

SENIOR LAW LORD ADDRESSES THE FUNDAMENTALS OF THE RULE OF LAW

[The Right Honourable The Lord Bingham of Cornhill, Senior Lord of Appeal in Ordinary (the most senior of those more familiarly known as the Law Lords) and an Honorary Fellow of the College, addressed the annual meeting of the College in London. His remarks are so eloquent a statement of those fundamental principles that we refer to as the Rule of Law that we have chosen to print them in their entirety.]

I hope you will bear with me if I do something unforgivable, which is to address a very big subject at the end of the morning. The consolation is that I shall necessarily address it very superficially.

The big subject is The Rule of Law. It has already been invoked by Chief Justice Roberts, by Lord Phillips and by Lord Goldsmith, and in this country it has just achieved statutory recognition, an Act of Parliament which says: “Nothing in this Act adversely affects the existing constitutional principle of the rule of law or the Lord Chancellor’s existing constitutional role in relation to that principle.” The Lord Chancellor is obliged on taking office to swear an oath to respect the rule of law.

One looks at the Act expectantly, hoping to find a definition, and there is none. Why not? One explanation perhaps is that it is so obvious what the rule of law is that there is really no need to spell it out, but that, I think, is a slightly unlikely explanation. Nobody now I think means by “the rule of law” what Professor Dicey meant by it when he coined the phrase in 1885, and there is a respectable body of thought that says that the expression is meaningless. I quote one distinguished academic author, I think from the far side from here of the Atlantic, who said: “It may well have become just another one of those self-congratulatory, rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort,” he continued, “need therefore be wasted on this bit of ruling-class chatter.”

The alternative and perhaps preferable explanation of the lack of a definition is that it was all rather complicated and difficult to define, and it was better to leave it to the judges to decide what the rule of law meant, this existing constitutional principle, when and as questions arise. But, of course, the judges must give effect to it, if it is a constitutional principle, and the Lord Chancellor is no doubt susceptible to judicial review if he fails to respect the rule of law. So it is not open to the judges to dismiss this as meaningless verbiage, and I hope that I may be permitted quite briefly and summarily to suggest what perhaps the rule of law actually means.

I shall state one general proposition and then venture eight subrules. These may all strike you as so obvious and uncontentious and banal as to merit no discussion. If that is so, then we can all celebrate our shared legal heritage. If, on the other hand, I say anything which you don’t agree with, then it gives us something to argue about over lunch.

In a single sentence then, I would seek to sum up the principle as being that all persons and authorities within the state, whether public or private, should be bound by, and entitled to, the benefit of laws publicly and prospectively promulgated and publicly administered. I am stating that as a very general principle, acknowledging that, of course, as I must throughout, there will be exceptions and qualifications. But I think that that formulation captures the essence of John Locke's famous declaration: "Wherever law ends, tyranny begins," and also that not less famous of Thomas Paine: "In America", he wrote in *Common Sense*, "the law is king; for as in absolute governments the king is law, so in free countries the law ought to be king and there ought to be no other."

So I turn to my eight subrules, which I shall treat rather in the nature of headlines or stations which an express train rushes through, leaving it difficult to do more than pick up the name of the station.

First subrule: the law must be accessible and so far as possible intelligible, clear and predictable. If we are all bound to obey the law after all, we have to know what it is. That sounds simple enough, but it is not perhaps quite as simple as all that, with thousands of pages of legislation being churned out every year, some of it not very easy to understand. The problem is to some extent compounded by a question to which Chief Justice Roberts has already alluded: the length, complexity and sometimes prolixity of judgments in courts at the highest level.

Now, I am on the whole, for reasons that I shall not develop, broadly, and I emphasise that, in favour of multiple opinions, but any court must recognise a very clear duty to deliver a clear majority ratio. I think that this subrule does inhibit excessive judicial innovation or adventurism, because it is one thing to develop the law in the direction it is going a little bit further, and it is another thing to set it off in a different direction altogether which renders the law unpredictable.

All these points, as I suggest, apply with even greater force to the criminal law than they do to the civil law, since somebody has to explain to a jury what the law is, and there is very little scope to develop the criminal law where the effect is to render something criminal which was not criminal at the time when the defendant did it. That, of course, in itself is a notable breach of the rule of law. [Editor's note: Juries are used in Britain only in criminal and libel trials.]

The **second** subrule that I would hazard is this, that questions of legal right and liability should ordinarily be resolved by application of the law, and not the exercise of discretion. By "discretion" I mean administrative discretion or judicial discretion. Now Dicey, as we know, was very passionately hostile to giving administrators really any discretion. Most of us would not go that far I think today, and most of us again could think of examples -- I certainly could -- where one would be very sorry if an administrator were compelled to act in a given way simply because that was laid down by the statute and he had no room to allow for the hard or difficult case.

