *what people do*. The process through which the public activities of people are directed is public administration - which this becomes a realistic expression of public policy. This complex directing process of society not only includes the regulations of governments, but, in a *functional sense*, extends to the public-purpose activities of non-governmental organizations, often undertaken in association with government and sometimes in opposition to it. For any matter of social concern to become a focus for direction of public policy and polity, there must be some minimal level of *social consensus, not* only with respect to the *problematic conditions*, but also with respect to *social goals*.

And, also in realistic sense, law is *what officials do, or whatever is done officially*.[1] This doing of something about disputes, this doing of it reasonably, is the business of the law "And the people who have the doing of it in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are *officials of the law. What these officials do about disputes* is, to my mind, the law itself."[2]

For a large mass of lawyers a minimal level of social consensus concerning law and public administration is the *rule of law*, the *true law*, the *legality*. For instance, the report of the International Commission of Jurists (New Delhi, 1959) emphasised a positive aspect of the rule of law by arguing that is depends not only on the provision of adequate safeguards against abuse

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[1] *R. Pound*: Fifty Years of Jurisprudence. 51. Harvard Law Review, 74 (1938) p. 800.

[2] *K. Lewellyn*: The Bramble Bush. (1930), p. 3.

of power but also on the existence of effective government capable of maintaining law and order and of achieving such social and economic conditions as will ensure a reasonable standard of economic security, social welfare and education for the mass of the people. The report claims in this connection, that the legislature has a positive role, that delegated legislation may be found to be necessary, but also that it is essential that there should be certain limitations on the legislative power, that the acts of the executive which directly and injuriously affect the person or property or rights of the individual should be subject to review either by a specialised system of administrative courts or by the ordinary courts, that citizens who suffer injury through an illegal act of the executive should have an adequate remedy against the state, that decisions of tribunals should be subject to review by the courts, and that the executive should give reasons for its decisions.[3]

What is the existent *form* of the above-mentiones "adequate remedy"? *Wade* says, everyone knows that the British Constitution is founded on the rule of law, but the more closely we inspect this sacred conception the more elusive we find it. Its simplest meaning is that everything must be done according to law, but in that sense it gives little comfort unless it also means that the law must not give the government too much power.[4] Government under the rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts of authority must be justified by law, for if the law is wide enough it can justify a dictatorship based on the tyrannical but perfectly legal principle *quod principi placuit legis habet vigorem*. The rule of law requires something further. Powers must first be approved by Parliament, and must then be granted by Parliament within definable limits.[5]

Legislative power belongs to the Parliament (or to the Congress in USA), and to the Parliament (or Congress) alone. And, of course, legislative power encompasses all law-making. It is well established (perhaps) that as a matter of constitutional principle the ligislative power cannot be delegated.[6] But a government usually, makes different legal norms. In a rather large number the actions of a government are law-making actions. And, in a sociological sense, factually the courts also make rules for legal practice. And, in the practice, the all

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[3] The Rule of Law in a Free Society, published by the Commission, and see *N.S. Marsh*: The Rule of Law as a Supra-National Concept. In: Oxford Essays in Jurisprudence. ed. by A.G.Guest., Oxford Univ.Press, (1961)

[4] *H.W.R.Wade*: Administrative Law. Oxford, Clarendon Law Series, (1961), p. 6.

[5] *H.W.R. Wade*: ibid. p. 37.

[6] See, for instance, *J. Dickinson*: Administrative Justice and the Supremacy of Law in the United States. Nesw York, (1959), chapter IV., *R. Pound*: The Spirit of the Common Law. (1921)., *W.I. Jennings*: The Law and the Constitution, 5th ed., (1959)., *E.B. Prettyman*: Trial by Agency. The Virginia Law Review Association, (1959)., *M. Dimock*: Law and Dynamic Administration. New York, (1980)., *D.H. Rosembloom - J.D. Carroll*: Toward Constitutional Competence: A Casebook for Public Administrators. Englewood Cliff. NJ., (1990), chapter I.

