CHAPTER FIFTEEN

THE RULE OF LAW

Constitutional and Administrative Law

THE RULE OF LAW

Introduction : The doctrine of the Rule of Law, whether or not invented by Dicey, was none the less expounded in its classic form by him in 1855. The doctrine contains three interlinked stands, namely

Strand One : " *… No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. ….* " [1]

Strand Two : " *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 courts*." [2]

Strand Three : " *….. that with us the law of the Constitution, the rules which in foreign countries naturally form part of the 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; thus the constitution is the result of the ordinary law of the land. ……..*" [3]

A common question asked of the Rule of Law is whether or not it is either a Rule or even a Law, and if it is legal rule, whether it is a rule that governs the law, or rather that it refers to the legal status of the Law as supreme ruler. Furthermore, if it is the latter, what norms underpin the rule? Does it lack normative value, simply reinforcing the sanctity of all laws, whether good or bad, promoting order and equality before the law alone, or is the rule subject to any form of constraint to protect against the tyranny of bad law that might favour some at the expense of others?

The Rule of Law does not exist in isolation from other rules or doctrines expounded by Dicey. It is irrevocably linked to Dicey's understanding and exposition of the notion of the Sovereignty of Parliament, a concept today morally and constitutionally embodying the notion of democratic governance as the guarantee of the sovereignty of the people.

The Rule of Law also embraces Dicey's reliance on the notion of the Separation of Powers, which places great emphasis on the role of the ordinary courts of the land (an independent judiciary) as protectors of the common law and arbiters of, and check on, the exercise of power by the executive. As a common law lawyer Dicey had great faith in the common law as developed by the courts of England (and Wales) as the primary judicial machinery to protect litigants and to resolve all disputes between both private citizens and between citizen and state. Above all he was deeply suspicious of the role of the French system of Administrative Law, which to many accounts it appears, he did not fully understand or perhaps chose not to understand.

Any analysis of the Rule of Law must therefore embrace consideration of the efficacy of the notions of Parliamentary Sovereignty and the Separation of Powers, since if either notion is in anyway flawed, such flaws may in turn undermine the efficacy of the notion of the Rule of Law.

Finally, in a world that has become global, both geo-politically and commercially, it falls to be considered whether or not the 19th Century Law of England, which held sway over much of global governance and commerce in 1855 under the guise of the British Empire, is the relevant Law that should Rule in the 21st Century. Is it possible to have a domestic Rule of Law and an International Rule of Law, and if so, which Law should ultimately prevail?

In order to provide a structured analysis of the notion, each strand will be examined in turn with reference to the following questions.

- What does it mean?
- What is the rationale for the existence of the rule?
- Is the objective of the rule desirable?
- Is the rule applicable to the modern constitution?
- If the rule is not applied, does this lead to problems and if so what solutions are required?

1 Dicey, AV, *Introduction to the Study of the Law of the Constitution,* 8th ed, 1885, reprint *2001,* Liberty Fund Publishing *p110*

2 *op cit,* Dicey, fn 1 p114

3 *op cit*, Dicey, fn 1, p121

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Strand One

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

1.1 What does it mean?

1.1.1 The citizen is free to do anything that is not prescribed by the law and cannot be subject to any punishment or suffer any other penalty for so doing, and

1.1.2 proposes a safeguard against arbitrary sanctions being imposed on the citizen by requiring that all laws be established "*in the ordinary legal manner*," and

1.1.3 could further be interpreted as either

a) restricting adjudicatory powers over "*distinct breaches of the law*" to the ordinary courts of the land, and/or as

b) giving the "*ordinary courts of the land*" the duty of declaring the law "*in the ordinary legal manner.*"

1.2 What is the rationale for the existence of the rule?

1.2.1. The establishment of a principle based on concepts of justice, fairness and predictability.

1.2.2. Concretisation of the principle by asserting that the law has a mechanism to reinforce it, namely by preventing the exercise of arbitrary powers (i.e. not established in the ordinary manner).

1.2.3(a) The protection of the concept of due process.

1.2.3(b) A restatement of the provenance of common law as the law of the people and the role of the judiciary in ascertaining that law either by discovering what the common law says and possibly by further recognising the interpretive role of the judiciary in respect of statute.