But it surely is important that the bounds of any discretion should be defined and narrow, and that administrative discretions should be governed by statute. I think that this again is a subject that one could develop at considerable length. I think that most judicial discretions are

very narrow because what is usually, and I think wrongly, described as a discretion is a judgment, and judges are, of course, required to exercise a judgment, as to whether a certain state of affairs exists or doesn't exist, but if they judge that it does or it does not, they have no discretion. It is then clear what they have to do, and I think myself that there is only a true discretion in a situation where a judge says to himself, "Well, I could do A or I could do B. Both would be perfectly defensible decisions. Which shall I do?" But I think it is important for the purposes of rule of law to recognise that there is no such thing as an unfettered discretion, whether administrative or judicial.

The **third** subrule that I would put forward is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. Some categories, of course, do justify differentiation -- children, prisoners, the mentally ill and so on -- but not, to choose the famous example, those with red hair, and I think most of us would have little hesitation in condemning as a flagrant breach of the rule of law Statute 22, Henry VIII, chapter 9, which read: "It is ordained and enacted by authority of this present Parliament that the said Richard Rose shall be therefore boiled to death without having any advantage of his clergy." Richard Rose was the Bishop of Rochester's cook. It seems a rather extreme penalty for cooking a bad dinner.

It is not, of course, unknown in our own society until quite recent times that certain classes of citizens were subject to disabilities and disqualifications. Roman Catholics, Jews, dissenters, women have all suffered at various times. Most of these obvious injustices have been rectified. But a class that does require constant care and consideration, as I would suggest, is that of non-nationals. Of course, there are some respects in which non-nationals have to be differentiated -- they don't have a right of abode -- but I would invoke as a ringing statement pertinent to the rule of law the observations of my first Head of Chambers, Lord Scarman, in a decision in 1984: "Habeas corpus", he said, "is often expressed as limited to British subjects. Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'No' to that question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection."

The principle has been in the law at least since Lord Mansfield freed a black in *Somerset's Case* in 1772. There is nothing here", he said of the legislation he was considering, "to encourage in the case of aliens or non-patriates the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed." The requirement of the rule of law is I suggest clear, and it is an important principle that non-nationals, non-citizens, should not be the subject of adverse treatment, save on grounds directly related to their immigration status.

My **fourth** subrule: the law must afford adequate protection of fundamental human rights. Now some distinguished authorities would challenge that proposition, and it has been argued that the rule of law has really nothing to do with fundamental human rights. It is to do with the promulgation of clear laws which must be observed. I would, for my part, take issue with that view. The preamble of the Universal Declaration of Human Rights assumes that human rights are protected by the rule of law, and I could not, for my part, accept that a state which savagely repressed or persecuted a minority complied with the rule of law simply because

the transport of the persecuted minority to the concentration camp or the exposure of female children on the mountainside was the subject of detailed laws duly enacted and scrupulously observed.

This is, of course, an extremely difficult area, since there is no universal standard, and differing views are held as to what fundamental human rights comprise. One can only point to the death penalty as an example. Even the most fundamental of rights are blurred at the edges, but within a given society I think there is ordinarily some measure of agreement where the lines should be drawn. The courts are there to draw them, and the rule of law must—should-- require legal protection of human rights which within a given society are regarded as fundamental.

Five. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. Now this rule is not in any way directed to prejudice arbitration or other means of resolving disputes, but it does, I think, recognise that if everybody is bound by the law, they must in the last resort be able, if they've got an arguable case or defence, to assert or advance it in court. Given the expense of litigation in common law systems, this is a real challenge. I think it is a challenge that to some extent you in the United States have gone further to solve than we have with contingency fees, acceptance of *pro bono* obligations, class actions and so on, although it is fair to say that vigorous efforts have been made, not least by the Attorney General himself, to promote the same sense of obligation in *pro bono* litigation as you recognise, but we all know the jibe about justice being free to all like the Ritz Hotel. It is a reproach I think that we owe a very serious duty to try to repair.

Six. Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith for the purpose for which the powers were conferred and without exceeding the limits of such powers. This will be seen by many as the core principle of the rule of law, and it is indeed fundamental. It is based, I think, on a simple proposition that neither the electorate nor representative democratic institutions ever give any government a blank cheque to do whatever the government or any officials want. The limits may be broad, but they are always there, and the function of the courts is to insist on their observance.

This, of course, leads to tension, which the Attorney General [who spoke earlier] has already acknowledged. He has also acknowledged that the rule of law requires that a decision should be complied with unless it is overruled or set aside or reversed by legislation. But this is, of course, a lesson of particular importance, as previous speakers have recognised, at a time such as the present, when governments, for good and wholly understandable reasons, want to go to the very limit of what they believe to be their lawful powers, and it is at this point that the role of the courts is, as I think, particularly critical in saying, "Thus far and no further."

Rule Seven. Adjudicative procedures provided by the state should be fair and public. As an American judge quite recently said, "Democracies die behind closed doors." There will be no debate about the general desirability of publicity. Fairness in civil proceedings I think can ordinarily be achieved. It can become more problematical in formal criminal proceedings and other contexts, such as deportation, precautionary detention, recall to prison, refusal of parole, where a decision may expose a person to severe adverse consequences as a result of the decision

made. That the decision-maker should be independent and impartial is so generally accepted as not to need emphasis.

