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◆ TBA BRIEFINGS ◆

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Defining Rule of Law



By Jim Rankin

"Omnes legum servi sumus ut liberi esse possimus"

Marcus Tullius Cicero, *Oratio Pro A. Cluentio Habito*, 66 B.C.

Some months ago, I was engaged in a conversation concerning a legal dispute between an officer of the executive branch of government and a non-governmental faction challenging the government's reading of a statute. The court ruled against the government, finding the government had read the statute in question incorrectly. In subsequent discussions, someone indicated he had looked up the statute and though it was ambiguous; he thought it could be read consistently with the government's position.

Others disagreed. Another person asked: isn't it the job of the government to read statutes and enforce the legislature's or congress's purpose in passing the law? Someone said that is the court's job. Another person asked whether legislative intent should be considered, especially where the statute's wording was ambiguous? The discussion concluded with someone stating—"What about the rule of law?" I thought, what did the phrase "rule of law" mean in a situation such as that which we were discussing?

The conversation made me curious and I began to research the phrase "rule of law." I found that others are also confused. In searching the internet, I found an online resource prepared by the American Bar Association entitled: "Dialogue on the Rule of Law." ABA Div. for Public Education (2008). The "Dialogue" is intended for use in civics courses and with community groups. Though the resource is limited, I found it helpful. The opening of Part I of the Dialogue underscores the problem.

"The rule of law is a term that is often used but difficult to define. A frequently heard saying is that the rule of law means the government of law, not men. But what is meant by "a government of law, not men?" Aren't laws made by men and women in their roles as legislator? Don't men and women enforce the law as police officers or interpret the law as judges? And don't all of us choose to follow, or not to follow, the law as we go about our daily lives? How does the rule of law exist independently from the people who make, interpret it, and live it?"

The Dialogue uses several important quotations from notable Americans in order to illuminate certain aspects of law. Social contract is mentioned as is judicial independence. Also mentioned are right to counsel, justice, openness and transparency, predictable results, and protection of certain basic rights. Some of the noted aspects resonated with me more powerfully than others. With further research, I found these aspects are recognized in other countries as well.

For example, the noted Anglo-Israeli positivist scholar Joseph Raz explains the rule of law as follows:

"The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which is it to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man... 'The rule of law' means literally what it says: the rule of

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the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it had come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase ‘government by the law and not by men.’ No sooner does one use these formulae than their obscurity becomes evident.”

Raz mentions eight basic principles: All laws should be prospective, open and clear; laws should be relatively stable; the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; the independence of the judiciary must be guaranteed; the principles of natural justice must be observed; the courts should have review powers over the

implementation of the other principles; the courts should be easily accessible; and the discretion of the crime preventing agencies should not be allowed to pervert the law.

Some years ago an Englishman wrote an essay directly addressing the subject. Michael Oakeshott concludes his essay entitled “The Rule of Law,” with these words:

“The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.”

Michael Oakeshott, *On History, and Other Essays*, (1983).

Michael Oakeshott (1901 – 1990), was a humble Oxbridge don later appointed professor of political science at the London School of Economics. Oakeshott’s meaning, above, and in all his writings must be teased

statement on the rule of law emphasizes non purposiveness. There is, of course, authority in a civil association. The authority must sustain order and keep the agreed upon rules in good repair, making adjustments and revisions to the rules when necessary. The authority, says Oakeshott, must be authentic. He had in mind a democratically elected parliament.

Oakeshott did not favor rationalist standards for society, such as bills of right and constitutional courts. He thought judicial review was somehow incompatible with democracy. Nevertheless, he praised the West’s achievement of individuality while regretting the tendency of modern man to put comfort, security, and equality ahead of freedom.