1.3 Is the objective of the rule desirable?

1.3.1. The citizen cannot be expected to comply with the law if he does not know in advance what is expected of him. Thus Mr Justice Oliver Wendell Holmes, a legal realist in the US, famously declared that the primary function of the law is to act as a predictor of trial outcomes, the essential tool of the legal advisor.[4] Against this is the problem of flexibility in the law and the ability to develop / evolve and to adapt to reflect the needs of an ever changing society. The two needs are contradictory, so that any accommodation of one is done at the expense of the other. All the law can do is seek to establish a balance.

1.3.2. Clearly, any general principle which is paid lip service to, but which is not in any way enforceable will achieve nothing other than provide false expectations and confusion. If 1.1. is desirable then it must need teeth. However, it should be remembered that there are a wide range of social obligations that are not amenable to the law, but for which non-compliance can attract arbitrary and arguably undesirable consequences. Anyone who has suffered (rightly or wrongly) adverse outcomes for ignoring the dictates of their parents will be able to relate directly to this.

1.3.3(a) The concept of due process under the law is seen as of paramount importance in Western Society.

1.3.3(b) The common law system is clearly a viable system, but whether or not it is the preferred system is a matter of debate. Common law lawyers would naturally agree whilst Civil lawyer would be expected to strongly disagree. Nonetheless, both systems recognise a role for precedent, differing only on its scope and the extent to which it can be regarded as binding. Neither would disagree with the role of the court as interpreter of and applier of the law in an instant case.

1.4 Is the rule applicable to the modern constitution?

1.4.1. The striking of a balance between the two requirements of predictability and flexibility means that there will always be firstly situations where the rule does not apply and secondly grey areas where it is not immediately clear in a given situation whether the law should address the needs of one or the other. Every trial involves a degree of uncertainty in respect of the establishment of either facts and/or interpretation, be it of law or of a legal document. The common law process exacerbates this.

[4] Holmes, Oliver Wendell, ***The Common Law*** **(1881)**

1.4.2 The mere fact that law is established in "*the ordinary legal manner*" is no guarantee that "the ordinary legal manner" will not result in arbitrary rules, but will merely ensure that there is advance warning of the existence of the rule or power unless the "ordinary legal manner" includes the ability to discriminate between lawful constitutional rules and unconstitutional rules. [5]

1.4.3(a) The Bill of Rights restated the concept of due process established in the common law courts by Coke.J and others earlier in the century. The Human Rights Act 1999 Articles 5-7 and Article 47 European Union Charter of Fundamental Rights (2000) restate the same principle in modern but differing terms. Articles 5-7 Human Rights Act have been invoked and applied in a number of cases since the Act came into force. It should be noted that the "ordinary courts" no longer have exclusive jurisdiction today, with a phalanx of tribunals, adjudicators, arbitrators and other ombudsmen/regulators exercising wide ranging adjudicatory jurisdiction, frequently but not always subject to the supervisory powers of the "ordinary courts" in the guise of the Queen's Bench Division of the High Court under Rule 45 Civil Procedure Rules 1999.

1.4.3(b) Whilst the courts act as a guarantor of due process, this is not to say that the determinations by the courts have not on times been controversial.* There will be those who consider that certain findings of compatibility with the requirements of the Act were incorrectly decided, demonstrating that due process is not protected by the law. However, if we cannot trust our courts to adjudicate on such matters who then should we give the task to? The Human Rights Act provides some guidelines as to what amounts to a fair trial, but this will not necessarily prevent the creation of arbitrary laws.

One problem lies in determining what amounts to an arbitrary power. Thus, for some the creation of strict or absolute liability offences is viewed as repugnant, though in general these are restricted to lower scale offences such as food safety regulations etc* and essentially matters of an administrative nature, where life and liberty are not at stake and where the need to establish *mens rea* might render the law ineffective. Due process exists in respect of absolute liability offences but the process is restricted to determining whether or not a state of affairs existed but does not embrace any consideration of culpable behaviour.

There are a wide number of instances where tribunals etc* have extremely wide ranging discretion. Parliament on times provides the power to determine issues without the delivery of reasons and has on a number of occasions* provided that the decision of a body is final and binding without other recourse to appeal and not subject even to judicial review. In such cases it must be conceded that Parliament has created arbitrary powers and Dicey's prescription has failed to procure its objective. Examples of such ouster clauses however are few and far between.