What, then, are the core principles of fairness? That no final adverse decision should be made until the party has had an adequate opportunity to be heard. That a person potentially subject to any liability or penalty should be adequately informed of what is said against him. That the accuser should make adequate disclosure of material helpful to the other party or damaging to itself. That professional help should be available where the person cannot adequately protect his interests without it. That there should be an adequate opportunity to prepare answers to what is said on the other side. That a person charged with criminal conduct should be presumed innocent until guilt is proved.

The main problems, I think, have occurred outside the strictly criminal sphere, particularly in a situation where the state is in the possession of sensitive information, which it wishes to lay before a decision-maker, but which it is unwilling to disclose to the person at risk, at risk that is of an adverse decision, or to that person's legal representative. Thus the person at risk does not know the detail of what is said against him and is obviously hampered in replying. Parliament has described certain situations in which this may be done, identifying the situations in some detail and providing safeguards. Courts have accepted this situation as unfortunate but necessary.

More difficult I think is the situation where such a procedure is employed without express authority of statute, the subject of a recent divided opinion in the House of Lords. This is, as the Attorney General pointed out, a difficult and uneasy area. Any adherent of the rule of law must, I think, be uncomfortable, and I think at the very least we should all acknowledge a duty to scrutinise with the utmost care any departure from what we would all accept as ordinary and familiar principles.

I am not sure if my **eighth** rule is contentious or not. It is that the rule of law requires compliance by the state with its obligations in international law. In hoping that it is not contentious, I can pray in aid an address by the first President Bush to a joint session of Congress in 1990, when he said that: "A new world is emerging, a world where the rule of law supplants the rule of the jungle, a world in which nations recognise the shared responsibility for freedom and justice, a world where the strong respect the rights of the weak. America and the world", he said, "must support the rule of law and we will."

The present President in his State of the Union address in January 2002, with an obvious eye on the international scene, spoke in somewhat similar vein: "But America," he said, "will always stand firm for the non-negotiable demands of human dignity, for rule of law, limits on the power of the state, respect for women, private property, free speech, equal justice and religious tolerance."

British statesmen I think would echo these sentiments, but one has to acknowledge that it has not always been like that. At the outbreak of war in 1914 the Chancellor informed the German Reichstag that what Germany was doing was a clear breach of international law, but he said it was necessary and the situation would be rectified "once," he said, "we have achieved our military aims." In response, the British adopted a blockade of extremely doubtful legality,

defending which the Prime Minister of the day, himself a very distinguished lawyer, expressed some impatience with what he called “juridical niceties.”

The Suez expedition or invasion of 1956 teaches important and valuable lessons. I am not going to express any view whatever about the lawfulness of the invasion of Iraq, but I would draw attention to four differences in this country between what happened in 1956 and what happened in 2003. First, in 1956 the Prime Minister of the day virtually acknowledged that what was being done was unlawful, and, echoing Mr Asquith, with much less justification, made reference to “legal quibbles.” Knowing that the very distinguished legal adviser to the Foreign Office, later a judge of the International Court of Justice and the European Court of Human Rights, had consistently advised that the proposed action was unlawful, he gave directions that he should not be informed of what was going on and issued an instruction to keep the lawyers out of it. No such remarks can be attributed to any leading statesman in this country in 2003.

The second distinction which I would mention is that in 1956 the Law Officers, whose duties it is to advise the government, were never formally consulted on the lawfulness of going to war. The government relied on the opinion of the Lord Chancellor, who in turn relied on a footnote in an article written by Professor Waldock. Professor Waldock was alive and well and living in Oxford. There was some doubt as to what the footnote meant, but nobody asked Professor Waldock, who would have disowned, it appears, the government’s interpretation, had he been asked.

The third difference is that in 1956, despite recent memories of Nuremberg, the armed forces did not ask for an assurance that what was proposed was lawful. In 2003 in this country they did and received such an assurance.

The fourth distinction is that although in 1956 the Law Officers were never formally asked to advise, in fact, they did so. They advised that they could find no legal justification for what was proposed, but nonetheless said that they supported publicly and privately what was being done, and one of them apologised to the Prime Minister for giving too much weight to what he described as “legalistic considerations.”

It would no doubt be naive to suppose that even today that major democratic states do not on occasions resort to legal casuistry to justify the use of force in doubtful circumstances, but I do not think, save perhaps *in extremis*, the government of such a state would today embark on a course which it acknowledged to be blatantly unlawful, or that those advising the government of such a state at a senior level would publicly support action for which they could find no legal justification.

In conclusion, there has been a debate whether the rule of law can exist without democracy. It has been argued that it can. To my mind that contradicts the fundamental premise underlying the rule of law. It depends on an unspoken but fundamental bond between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power they would otherwise enjoy.

The individual living in society accepts that he or she cannot enjoy the unbridled freedom of Adam in the Garden of Eden before the creation of Eve and accepts the constraints imposed by laws properly made because of the benefits which on balance they confer.

The state, for its part, accepts that it may not do at home or abroad all that it has the power to do, but only that which laws properly made authorise it to do. I believe and I hope that most of you believe that the rule of law so defined, although a constitutional principle, is, in fact, a principle of such manifest and fundamental importance as to animate not only our professional lives, but our lives as members of our respective societies.

Thank you very much.