kind of regulations are valid.[7] The law requires a hearing in an adjudication. It requires a real hearing of both side of an iusse, not a meaningless formalism. The law does not sanction the combination of the roles of prosecutor and judge in one person. There is also the problem created by the formulation of policies beyond, or even contrary to, statutes. There is the major problem concerning findings of *facts* and conclusions of law. The law requires that findings of facts be upon evidence, and that conclusions of law be upon these findings. It does not countenance preconception or unsupported assumptions as substitutes for hard facts spread upon the record. It forbids findings fitted to a predetermined results or to a cause.[8] Institutionally, the increase in *executive power* has manifested itself in the growth of administrative authorities, in the rise of the administrative process. Legally, the result has been the development of public administration law. And in this development is an other chapter of the development of judge made law.

The theoretical answer comes from the idea of Rule of Law. But the rules of the *Rule of Law* we cannot find in the text of a constitution, an Act, or other formal source of law. Thus, first of all, it is a *doctrine* of jurisprudence or a specific thesis of legal argumentation. It is a *real* doctrine in that case when it is applied by practice. Without practical application the rules of the Rule of Law are *theoretical* tenets. In this way, the problem of the Rule of Law may be a practical and theoretical question.

## *2. Rule of Law*

The range of interpretation of the *principle* Rule of Law is the functioning of the *modern political state*. In the modern political state the powers are separated, i.e. there is a *legislative*, an *executive*, and a *judicial* power.

*C. Montesquieu* defines the doctrine of the separation of powers as a condition of *liberty*. The *legislative* power, i.e. the Parliament has the right to legislate. The *judicial* power is not legislative. The *executive* power is neither legislative nor judicial, but the executor of the public resolutions. There would be an end of everything, were the same man or body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[9]

In this triangle supremacy rests with the legislation. *Rousseau's* idea was the infallibility of the *lègislateur* of the *volontè gènèrale*. Montesquieu's tenet was the rationality of the state. The highest rule for political conduct is not regulated by a moral standard but solely by *raison d'ètat*. Montesquieu's

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[7] Compare, *Kovács István*: A törvény és törvényerejű rendelet problematikájához (I. Kovács Sur la problématique de la loi et du décret-loi), Állam- és Jogtudomány, Vol. XVI. N.3. (1973)

[8] See Judge *Prettyman*, ibid, p. 7.

[9] See *C Montesquieu*: The Spirit of the Laws. Hafner's edition, p. 152.

doctrine of the separation of powers included also a comprehension of the significance of economic equality. According to him, *economic eguality* is a condition of human *freedom*. Only in a relatively equal society will the separation of power be able to function as a guarantee for human *freedom* and *security*.[10]

At the beginning of the modern political state was another typical doctrine *laissez faire*, an argumentation of industrialists against landowners, which defined *laissez faire* as a condition of *liberty*. But in this sense the government is a necessary *evil*, and law is an *infraction* of liberty.[11] Laissez faire policy, of course, was liberty of contract and freedom for employers bent on maximising profits in the early industrial age.

The first classic of the Rule of Law was *Albert Venn Dicey*. I think that in 1885, when Dicey published his famous "*The Law of the Constitution*". a large number of lawyers had a private opinion about Montesquieu's tenet on the separation of powers. The American Constitution utilized this distribution, but contained a lot of other principles.

The American Constitution was rather similar to the English one.[12] Both contained supports from *natural law*. The constitutional interpretation accepted the importance of natural, codified and common law, i.e. the higher law background of constitutional law was supposed to be in conformity with natural and common law. Actually the codified law created by legislative power was only a small part of American and English law.

The American or English judge, as is well-know, was not a simple law-applier. In these countries, however, to modify constitution was difficult and infrequent. In the US the *Supreme Court* did interpret the Constitution in accordance with *policy*,[13] i.e. judicial reason was (and is) subordinated to

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[10] *L.D. Eriksson*: Repudiating Montesquieu! Helsinki, (1990) p. 2.

[11] *J. Stone*: Human Law and Human Justice. Stanford University Press, (1965). p. 120.