1.5 If the rule is not applied, does this lead to problems and if so what solutions are required?

Any wide scale perception that this aspect of the Rule of Law did not prevail in the United Kingdom would inevitably lead to a total disregard and distrust of the law and the legal system and could potentially lead to a break down in society. General concern is unlikely for minor breaches of the Rule in situations where the security of the state and the national interest are involved. Indeed, the wide-ranging exceptions to the Human Rights Convention on account of security and the national interest indicate that it is neither possible nor desirable to establish a simple black and white rule of general application. Exceptions to the rule, created by Parliament are a matter of political choice and must be regulated by the normal political process and the checks and balances within the constitution. Herein lies the danger, that by tinkering with the constitution such checks and balances may be disturbed and the equilibrium of the constitution destroyed. The exceptions therefore emphasise the importance of establishing and maintaining an effective constitution that enables those that exercise political power to be held to account not just by the courts but also by Parliament for and on behalf of the people. Whilst the enforcement of ministerial responsibility and parliamentary scrutiny is essential, it is submitted that sadly these mechanisms are not as effective as they might be.

** Note that the author has deliberately avoided providing specific examples in the above analysis to provide scope for candidates to conduct research and provide their own examples for the purposes of examinations.*

[5] See 1.3(b) of this section below.

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Strand Two

" ….. 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 courts. …"

2.1 What does it mean?

2.1.1 No man is above the law – the law applies to everyone without fear or favour, irrespective of rank or status, so we are all equal in the eyes of the law. The law does not discriminate between individuals on the basis of race, colour, age or sex etc.

2.1.2 No man is exempt from the jurisdiction of the courts.

2.2 What is the rationale for the existence of the rule?

2.2.1 The rationale for equality before the law is, it is hoped, self-evident. Justice should not be something that can be bought or sold. Rank, wealth or other privilege should not enable someone to be placed beyond the reach of the law. Every citizen should fall under the protection of the law.

2.2.2 Since the courts are the protectors of and enforcers of the law, the first half of this rule would be rendered meaningless without this rider to it.

2.3 Is the objective of the rule desirable?

Taken at face value it is difficult to disagree with the desirability of such a rule. The problem rather is that the devil lies in the detail, e.g. who is a protected "*man*" ? and see further below.

2.4 Is the rule applicable to the modern constitution?

The major problem with this rule is the determination of what is meant by equality under the law. Parents, employers and office holders to name but a few general classes, all exercise positions of power and authority over others with the ability to issue and enforce rules.

Perhaps the only way to make sense of this rule is to accept that it is necessary in society, in order to ensure order, that office holders be given such responsibility, but that the exercise of the powers needed to carry out their responsibilities are properly governed, regulated and supervised by the courts, and that furthermore, any citizen can aspire to such an office on the basis of equal opportunity and merit.

Perhaps the most obvious exception to this is the Monarch in that only those in succession to the throne could aspire to that office, and once so installed, the Monarch is immune from prosecution before the Crown's Courts.

2.5 If the rule is not applied, does this lead to problems and if so what solutions are required?

Should the Monarch abuse the privileged position it is likely that a revolution would ensue and the monarchy would be abolished. The press is quick to highlight alleged deferential treatment of VIPs.

The much more important question here is

a) whether or not office holders are properly governed, regulated and supervised by the courts, and
b) whether or not it is true to say that any citizen can aspire to an office or other position of power and responsibility on the basis of equal opportunity and merit.

As for a), the legal balance between employers and employees and in respect of other relationships in society, there will always be debate as to whether or not the law strikes the right balance, and the effectiveness of regulation in any area of government activity is continually subject to review and development.

As for b), whilst anyone can become an employer, money often makes money and not everyone will have the opportunity to become a powerful businessperson etc. Most offices will require high degrees of education and social opportunity not available to all. We still talk of a *Glass Ceiling* restricting the career aspirations of females in society and the concept of "institutional racism" is widely debated even now.

It is doubtful that society could ever produce a code that provided a definitive answer to a) and b) and those that perceive that there are grievous failures in striking the balance in respect of the above are wont to declare that the Rule of Law totally fails to deliver on its promise and is thus an empty vessel.

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Strand Three

" ….. that with us the law of the Constitution, the rules which in foreign countries naturally form part of the 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; thus the constitution is the result of the ordinary law of the land. …….."

3.1 What does it mean?

3.1.1 The courts together with Parliament over time created the Constitution in contrast to other countries which created a supreme constitution, from which all other power is derived. In short the British constitution is the consequence of evolution, not revolution, an integral part of the law but not superior to it.