Oakeshott distrusted abstractions, leading him to criticize America’s Declaration of Independence. Abstract principles, argued Oakeshott, are post script, not prefaces. Indeed, abstractions are often merely ideological slogans inspired by known history, but here, I think Oakeshott is wrong. Some abstraction is required in order to inculcate into the public consciousness ethical postulates. In debating Stephen Douglas, Abraham Lincoln argued that the authors of the Declaration meant to set up a “structural maxim” for a free society which might be constructively referenced, constantly worked for, and though never perfectly achieved, at least approximated.¹ Lincoln was right; even abstractions—especially when they are in print—matter.

Other great jurisprudential minds have advanced important ideas: A.V. Dicey, Lon L. Fuller, H. L. A. Hart, Hon. Richard Posner, and Ronald Dworkin to name a few of the recent commentators.

Quite some time after the court ruling described above, I learned that the



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from his times and experiences—the period between the world wars followed by the excesses of European fascism and Nazism, Stalinism, and British socialism.

O a k e s h o t t disdained what he referred to as “enterprise associations” either within society or as a rule for the whole of society. Oakeshott viewed enterprise associations as teleocratic programs where the end is more important than the means. Oakeshott preferred what he called a civil association where members are joined only by their agreement to a set of rules. This is why his

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legislature clarified the statute which was the subject of the discussion. It occurred to me that this is how the system is supposed to work. The “rule of law” might be seen as a conversational exchange among entities evolved from traditional methods of exercising power. The conversation is foundationally based upon traditional values that lend themselves to peace within the community. The secondary level of conversation is a logical extension of the foundational level. Entities agree to forego violence and deception in their common interactions and are empowered by custom or written constitution to exercise power for either the greater good or for the protection of a minority—an individual or a group. By tradition, the exercise of power is deemed moral because it comes from foundational rules intended to maintain peace. The public participates in this conversation by loyalty to the entities, approving the agents of the entities, and by obedience or disobedience to the rules of the entities. In modernity, we might see this as the legislative or parliamentary branch enrolling a law, whereupon the executive may then interpret the law as necessary and either impose or withhold force in accord with the law’s intended purpose. Next, the judiciary resolves disputes, if any, arising from executive action on the law and renders its opinion on the right reading of the law (in the United States, the judiciary might declare the law itself unconstitutional). Last, the legislative branch may choose to act again on the same subject matter. There are, of course, subsidiary or ancillary conversations between private parties, lawyers, police, and judges. But to me, the rule of law is a series of conversations carried out in a few days, weeks, years or over many generations about societal policy, rights and duties, the foundation for which are rules deemed moral because they are seen as reasonably necessary to keep peace.

My simplistic conclusion about the rule of law is not as compelling as the conclusions of real philosophers. I have only tried to define the phrase in the

context of a process which transcends substantive rules. Perhaps, however, the words of a Baptist pastor best express how the conversation about law, and its rule, will find its moral end.

“You deplore the demonstrations taking place in Birmingham... You express a great deal of anxiety over our willingness to break laws... The answer lies in the fact that there are two types of laws: just and unjust... How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law... One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”

Martin Luther King, Jr., *Letter from*

Birmingham Jail (April 16, 1963)

¹ See the helpful commentary on Oakeshott’s thought in Digeser and Flatham, “Oakeshott’s On Human Conduct” an essay included in The Cambridge Companion to Oakeshott (2012). Also see, Timothy Fuller, Michael Oakeshott, the Politics of Faith and the Politics of Skepticism, (1996).

Correction to the August 2015 President's Column:

In 1951, Topeka High School and junior high schools were integrated. The Topeka Public grade schools remained segregated.

Save the Date

YLD Golf Tournament
September 18, 2015
Cypress Ridge Golf Course

Turkey Shoot
November 20, 2015
Creekside at Berryton

Holiday Party
December 3, 2015
Governor's Row House

COMMUNITY EVENTS CALENDAR

EVENTS

Women’s Night Out
benefitting the YWCA
Thursday, October 8,
5-9 p.m.

Visit ywcatopeka.org for more
information or
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astclair@gseplaw.com or
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