[12] This is an interesting illustration of the point which Prof. Wade make: "It is always hard to know which note one should strike louder: should we stress how similar we are, or how different we are? At the outset one feels most tempted to stress differences: our English doctrines of parliamentary sovereignty and ministerial responsibility, which profoundly affect our administrative law, are quite strange to American minds. You have a written constitution containing express guarantees of civil rights. and a legislature which cannot tamper with these guaratees except under special safeguards. We have an omnipotent Parliament which, if it liked, could repeal Magna Charta and the Bill of Rights and the Habeas Corpus Acts tomorrow - and by simple majorities. Not only do we have no entrenched rights but it seems that we cannot get them even if we want them. For nothing can prevent any statute of any description being repealed by this unbridled power which Parliament has. Then there is ministerial responsibility to Parliament. Again and again discussion of our divergencies comes back to this doctrine, which greatly affects the whole atmosphere in which administration is conducted." *H.W.R. Wade*: Towards Administrative Justice. The University of Michigan Press (1963). p. 3.

[13] Compare *M. Spabr*: When the Supreme Court Subordinates Judicial Reason to Legislation. In: Rational Decision, Nomos VII. New York, (1964), p. 162.

governmental-political considerations, and from another point of view, making *judicial legislation*. And, last but not least, the *executive* power made also *legal rules*, for solving public goals. At the end of the 19th century the *separation of powers was not a realistic fact* but only a theoretical tenet. As far as *laissez faire* is concerned, it was under a cloud.

*A. V. Dicey* defines the Rule of Law as procedural regularity of equal liberty under law. The *Rule of Law* or supremacy of law comes from the English constitution. "That 'rule of law' then, which forms a fundamental priciple of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else."[14]

Another meaning of the rule of law, says Dicey, is that "when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[15] Every man is subject to ordinary law administered by ordinary tribunals.

The third meaning of the rule of law, according to Dicey, is that whereas in many countries private rights such as freedom from arrest are sought to be guarateed by a statement in a written constitution of the general principles relating thereto, with us these rights are the result of court decision in particular cases which have actually arisen.[16] "The 'rule of law' lastly, may be used as a formula for expressing the fact that with us the law of the constitution, 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; that, in short the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; this the constitution is the result of the ordinary law of the land."[17]

The equality or equal liberty before the law can be given definite as in the procedural guarantees of Magna Carta, and the original sense of "*due process of law*".

The Rule of Law as an *individualistic conception of liberty* is characteristic in the theory of Prof. F.A. Hayek. The real function of law must be the *true type of law*. "Nothing distinguishes more clearly conditions in a free

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[14] *A.V. Dicey*: The Law of the Constitution. 10th ed., London, (1960), p. 202.

[15] *A.V. Dicey*: ibid, p. 193.

[16] *A.V. Dicey*: ibid, p. 195.

[17] *A.V. Dicey*: ibid, p. 203.

country from those in a country under arbitrary government than the observance in the former of the great principles known as the rule of law. Stripped of all technicalities this means that government in all its actions is bound by rules fixes and announced beforehand - rules which make it possible to foresee with fair certainly how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[18]

For Hayek, law contained two types of norms, i.e. *rules of just conduct*, like private law and criminal law, and *rules of organisations*. The real territory of the *rule of law* is rules of just conduct. The legislative organs have authority to amend existing judgedeclared rules where, owing to a change of economic background, they no longer reflect community standards of corrective and distributive justice. But they have no authority to make selective redistributions of resources in the interests of particular groups. A governmental legislation for private sphere, private law, violates the rule of law. *The true law grows and is not made.*

In *Lon L. Fuller*'s view the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order. "Though the principles of legality are in large measure interdependent, in distinguishing law from managerial direction the key principle is that I have described as 'congruence between official action and declared rule'. Surely the very essence of the Rule of Law is that in acting upon the citizen. A government will faithfully apply rules previously declared as those to be followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. Applying rules faithfully implies, in turn, that rules will take the form of general declarations, ...law furnishes a base line for self-directed action, not a detailed set of instructions for accomplishing specific objects.