3.1.2 It is the ordinary courts of the land that regulate the relationship between citizen and state.

3.2 What is the rationale for the existence of the rule?

3.2.1 There is no rationale here, merely a recording of fact, but it does establish a different relationship between the UK courts and the constitution to that of other countries and enabled Dicey to build his second construction. It justifies our Constitutional Monarchy (*Compare the notion of a Republic*)

3.2.2 As noted earlier, Dicey had an intense distrust of the Administrative Law process adopted by France and further distrusted the idea of a Supreme Constitutional Court with the power to declare Acts of Parliament invalid and contrary to the notion of the Sovereignty of Parliament and hence the sovereignty of a democratic people.

3.3 Is the objective of the rule desirable?

Whilst the notion of democracy is in many ways admirable, it only remains so whilst the democratic will of the people produces "*acceptable*" diktats. Should the people demand "*unacceptable*" laws admiration is want to wain. What is or is not acceptable is subjective and depends on value judgements of "*is and ought*."

Populist government, whilst it panders to the democratic wishes of the people and the press, is driven by short-termism, the need to demonstrate that "something" is being done, rather than in taking the time to ensure that what is done is well thought out, measured and potentially effective.

3.4 Is the rule applicable to the modern constitution?

The extent to which government is now a representative or democratic mirror of the wishes of the people is highly questionable. This may of course change in time. The party system suffered convulsions in the early 20th Century as the Liberal Party power base collapsed and gave way to the rise of the Labour Party. At present a shrinking Conservative Base and a resurgent Liberal Party echoes that collapse, with the Labour Party riding high on the back of a divided opposition, profiting from the vacuum. The first past the post system does not lend itself to a multi-party system. Majority support for policies is hard to establish.

The decline in the personal autonomy of MPs and the desire to serve the people on the basis of conscience has been sacrificed on the altar of party politics. The whip system provides governments with a strong loyal membership base in the House of Commons, devoid of an effective, independent back bench opposition. This enables government to establish bodies, which are endowed with arbitrary powers. It was the political balance of power that existed in 1855, rather than the Rule of Law that minimised the risk of arbitrary power being created. Parliamentary Sovereignty alone provides no protection.

3.5 If the rule is not applied, does this lead to problems and if so what solutions are required?

Ironically for Dicey, it is the part codification of the constitution, through the enactment of the Human Rights Act 1999, a mini-mirror of Dicey's hated Napoleonic style Codification that is providing some form of protection against legislative abuse. Whilst there is no legal rejection of the Sovereignty of Parliament, there is a de facto negation of it, since it is politically difficult for Parliament to reject a declaration of incompatibility. At present, the eventual shape of the proposed new Supreme Court which is destined to replace the House of Lords and the highest court in the land is yet to be determined. It may be given the task of operating as a constitutional court. If that is the case, it would amount to a legal rejection of Parliamentary Sovereignty. The Rule of Law would become the Sovereign Law, administered by the Supreme Court.

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WHOSE LAW SHOULD RULE ?

The latter half of the 20th Century has witnessed the rise of trans-national legal entities such as the United Nations, the hybrid European Community and the elevation of concepts of Public International Law to pre-eminence at a global level.

Traditionally, the common law deferred to Parliament in the enforcement of Acts that conflicted with the public commitments of the government to foreign governments and international legal personalities such as the United Nations. Whilst in the case of ambiguity any interpretation that reconciled potential conflicts might be embraced by the courts, where a clear and unambiguous Act was in conflict with international law, the courts of England and Wales would follow the Act unquestioningly.

One solution was to incorporate the terms of such an agreement, be it a Treaty or Convention, into English Law by way of an Act of Parliament. Thus the European Communities Act 1972 adopted such an approach.

However, that Act also ushered in the new concept of shared Sovereignty, albeit that it was restricted to the scope of the Treaty of Rome and its successors. To the extent that European Community Law is now sovereign, does this mean that Dicey's Rule of Law now applies to the Rule of Community Law? If so, the role of the "ordinary courts of the land" must equally give way to the rule of the European Court of Justice. The notion of a common law of the community, represented by the concept of harmonisation prevents domestic courts from interpreting community law.

