

## THE RULE OF LAW

### I. THE RULE OF LAW

- A. A definition: the principles, institutions and procedures, not always identical but broadly similar, which experience and tradition in many different countries have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.

*--The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959.*

- B. Institutions within a free society, including the military, are administered by the rule of law and not the individual discretion of government leaders. The rule of law ensures that the will of the people as expressed through their elected representatives is carried out within the institutions of government.

### II. EVOLUTION OF THE CONCEPT OF A RULE OF LAW

- A. Law arises within a society from the discovery that it is more profitable to solve the continual disputes arising from opposing desires by adherence to rules, than by constant dispute or fighting.
- B. Society ruled by law is an idea as old as the Greeks and common to many different civilizations.
- C. The emergence of the nation-state system in the chaotic aftermath of the disintegration of the "universalist" empires of antiquity was accomplished by a growing realization that a just and stable world order can only be achieved by a rule of law among nations as well as within them--and that progress toward the former depends on progress on the latter.
- D. In a very real sense, the course of international relations for the last 400 years reflects an ongoing debate (often a bloody one) over the importance of international law in regulating state behavior--both externally and internally.
- E. As recent events in Bosnia, Somalia, Rwanda, Kosovo and Sierra Leone show, we are still a long way from universal acceptance of the rule of law. Nevertheless, the near unanimity of international condemnation of the abuses perpetrated in these countries is one sign that progress continues toward such acceptance.

### III. PROGRESS TOWARD ACCEPTANCE OF A WORLD RULE OF LAW SINCE WORLD WAR II (WWII)

Some milestones:

- A. Establishment of the United Nations by the victors of WWII, and their conscious (though only partially successful) attempt to avoid the mistakes that lead to the failure of the League of Nations.
- B. The trial, by international tribunals in the aftermath of WWII, of high ranking German and Japanese officials for war crimes in violation of the existing Laws of War.
- C. The U.N. General Assembly's 1948 Universal Declaration of Human Rights. Much will be said about this document during the rest of this seminar.
- D. As one outgrowth of this Declaration, the work of an International Commission of Jurists in reaching a consensus on the societal prerequisites to establish and maintain a rule of law. This work was accomplished between 1955-65 at a series of meetings around the world, the most important of which took place in India in 1959 and produced a seminal report, *The Rule of Law in a Free Society*.
- E. Many countries (including the U.S.) have ongoing programs and policies which attempt to further the principles of the UN's Universal Declaration of Human Rights and the goals set forth in the 1959 report of the Congress of New Delhi.

### IV. SOCIETAL INSTITUTIONS ESSENTIAL FOR THE RULE OF LAW

- A. Among the legal institutions, procedures and traditions generally agreed to be important in giving practical effect to the ideals underlying the rule of law, four were considered essential by the International Commission of Jurists in its 1959 report: the legislature, the executive, the administration of criminal law, and the courts and the legal profession.
- B. To give a sense of how this report attempted to emphasize the commonalties among national institutions in these four areas, one of its key conclusions in each area is summarized below.
  - 1. "The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality. . . . The legislature in a free society under the Rule of Law must:

- a. abstain from retroactive penal legislation;
  - b. not discriminate in its laws as between one citizen and another...;
  - c. not interfere with freedom of religious belief;
  - d. not deny to the members of society the right to responsible government;
  - e. not place restrictions on freedom of speech, . . . assembly or . . . association, except insofar as such restrictions are necessary to ensure . . . the status and dignity of the individual within society;
  - f. not interfere with the procedural machinery whereby the above . . . freedoms are given effect."
2. "The Rule of Law depends not only on the provision of adequate safeguards against abuse of power by the Executive, but also on the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions for the society." [Balancing these two conditions requires:]
- a. ". . . an Executive invested with sufficient power and resources to discharge its functions with efficiency and integrity."
  - b. ". . . a Legislature elected by democratic process and not subject to manipulation by the Executive."
  - c. ". . . an independent Judiciary which will discharge its duties fearlessly."
3. "An accused person is entitled to be presumed innocent until his guilt is proved. 'Guilt by association' and 'collective guilt' are inconsistent with the assumptions of a free society. Those having custody of arrested persons have a particular responsibility to respect the presumption of innocence."
4. "An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercises of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it to the best of his abilities and in accordance with the dictates of his own conscience."

- C. In a later module we will look more closely at how the interaction of these institutions promotes the rule of law--and prevents the abuse of military power--in a

constitutional democracy such as the United States.