The twin principles of generality and of faithful adherence by government to its own declared rules cannot be viewed as offering mere counsels of expediency."[19]

Fuller's interpretation of the Rule of Law is connected with his conception about *morality of law*. The criteria of the morality of law, or the principles of *legality* are as follows: the requirements of generality, promulgation, non-retroactivity of laws, clarity, non-contradictions in the law, the possibilities of compliance, the constancy through time, and the congruance between official action and declared rule. And, the internal morality of law is not and cannot be a morality appropriate for every kind of governmental action. The procedure normally involves a series of accomodations and compromises among those to be affected by the final decision.

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[18] *F.A. Hayek*: The Road to Serfdom. (1946), p. 54.

[19] *L.L. Fuller*: The Morality of Law. (1969), p. 209-210.

The above very short survey of the Rule of Law touched only one side of the problem. On the idea of the Rule of Law different authors, in rather large numbers, polemize with one another.

The other side of the problem is the *applied* rule of law doctrine. Of course, this is also changing.[20]

Rule of Law, as an idea and as a practical doctrine is characteristic only in the world of English and American law. I think that the Rule of Law first of all is a specific, both ideological and practical tenet of English and American jurisprudence. As *Marsh* says: it is not more than a summary of the main principles of English constitutional law.[21] It is *not a general theory of law*, but a presentation or interpretation of a *specific legal order*, i.e. of the Anglo-American legal order. From a comparison of all phenomena which go under the name of English and American law, it seeks to discover the nature of law itself, to determine its structure and its typical forms, but is independent of the changing content which it exhibits at different times and among different peoples. In this manner the rule of law derives the general principles by means of which enacted law, adjudicative law, law made by contracts, and customary law can be interpreted and comprehended.

The *idea* of the Rule of Law is one way of attacking *legal positivism*. Legal positivism is undoubtedly one kind of general theory of law. If somebody critized one sort of general theory of law, well, in that case it is not quite sure that he is also creator or another kind of general theory of law. That is, attacking positivism does not give any scientific rank for the Rule of Law, but it does not damage its theoretical positions either. Rule of Law is a *thesis* of jurisprudence or legal sciences and a *doctrine* of law in the English and American legal practice and political debate.

### *3. Technical Theory of Jurisprudence*

*Law* can be interpreted in terms of what people think is a legal rule and order, then in terms of what is the meaning of a lawfully created legal norm, then with what content of meaning the judicial and other official organs apply the rules as well as from different other professional aspects. The result - if we wish to define the law - depends on in what kind of range of interpretation we tried to define the law.

For us, the point of departure is the realm of *positive law*. A legal norm or rule is *positive* in that case when rule *is applied* in practice or *may be applied* in practice. Norm is positive because it is *effectually valid* by the practice. Positivity of a norm is a question of *fact*. That which is applied in practice, that is the positive law.

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[20] See, for instance, *E.C.S. Wade*: Introduction to the Study of the Law of the Constitution. In: *A.V. Dicey*: The Law of the Constitution. (1960), p. cxiii - cxxxv.

[21] *N.S. Marsh*: ibid, p. 223.

In the modern political state the legislation is a *political operation*. The legislative organs are political organs. The Parliament, the Congress, the government are political organs. But the government is a law-maker and law applying organ. In the modern political state the legislation is a specific technique of politics.

*Application of a rule* is always a *technical operation*. Without some operations we cannot apply the rules. In the world of law, the operations are *factually* characteristic. Creating and applying the law, and human behavior with legal relavance, have specific operations, specific technique. The technique of the legislative, judicial and other law applying organs is their procedure. The citizens'conduct as a technique is not a procedure but simply a technique. The functioning of law is the functioning of a specific technique.

The *Technical Theory of Jurisprudence* establishes those general principles by means of which the functioning of any legal order can be comprehended. It anwsers the question of *what the actually functioning law is*, not what it ought to be. The latter question is one of politics or ideologists, while the technical theory of law is a legal science.