Public International Law, principally under the auspices of the United Nations poses further challenges for the notion of the Rule of Law. Should UK domestic law give way or defer to the jurisdiction of the UN courts? Public International Law will amount to nothing if it permits domestic law to provide diverse interpretations of what is prescribed by the law. It too must insist upon harmonisation. Whilst it is referred to as Public International Law, (*as opposed to Private International Law*) its remit has in a number of instances been broadened beyond to regulation of relationships between states, to have a direct impact upon the citizens of member countries. Hence maritime pollution can lead to private penalties and the international court at The Hague can bestow benefits on individuals. Likewise the International Criminal court can indict individuals and not just countries / member states.

An instant case is the invasion of Iraq. There appears to be a consensus within the global community that the invasion was contrary to the dictates of the United Nations Charter. An application has been filed before the International Criminal Court to indict Tony Blair for crimes against humanity for waging an illegal war. Note that the US has not ratified the convention and is thus not subject to the court's jurisdiction.

The United Kingdom government is adamant that under British Law the war was perfectly legal. In as much as it was condoned by Parliament, albeit that the information on which Parliament based its decision to support the war may have been to some degree inaccurate or at least over-stated, it was clearly a legal war. No UK court can question the Parliamentary roll (*or the Royal Prerogative*). Whilst regime change is strictly prescribed under the UN Charter, which only permits an invasion to protect international peace and security (the reason why efforts were made to establish that there was a real threat from Weapons of Mass Destruction [WMD] was made) nothing under UK Law invalidates a war whose sole aim is regime change.

It may be that the absence of a right to pursue regime change under International Law is a fundamental problem that needs to be addressed in order to prevent future occurrences of the problems evidenced in Rwanda, Haiti, Liberia, Somalia and Zimbabwe etc. Indeed, the latest UN Report has provided compelling evidence of wrong doing by France and Russia in the abuse of relief oil sales in Iraq which supported the Saddam Hussein regime and rendered sanctions ineffective and could in the long term have enabled him to reconstitute stocks of WMD which might then have threatened international peace and security. However, in the meantime, nothing under the United Nations Charter permits pre-emptive action before such a threat has been realised.

There has been an attempt by the US and the UK to justify the war on the basis on a failure by Saddam Hussein to abide by previous UN Resolutions and to assert a mandate for action. However, the UN appears to support the view of Hans Blix that no action was justified pending his report. Surely only the UN can be the arbiter of what the Charter authorises and not member states? The A.G.'s opinion is irrelevant.

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CONCLUSIONS

Since Dicey's original exposition of the Rule of Law, there have been a wide range of reinterpretations and accounts of what it represents. Dicey's exposition was very much a representation of the constitutional structure of his age, and was furthermore a personal exposition reflecting his own biases rooted in the primacy of the common law. However, assertions that Dicey ignored the role of state are unsustainable since he expressly includes it in his third strand.

This poses a major problem for the establishment of the rule, in that by Dicey's own definition, as supported by Oliver Wendell Holmes, in order to be a law, a rule needs to be clear and transparent and fully developed and where it prescribes conduct, as opposed to a merely declaratory law that describes a state of affairs, needs to be enforceable (even if not actually enforced). Examples of non-compliance of the Rule of Law under the British Constitution, which have no remedy, are well documented.

- The Rule of Law cannot be enforced if the contents of the rule are not defined in singular and categorical terms.
- The Rule of Law fails to deliver on its promise of an absence of arbitrary powers under the law.
- The ordinary courts of the land form just one small part of the adjudicatory system in the UK today.
- If the Rule of Law is real, then it is unclear which law rules, UK, E.C. or International.

The Rule of Law works better on the ground in some instances than the strict legal theory would allow, in that Human Rights under the ECHR are more likely to be honoured in practice even though legally a Sovereign Parliament might over-ride judicial declarations of incompatibility.

Dicey's evident loathing of Administrative Law was based on a misconception and held back the development of Administrative Law in the UK, which was ironically driven forward by the ordinary courts (QBD) in the late 20th Century following **Ridge v Baldwin** [1964].

The Rule of Law may in the not too distant future be the Rule of a Fundamental Constitutional Document of some sort, such as a new improved BILL OF RIGHTS akin to the "US Constitution", which may be enforced by a UK Supreme Constitutional Court. Lord Scarman might approve.