**V. WHY RESISTANCE TO THE IDEA OF A WORLD RULE OF LAW CONTINUES**

Resistance comes from countries that have:

- A. Unique legal traditions they wish to preserve.
- B. A culture and value system threatened by change.
- C. Levels of political and economic development that make the ideal of a rule of law seem irrelevant.
- D. A desire to retain absolute national sovereignty.
- E. Leaders or ruling groups whose acceptance of the rule of law would undermine their power.

**VI. THE MILITARY LEADER'S DILEMMA IN A SOCIETY RULED BY LAW**

- A. As the military performs its duties on behalf of the government, there are certain fundamental realities which confront every military unit. These include:
  - 1. The need to accomplish the unit's mission;
  - 2. Self-defense of the unit;
  - 3. Unit efficiency;
  - 4. The need to make decisions in a timely manner;
  - 5. Maintenance of good order and discipline;
  - 6. Maintenance of morale; and
  - 7. Obedience to orders (this means military obedience to orders from civilian superiors and the need for military commanders to exact obedience from subordinates.)
- B. The dilemma for the military commander at any level is thus how best to reconcile expedient and efficient mission accomplishment with the legal and operational constraints governing the use of military power and individual and unit conduct. At one time or another in his or her career every military commander has faced one or more of the choices below as they attempted to accomplish their assigned mission within the rule of law.

1. The Ends versus the Means.
  2. Autonomy of Command vs. Accountability to Authority.
  3. Speed vs. Standard Operating Procedure.
  4. Expediency vs. Legitimacy
  5. Short-term Mission Goals vs. Long-term National Goals.
- C. Some Historical Examples to Illustrate These Dilemmas (And Others as Well):
1. General U.S. Grant in the American Civil War: Duty vs. personal beliefs.
  2. General Erwin Rommel in North Africa in WWII: Mission accomplishment v. blind obedience to Hitler's orders.
  3. Lieutenant Roger Nye in the Korean War: Safety of the unit vs. the Law of War--a responsible weighing of the risks.
  4. Lieutenant William Calley in the Vietnam War: Safety of the unit vs. the Law of War--an unthinking response.
  5. The importance of each individual's own sense of right and wrong in such situations.
- D. Application of the rule of law to specific situations in the military is thus often difficult.
1. It is impossible to create a statute or regulation that anticipates every possible situation that may arise.
  2. It is difficult for military personnel, especially those with demanding military operational responsibilities, to know and understand all the regulations that may govern their actions.
  3. Regulations may be unworkable in actual experience and need to be revised.
  4. Adherence to the rule of law is often cumbersome and may well be avoided--especially in crisis situations--unless there is some means of enforcement.
  5. Regulations which affect the rights and benefits of individual servicemen and women may not be well known and will not be applied or enforced unless these individuals assert themselves.
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## **VII. BENEFITS OF APPLICATION OF THE RULE OF LAW TO THE MILITARY**

### **A. For Society.**

1. The military is operated in conformity to the will of the people as expressed through their elected representatives.
2. Military decisions are made based on the rule of law and not the individual whim of military commanders.
3. Government civilian leaders are able to exercise oversight and control of the military through the chain of command (directly) and laws and regulations (indirectly).
4. Similar cases are handled uniformly.

### **B. For the Military.**

1. Direction from civilian leaders is clarified.
2. The military earns the trust and confidence of the civilian government and the people.
3. Overall morale of military personnel is increased due to greater confidence in the fairness and uniformity of military decisions.

### **C. For Military Commanders.**

1. Their autonomy and independence actually increases because regulations clearly define where they have discretion and when they must seek higher approval.
2. Commanders receive policy guidance that helps them in making decisions within their area of discretion.
3. The regulation drafting process provides an opportunity for commanders to make recommendations for new regulations or changes to existing ones.
4. Unit morale increases when decisions are uniform and applied equally. Military members will have confidence in their commanders' military decisions because they know they are based on principles approved by elected officials who represent the will of the people.
5. Military commanders are provided a clear mandate for exercising their authority.

- D. Conclusion: Finding the right balance between military necessity and the rule of law is a challenge faced by every military commander, regardless of the size of the force or the difficulty of the mission. How the commander meets that challenge reflects not only on himself or herself, but also on the men and women who serve in the unit; the senior officers, including elected officials, who are ultimately responsible for the conduct of the unit; and finally on the nation itself, its citizens, and their place in history.