The regularity of the practical funkctioning of law is a normal technique, an applied realistic solution. To ascertain and generalize the regularities of this technique constitutes the technical theory of jurisprudence.

Some general methodological rules that can be related to the legal order as rule-standards are as follows:

a) The positive law can be constructed as a specific social technique. In this respect the paramount theoretical interpretability of law is that it is a functioning social system of rule-standards. Any tenet of a legal character which fails to function in reality can only be interpreted as a lawrelated principle, or legal ideology.

b) The social bases of the functioning of law is the credibility of its hypotheses, in a given case independently of the rightness, truefulness, justness, untruefulness, etc. that may be associated with it, which are and will remain areas of political, moralistic, economic, religious and other interpretation.

c) The legal system or law as a system of norms is an induced form. In this sense as a basis of normativity, it is perforce a hypothesis. This shows itself best in legislation as an operation of the technology process. During the creation of a legal norm, the validity, the usefulness and effectuality of norm is pure assumption.

d) The actual functioning of law may be factually interpreted, irrespective of the fact that only data on legal conflict-situations are at our disposal. The law as fact: this is legal practice. This law can be interpreted in time and space. The practice can be appropriately typified by the legislation and the law case. A principal technological feature of the legal norm is that it can be multiplied to various kinds of law-suits. To distinguish between "general". "typical", "specific" and "individual" cases, that is only a joke with philosophical

categories. A construction of a legal norm may be "general" and "special", "typical" and "individual", perhaps. A principal feature of the law cases is that they are unique and irreversible.

e) The law as a norm - it is necessarily a defined norm. It is indifferent from this aspect that it is codified law or judiciary law. From a technical point of view, here the main question is only whether we have a valid legal rule for practice or not. The legal practice positivates the rules, both codified and non-codified ones.

f) Modern law - or the law functioning in the modern political state - is defined first and foremost by the state, by the legislative power, which constitutes one system, i.e. the system of legislation. Law in the modern state constitutes only one paradigm-system, which is the valid law.

g) Modern law - as a system of rule-standards primarily defined by legislation is based on one axiom-system only, which legal practice is used. In the world of modern law we cannot find a classical form of customary law. The judge-declared law is virtually a continuation of the sporadicism and individualism of medieval law traditions. Actually, in the countries of judge-declared law, the jurisdiction is guided by legal norms of legislation and decisions of higher law-courts. In such a way the centraliyation is effectively unified. From a technical point of view it is not a main question that from which sources of positive law this unity of the axiom-system of law has arisen.

h) In the definition of the generally known and unknown parameters of law as well as in the choice of legal-paradigms, the governmental bodies play a dominant role. It is in the manner of form and not that of content that the law delimits government of a state. For the governmental legislative power can alter the content of legal rules at any time and, hence, the change of laws is connected with the change of government in modern political states. This, however, involves that in the modern political state the legislature and executive tend to come very close to each other.

i) Positive law - as an actually functioning system of rules - does not originate exclusively from a central etatistic idea, but it is much rather a self-generating phenomenon. It generates from itself as a fact. This fact is the law-creating act and the law suit as an act. The effect or "imprint" of a temporally earlier act of legislative and executive will ever be left upon government and legal order, and will, among others, delimit one of the finalities of the actions of government. This is a certain continuity in time and space, but it is not sure that it is a continuous rationality. And this applies also, to some degree, to earlier law cases and jurisdictions. As opposed to this, the interpretation of modern law tends to argue with "rationalities". On closer inspection the majority of these appears as evidence or feeds on axiom-like bases.

j) The rules of positive law are reproducible and multiplible. The time and space dimension of a legal norm is artifically constructed, such as legal force in time and territory, i.e. it is a prescription of norm. Realistically a legal norm is non-defined in space and time: that is law in force. The world of law consists of facts, rules and interpretations. Law-suit as a situation can be defined as mass of

facts. The situation is unique and irreproducible. Only similar situations can arise, and not identical ones.