Short comings apart, it has been demonstrated that the Rule of Law embodies a range of concepts, which form the basis of notions of justice, fairness and equality before the law, which cannot and should not be ignored. However, taken too literally, the Rule of Law could pave the way for a tyranny of law by an unaccountable executive, should the defects in the UK application of the separation of powers cease to be constrained by other checks and balances in the constitution. When the political opposition is weak, the only buffer against the passage of legislation introduced at the behest of an elected dictatorship vests ironically with the House of Lords. The transformation of the House of Lords into a mirror image of the House of Commons would remove that buffer. A House of cronies would equally be unlikely to act as a constitutional protector. Perhaps then salvation might lie in the creation of a Supreme Constitutional Court? However, that would be at the expense of flexible development in the law. Dicey's reliance on the ordinary courts of the land and the sanctity of the common law would then lose all future validity. A Rule of Law may well prevail, but not the Law as conceived by Dicey.

Further Reading

Dicey and the Rule of Law http://www.lawinabox.net/liasconst1.pdf	Article by Anthony Lias, LLB Student, Birbeck College on Concilio web site - Law in a Box.
Rule of Law http://www.law.cam.ac.uk/squire/about_lib_woolf.php	Links to recent articles on Cambridge University Web Site Squire Library
The Rule of Law and a change in constitution http://www.law.cam.ac.uk/docs/view.php?doc=1415	Lord Woolf - Cambridge University 2004

NATIONAL VERSUS INDIVIDUAL SECURITY AND THE RULE OF LAW

The Social Contract Theory

The citizen, as a member of the collective, enters into a contract with the state, whereby the State is mandated to deliver secure governance to and for the people. Governance is not possible without the cooperation of the people. Cooperation will include the provision of finance (taxation) and submission to the law of the land. Under that law citizens may be required to allow government officials to interfere with their private lives and interests. The law will also provide enforceable sanctions for those who break it.

The law plays a central role in the social contract theory. Whilst the law may well contain provisions for the protection of the liberty of the individual, the administration of justice is likely to require that in ***limited circumstances*** the state can demand the right to ***temporarily infringe*** that liberty. In order to investigate and prosecute a trial a citizen may be detained, questioned and required to stand trial. The citizen who is subsequently released without charge or is later found not guilty of any offence may or may not be compensated for any inconvenience suffered. The rules differ from state to state. Similarly, the amount (if any) of state assistance accorded to a citizen to mount a defence varies from state to state. Whilst it is a common theme of Human Rights legislation that trials must be ***"FAIR",*** there is no universal agreement as to the standard that ***"FAIRNESS"*** demands.[6] It can be seen therefore, that the Rule of Law cannot deliver ***ABSOLUTE FREEDOM*** to the individual from state interference at all time and in all circumstances, but only ***RELATIVE FREEDOM***. Ultimately, the justice system may deprive a citizen of liberty for breaches of the law. Thus, those found guilty may be imprisoned or otherwise sanctioned by the law.

Understandably society places great value of security, both for the individual and for society as a whole. The Rule of Law plays a major part in this, in that ***everyone*** is entitled to equal protection under the law and ***all*** law breakers are subject, ***without exception***, to the law. Are there any circumstances when it might be justifiable for the state to depart from this rule and deprive individuals of protection under the law or exempt others from the operation of the law in the interests of national security? Are the limited exceptions to the liberty rules that apply to the administration of justice sufficient to enable the state to deliver its half of the social contract bargain and guaranty security?

The Rule of Law in War Time

In times of war, extraordinary measures are required to deal with extraordinary circumstances. The sacrifices demanded of the citizen to protect the state during war are understandably greater than in peace. Restrictions are likely to be imposed on the freedom of movement and expression and the citizen may even be required to risk his life, at home or abroad, in the service of the country. Special rules, namely martial law, apply to the activities of the armed forces when engaged in combat. Difficult choices have to be made when the services of military personnel are called upon to police the peace outside the theatre of war. Whether or not it is practicable to apply the ordinary rules that apply to civilian police in such circumstances is questionable, since whilst open conflict may well be at an end, the situation may yet be for from that encountered by the police in times of peace. It is most likely that the state will impose a modified version of the rule of law, less restrictive than that which prevails under martial law, but more restrictive than that applied in normal circumstances.[7]

The Rule of Law and Civil Unrest

Most societies reserve the right to impose extra-ordinary measures to deal with peace time riots and civil commotions.[8] In emergency situations the services of the armed forces may be utilized to restore and maintain law and order for the duration of the emergency. It is likely that the rules governing a member of the armed forces will differ from those governing the everyday activities of the civilian police force.