Interpretation of law can be defined as a specific technical operation with *facts, rules and principles*. *Functioning* of law is by interpretation. This is evident because the situation and norm are different in space and time. The interpretation of determinate character is mostly worked out in the *professional lawyer's sphere* as the interpretation by legislation and by jurisdiction and by other application of law.

In terms of operations, the lawyer does not interpret directly principles of norms, but expounds rather situations of decision and judgments or ruling, that is "rationalizes" by means of norms and principles. By means of such principles like "rightness", "justfulness", "freedom", "legality", "truthfulness", "democratism", "equality before the law", "fairness", "rule of law" etc. as to the creation of legal norms - and by means of norms - in cases of jurisdiction and other law-application - which people *presuppose* to be right and just, which warrant equality before the law, justful, freedom, legal, which are fair and are equal to other similar principles, that is, they are equal to other similar principles, that is, they are *lawful*. Significantly, these concepts, principles and rules not only hypothesize and symbolize reality in some manner, but the technical operations and/or manipulations with them somehow generate it as well. Or do not, we may add.

What can guarantee the *functioning* of the governmental legislation and judge-declared rules if at the passing of decision neither legislation nor jurisdiction has at its disposal an exact way of evidence? Or put it differently, what is the permissible margin of error in these situations?

A realistic answer may be that it is society' recipiency at a given or concrete situation determined in timespace dimensions, that is the credibility by society of the legislator's and the law-applier's act. Social credibility usually comes about not through the persuasive force of sem kind of absolute and logically sound deduction. A legal decision may meet a general social acceptance even on purely emotional grounds. The bases of social credibility may be varied, and may change in a variety of ways. This may be rationality, a correspondence with different principles and ideas, the manner of decision-making, confidence in the correctness or necessity of the procedure, belief, respect of authority, expectation in future, feeling of intimidation, defencelessness, coercion, terror and so on. Credibility cannot be traced back always to the same cause, or the same type of group of causes.

In other words: the functioning capacity of the legal norms relies upon its social credibility as a legal norm. Essentially, this is on the one hand the assumption that legal norm contains a satisfactory, acceptable rule, and on the other hand that in case of a violation of the rule the law-courts and other law-applying organs will indeed take measures against anyone who fails to observe the norm. The functioning capacity of legal norm, therefore, lies in its *usability as a motivational social technique and the coercive power of the official jurisdiction*. The legal technique of functioning is thus a unity of persuation and

coercion, i,e. the combination of two kinds of technique. This unity is not a theoretical question, but in full measure a pragmatic one, which can be solved only in a concrete situation. In the modern political state the motivation and the coercion are basic practical questions of legislation and all techniques of law in function.

### *4. On some limits of legislation*

There appear to be three major areas of interest in legislation today. First, there is the question of how the major governmental structures - state, local, governmental and non-governmental - should be legislative authorities. Second, there is a renewed interest in reexamining the traditional theory of the relationship between politics and legislation, and reevaluating the role of the legislator in the formation of policy. Third, there is a growing awareness that there is a "human aspect" to legislation, that legislation is concerned with the behaviors of human beings.

*Legislation* is the *normal activity of a legislator*. Legislative bodies are generally the governmental bodies, i.e. the Parliament, the government, and the. local bodies. In the modern state, under the doctrine of separation of powers, administrative agencies must not be permitted to exercies legislative functions.

The communist theory of law does not accept separation of powers, and in the communist dictatorships the legislative and executive powers are fused. The doctrine that the legislative power, being a delegated power, cannot be re-delegated is closely allied with the doctrine of separation of powers. But at present, in all kinds of modern states including of course communist dictatorships, the executive power actually esercise law-making, as delegated legislation.

All legislative organs have some *ultimate legal bases* in the *constitution*. Legislative bodies form written or codified law. In *J. Bentham*'s opinion, only written law deserves being called law. because it alone possesses a certain manifest foundation and certainty. But in the theory of Rule of Law we can find another thesis by *A. V. Dicey*, namely, that *the constitution is not the source but the consequence of the right of individuals*. According to this, the rights of individuals exist, and a higher legislative power - the parliament - only explain that, in a right form.