6 **Steel & Morris v UK** [2005] ECHR. *68416/01:* Poor defendants in a libel case should receive legal aid to fund their defence. Should this rule be extended to all defendants engaged in civil litigation against businesses or only powerful businesses, and if so, how powerful is sufficiently powerful to invoke the rule? Concerned the alleged libel of McDonalds by Steel and Morris.

7 **R v Kenyon, Cooley, Larking & Bartlam** [2005] W.Germany, before Judge Advocate Michael Hunter. Four British soldiers found guilty of offence committed in 2003 at Camp Breadbasket, Basra against Iraqi looters in a food store. The US courts have also convicted US soldiers for human rights abuse for incidents that occurred at Al Graib prison, Bagdad.

8 See e.g. The Civil Contingencies Act 2005.

The Rule of Law, Public Safety and National Security in peace-time

As noted above, the freedom of the individual from interference by the state is relative to the needs of the authorities to operate the justice system. Whilst the law has sought to establish minimum standards of protection for the individual,[9] often the level of protection rises above that minimum standard. There are times when the authorities struggle to provide the level of security that society believes it is entitled to receive. The perceived problem may simply be one of competence and resources and hence a matter to be resolved through traditional democratic processes. Hence, law and order tends to feature strongly at election time. The correct legal balance to strike between freedom and interference comes into play when the authorities assert that the legal constraints on police powers prevent effective policing.[10] Whilst our society will normally tolerate very limited powers being extended to the police to stop, search and detain citizens the press frequently calls for extensions to those powers whenever society is confronted with a particularly cunning, elusive and persistent murderer or rapist.[11] New threats to society can also result in the development of novel control powers.[12]

The fluctuating balance tends to be one which remains above the threshold of what are considered to be fundamental human rights, but one issue above all others, namely the anti-establishment threat posed by terrorists, has frequently fallen below that threshold. Whilst the public is capable on times of being quite generous to terrorists operating abroad and may be prepared to even consider them to be "***freedom fighters***" attitudes harden when they operate on home soil and offer a direct threat to the safety of the citizen. The problem posed by terrorists to the authorities is not new. In the UK the ***"Irish Question"*** is long standing. In the 1970'ies the anti-establishment movement posed a serious threat to security throughout Western Europe.[13] Throughout history single-issue extremist groups[14] have presented major problems for the authorities that go far beyond the demands posed by moderately behaved protest movements.[15]

The current concern of the authorities lies in the so-called "***War against Terror***" and the threat posed to national and international security by ***Al-Qaida***. The events of 7/11 and the destruction of the Twin Towers by high-jacking two civil aircraft and flying them into two densely populated high rise buildings, demonstrated the potential for inflicting devastating harm on the community posed by such terrorists.[16] The tactics of asymmetric warfare adopted by terrorists are difficult for the authorities to combat. Secrecy and solidarity are central to the art of subversion. Large sources of private funding, access to adapted weapons through modern technology such as mobile phone activated bombs, access to sophisticated mass communications techniques and a high degree of international mobility (including illegal economic migrants, refugees and asylum seekers) make the tasks of detection and containment very difficult for the authorities. Terrorists exhibit high degrees of tenacity and enjoy the element of surprise. Patience plays to the advantage of a terrorist, who only has to succeed once in a while to have a major public impact. Locality is not important so terrorist strikes can be highly random and unpredictable.

The prime weapon for the terrorist is manipulation of the media in order to spread fear and misunderstanding. At the heart of most terrorists lies a legitimate issue of public concern. What distinguishes the terrorist from the ordinary protester is a willingness to resort to terror and other means beyond the law to achieve a desired outcome. The terrorist will manipulate the media to exploit any public sympathy and emphasise anything that supports their cause, whilst totally rejecting out of hand any

9 In the UK see inter-alia **Entick v Carrington** ; Magna Carta; Bill or Rights ; Human Rights Act 1999 ; etc

10 See the problems with the London Metropolitan "Suss Laws" (stop and search on suspicion) in the late 1970'ies, allegations of racial harassment by the Police against second generation citizens from the Caribbean in the Capital and the introduction of the Police and Criminal Evidence Act 1984.

11 See for instance the cases of The Moors Murders – Ian Brady & Moira Hindley ; The Yorkshire Ripper, alias Peter Sutcliffe etc

12 See for instance the legislation to deal with football hooliganism and more recently in respect of anti-social behaviour.