What is the role of parliament in this context, and what is the reason of sovereignty? Which is stronger: the legislator's law, or the doctrine of rule of law? Or, is the sovereignty of a parliament compatible with the rule of law? The answer may be the *equality supposed*, i.e., individuum and parliament are under the same conditions, moreover, they are "*equal*". I am afraid that at the present time, this is an *absurdity* both theoretically and effectively. Parliament has a legal supremacy of the law, while the individual has not. Parliament has a right to legislate, the individual has not.

There is another aspect of the question in *Hayek's* thesis: *the true law grows and is not made*, rules of just conduct are not really a territory of the legislator's law. It appears on the basis of fact that the division of norms into "law proper" and "law of organization" is a nice theoretical aspect. But at present to separate them in practice is rather difficult. In a certain sense, here lies the question of *what law is*.

*Law* as a norm is rule, a *model* of human behaviour, primarily for the subjects of law, and a *measure* for conduct, primarily for the law applying organs, and it means *both* for the legislators and thus, it is obligatory.

The law, for instance, in the last century in England, America and Hungary, was neither codified law, the legislator's law, nor any other positive law; for this could not test its own validity. It protects the natural right of life, liberty and property: written laws are usually tuned to local customs and institutions. In that law. certainly, the morality, the practical rationality, the customs and traditions could play an essential role. Then, the norms, the principles and legal doctrines were possible as equivalents to each other. In that situation, the doctrine of rule of law could be used easily in practice: it may be a model or guide for the legislator, and a measure of law for judicial review.

Nowadays the codified law is typical in Hungary, and legislator's law is rather characteristic, for instance, of England and US, especially in *public administration*. The last sixty years have seen a growth of public affairs and expansion of public administration. Many regulations deal with matters such as the safety in factories, environmental protection, energy-supply, safety of consumer goods, regulation of building, of road traffic and many similar matters. These matters are regulated by Acts, orders, statutory instruments, public bills which become law, bye-laws, etc. In administrative law sometimes it is exceedingly difficult to distinguish the "rules of just conduct" from "law of organization", as suggested by Prof. *Hayek*. Therefore his conception of Rule of Law is suspicious, i.e., its validity in administrative law and public administration is dubious. And if we add that administrative law makes up the substantial part of the law, well then, the position of the conception does not fare any better.

A counter-argument is given by Prof. *Dicey* (The Law of the Constitution, Appendix 2), as he writes that (the French), administrative law is fundamentally inconsistent with the Rule of Law.

*Jurisdiction* may be an other aspect of interpretation of the rule of law. Jurisdiction is the *normal activity* of an independent court. Equality before the law can be given as a procedural guarantee, and the original sense of "*the rules of natural justice*" in England, and what in US is called "*the due process of law*". Prof. *Fuller* claims that where courts are applied as a means of enforcing congruence between official action and declared rule, due process of law is a useful instrument.

But opinions do differ. In US. for example, the legislative bodies have the right to determine the structure of new administrative organizations. But in framing the basic legislation the organizators must attempt to predict what the courts will do when they review the activities of the new organization. That is to

way, as a program may be illegal in any form, it is considered by the courts lest private individuals should not be deprived of their life, liberty, or property without due process of law. Others might claim that till the end of 1930's the US Supreme Court was generally dominated by a majority of justices to whom "due process of law" meant something akin to *laissez faire*.

Jurisdiction is neither legislation not public administration. But, under the Rule of Law, judicial legislation has completed, corrected, modified legal norms enacted by legislative organs, and, first of all private law. As public law is concerned, it is a massive fact of English and American law that officials are liable before the ordinary courts, and that judicial review of administrative action is undertaken by the ordinary courts applying ordinary remedies.