13 The Red Brigade ; The Barder-Mainhoff Group etc

14 See for instance the activities of animal rights activists and anti-abortionists, to name but a few.

15 Thus the threat to law and order by the suffragettes was of a very different order to that of the various *"cause celebre"* such as the Tolpuddle Martyrs, the Newport Riots, the Rebecca Riots. It should be noted that many of these in fact ultimately led to legal reform and the extension of rights to the citizen.

16 Other threats include urban bombing (eg Manchester, Canary Wharf, Madrid etc); suicide bomb attacks ; chemical attacks to air and water supplies, as in the Tokyo Underground ricin outrage etc.

counter-arguments or events, however valid they might be. The terrorist relies on dogma and does not believe in moderation or constructive dialogue. It is hardly surprising therefore that the authorities frequently attempt to deny the oxygen of publicity to terrorist organisations. The problem for the state is that any attempt to do so involves restrictions on the freedom of speech. Such measures may also be counter-productive since by banning an organisation and its propaganda, there are those who will think the state has something to hide. In the battle of the propaganda war it can play into the hands of terrorists.

A central objective of a trained terrorist, if arrested is firstly to depict any actions of the state as being contrary to civil liberties,[17] and secondly to withhold information and evidence on their organisation from the authorities, or even better to supply misinformation. Terrorists tend to operate in cells, communicate by code and have limited knowledge of their organisation's command structure. The less an individual knows the less he can be made to tell. The goal of the authorities is to break the will of detainees and extract information that will lead to convictions and the arrest of other terrorists in that individuals group. The normal rules governing the periods of time permitted for the authorities to question individuals without making charges and submitting to trial favour the committed, well schooled terrorist. Exceptions to the rule of law may be made to enable the authorities to detain suspected terrorists for extended periods of time[18] and even to permit extra-ordinary methods of interrogation. Whilst the European Convention on Human Rights adapted for use in the UK by the Human Rights Act 1999 permits some exceptions to the normal rules, abnormal methods of interrogation may go too far and amount to unusual punishments.[19] The methods of interrogation adopted by the US in Camp Delta, Guantanamo Bay, Cuba, a detention centre for alleged Al Qaida members has given rise to much criticism, with assertions of breaches of human rights by the US authorities.

The House of Lords examined the provisions of the Terrorist Act 2000 for the detention of individuals with suspected of links to terrorist organisations.[20] The individuals concerned had entered the UK unlawfully. Whilst the government would have preferred to deport the individuals back to their countries of origin this was difficult. Firstly, the authorities did not know the nationality of all of the individuals.[21] Secondly, as known or suspected terrorists, they might be subject to inhuman treatment if deported. Unless the state is able to locate a safe country willing to accept such an individual, deportation is not permitted under the European Convention on Human Rights. Understandably the government is reluctant to release such individuals into the community. The problem for the government appears to be that whilst the government maintains that it has sufficient information to give it reason to believe the individuals represent a serious threat to security, the government lacks sufficient evidence to secure a conviction. Other evidence acquired through wire intercepts could be used, but the government has decided not to use such evidence in order to protect its sources. The House of Lords declared that the Act is incompatible with the Human Rights Act.

The government is now in the process of introducing new legislation that if successful, will enable the individuals concerned to be released into the community, subject to a range of constraints on their freedom, including communication barriers and house arrest. In order to avoid assertions that the legislation discriminates against foreigners, it will also apply to all citizens in the UK, not just unlawful entrants. The proposals have been subject to widespread criticism on the grounds that the decision to impose the restrictions will fall to the Home Secretary,[22] subject to a judicial review challenge. Detractors want the initial decision to be made by a judge. House arrest is a common feature of totalitarian states and has been used most famously by the Burmese Government against Aung San Suu Kyi, a political prisoner and daughter of the deceased president of Burma. Also, house arrest provisions may infringe the Human Rights Act.

17 even though most terrorists would accord no liberties to their enemies or even to innocent victims of their activities.

18 eg Terrorism Act 2000

19 **Ireland v UK** [1977] ECHR. Court upheld allegations of unlawful conduct by the British Authorities, during internment under Emergency Powers, against prisoners through the use of techniques including wall standing, hooding, noise, sleep, food and drink deprivation.

20 **A (FC) & X (FC) et al v Secretary of State for the Home Department [2004] UKHL 56**

21 It is common for unlawful entrants to destroy all paperwork to hide their identity.

22 This is allegedly contrary to the doctrine of the Separation of Powers, which states that the judiciary, not the executive should exercise judicial powers which affect the liberty of the individual.