And now, let's come back to *Fuller*: "the very essence of the rule of law... a government will faithfully apply rules *previously declared* as those to be followed by the citiyen and as being determinative of his rights and duties. "Well, when the court modifies common-law rules, it does not apply faithfully the rules previously declared as those to be followed by the citizen. And what is more, the citizen will learn his rights and duties from the judicial decision. That is to way, judicial legislation is typically retroactive. It does not matter, it is not opposite to the Rule of Law. The Constitution of US *forbids* to pass *ex post facto* law. But a judicial decision cannot be regarded as ex post facto law, because the *ratio decidendi* in the future will be determinative.(!)

The Rule of Law-ideal constitutes some limits for legislation. Legality, moral qualities, freedom, equality as equal liberty before the law, equal application of law. truthful law, fairness, regularity, i.e. categories with which Rule of Law operates, are well-know as components of other legal conceptions. Rule of law as a principle or theory for legislation is too general, like some kind of an outline. Some arguments of Rule of Law one can find for instance at Aristotele, in the Roman law, or in the old Hungarian law. So the juristic essence of the rule of law is known to lawyers all over the world. But the Rule of Law as a doctrine is valid, at the very most, in the countries of common law (i.e. in these countries that is a real legal technique).

The Rule of Law has certainly a small or second-hand importance as legal theory of legislation. Its theses are plausible, its methodology is uncertain, eclectical. The rule of law as a legal technique is effective and - as a technique - is very important, of course, first of all in the common law countries. In this sense the rule of law is a measure or means of *legal policy*. Rule of Law is, certainly, a selective view of society, law politics, morality, legislation, jurisdiction, etc. for this reason it may be a successful piece of English-American legal-political *praxis*. Rule of Law is excellent food for a member of parliament in opposition, for advocates and legal advisors, judges and for clever scholars.

From the aspect of the Technical Theory of Jurisprudence the Rule of Law as a legal technique is an excellent but *old-fashioned* technique. Since, from the seventeenth century on, *authoritarian* governments have existed next to *democratic* ones, and since in the twentieth century *totalitarian* governments have existed next to *non-totalitarian* ones, the *claim of all these*

*systems to legality and rationality must be disputable. The diversity* of democratic rationalization is also evident in the question of legislation, law and justification. Its internal and external conditions hardly correspond to the Rule of Law ideal. Legality or rule of law is connected with *international relations*.

It is also connected with *human aspect*. This does not imply at present time, what is good or truthful for the people, but what *is accepted* or what *may be accepted* by the people. In view of the technical theory of jurisprudence, the main limitation for legislation is *credibility*. Credibility is a *fact* and is not a theoretical supposition. Positive law as a generally accepted law is not adequate with the law-making decisions of legislature and the law is not in any case what the judge decides.

In its theoretical foundations the Rule of Law is perhaps natural law, but directly it is constitutionality, what proceeds from the Constitution. But it is not enough to say that citizens are ruled by the law, and by the law alone, which comes from the constitution: for that is true even of the most Power State. The constitutions now in force, however, are political ones. The constitution can scarcely be considered as a "*universal logos*". Nor can it be stated that the Constitution is identical with the axiom-system of the positive law or law in force.

The conception of the Constitution as an absolute is absurd of *legal myth*. Nor can be derived from the Constitution some rule of law as a universal logos. It should be kept in mind that all norms are *equally* binding: the Constitution is no more binding than the act, and the act is no more binding than the bye-laws.

The human aspect of law is its credibility. Law is a kind of rule which the people are willing to accept as a legal norm. The best technique of the preparation and creation of law is when the legislator and the law-applying organs, through their decisions, succeed in reaching a consensus or respect of the people or the nation involved, i.e. in earning the *nation's trust*. And this is by no means simple.

It is a central aim in all forms of democracy, and a fancied one in dictatorships. Democracies and dictatorships, both weak and strong, do crop up time and again. Yet it should not be forgotten that people are prone to clap now for a democracy, now for a dictator, at least temporarily. And in either case it is what people accept as law will eventually prevail and function. For there is no "general will" in the creation of law, still there really is something akin to it in its acceptance. The Greek philosopher, Protagora, stated that "man is the measure of all things". A norm that becomes positive law is usually the one that is universally credible as a legal rule to the subjects. The law is law.