

Preface

LORD HACKING*

As long ago as the fourth century B.C. the great Greek philosophers Plato and his student Aristotle were identifying the rule of law as a concept different from the rule of men. In earlier understanding the basic premise of the rule of law was that no-one should be above the law whether he be a king or a peasant. For many centuries this application of the rule of law was not one to which English Kings exactly adhered! Yet the Barons forcing King John in England in 1215 to sign the Magna Carta were essentially seeking the King to submit to the law and to put limits on his power to obtain feudal fees and duties. Similarly the Commonwealth Parliament, following the English Civil War, was essentially asserting the rule of law when charging, in January 1649, King Charles I before the Court in Westminster Hall with High Treason against his own peoples—namely the King was not above the law. As cited in these papers on the rule of law, his father, James I, had been reminded by Chief Justice Coke that the King should be “*under God and law*”!

As the years have gone by the concept of the rule of law has developed and become more closely and, interestingly, more widely applied. This is not to desert the fine words of Thomas Paine in his 1776 pamphlet *Common Sense*:

“For us in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other”

but to recognise that in developing communities that the rule of law has to have more ingredients. The law itself has to be fair. It has to be certain and brought into being by a democratic process. It has to be applied equally to all and has to be buttressed by some, if not complete, separation of powers between the executive, the legislature and the judiciary. The importance of the separation of powers was magnificently expressed by John Adams in 1780 in drafting the constitution of the Commonwealth of Massachusetts:

“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legisla-

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tive and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men”.

While the United States of America, in its first Constitution of two hundred years ago, perfected the separation of powers, it is not necessary to have that perfection, to achieve a rule of law which carries the respect and obedience of societies. In the United Kingdom, and those countries who follow the Westminster parliamentary system, the executive, although a separate entity, is not truly separated from the legislature. Indeed, in the latter part of the last century, Lord Hailsham, a former Lord Chancellor in England (later to become Lord Chancellor again), wrote in 1976 a book entitled ‘The Elective Dictatorship’ in which he described the dominance of the executive within the legislature of the English Houses of Parliament, particularly in the House of Commons.

On the foundation stones of the Constitution of the United States of America and of the great treatises in England of Dicey’s Law of the Constitution and Halsbury’s Laws of England, it is possible to identify more clearly other parts, and important parts, of the rule of law. Of recent times, since the adoption in 1998 of the European Convention on Human Rights, into an English Act of Parliament, it is also possible to identify the rule of law with much greater precision. Going beyond the rule of law concepts of the ‘presumption of innocence’ in criminal law (every person being presumed innocent until it is proved otherwise) of legal equality and of ‘habeas corpus’ the great enactment of seventeenth century England (every person being held in custody having the right to be told of which crimes he or she stands accused and every person so being held having the right to be brought before a judicial authority for that custody to be challenged) there have developed other important principles such as: laws should be prospective rather than retroactive, there should be clear and open procedures for the making of laws, the principles of natural justice should always be observed, there should be access open to all citizens to the courts of law and above all there should be guaranteed the independence of the judiciary. Moreover no longer is the rule of law only being applied within sovereign states but now on the international stage. Lord Bingham, one of the contributors to these papers on the rule of law, gave the British Institute of International and Comparative Law Lecture last November in which he argued, as have others, that the invasion of Iraq was a breach of the rule of law. This opens the dimension of what is the rule of law as applied internationally? Is this limited to law stated in International Conventions or in Resolutions of the United Nations Security Council? Or does it have a greater being? Are there now rights, under international law, whether or not expressed in Resolutions of the United Nations under which there can be humanitarian interventions into sovereign states when the peoples of a sovereign state are being inhumanely treated by the rulers of those states?

In an endeavour, therefore, to explore further the rule of law, we have gathered together these distinguished papers, which, bar two, have all been delivered at meetings of the American Bar Association. We are thus able to explore with Lord Phillips, the former Lord Chief Justice of England and Wales and the President to be of England’s new Supreme Court, how the rule of law should be applied when faced with the menace of terrorism. Through Lord Phillips we are able to see how the rule of law should never be abandoned whatever the threat of terrorism and to see how important, both in England and the United States, is the role of the courts of law. We then have the paper of Lord Goldsmith QC, formerly the Attorney General of the United Kingdom, who had to grap-

ple with the problems of terrorism throughout his six years in office. Like Lord Phillips, he argues that to abandon the rule of law is to abandon the most effective weapon under which terrorism must in the end be defeated. Then there is the remarkable account of Lord Bingham, formerly Lord Chief Justice of England and Wales and later Senior Law Lord in the House of Lords, of the case of *Liversidge v. Anderson*, in which the House of Lords in 1942 at a perilous stage in World War Two, grossly misapplied the rule of law in agreeing to a continued detention in prison of a suspected enemy alien when there was no charge of criminal conduct against him and when the Government of the day was not required to give any reasons for his arrest and detention. Only one Law Lord, Lord Atkin, had the courage to strongly dissent from his fellow Law Lords giving an Opinion which has subsequently been recognised as right as the majority of Opinions of this House of Lords judgment have now been held to be wrong.

Sir Anthony Clarke, the Master of the Rolls and Head of Civil Justice in England and Wales, gives his perspective of the rule of law as applied in the administration of civil justice so that “*our civil justice systems are readily accessible and effective*” and not like it was in the nineteenth century when, in the words of Jeremy Bentham, the law was

“a lottery: have you money enough for a ticket? Down with your money and take your chance. Does money run short with you? Lie still and be ruined. It was not for you that justice. . .was made.”

In Lord Hope’s paper on the judgements in England relating to the extradition of former President Pinochet of Chile, we learn of the difficulties in fairly applying the rule of law when the offender, at the time of the alleged series of crimes against humanity, was the President of a sovereign state. In interesting contrast is the paper of Maria Vicien-Milburn, the Director of the General Legal Division of the Office of Legal Affairs in the United Nations who, writing in a personal capacity, tells how the rule of law can be established, relating to its own employees, in an international organisation, such as the United Nations, which has immunity from legal process. Thus the rule of law should always be present whatever be the human activity.

From the United States there is the paper which the Chairman of the Section of International Law of the American Bar Association, Aaron Schildhaus, gave last December to the Nigerian Bar Association in which he argues that it is not “*just the rule of law: it is the just rule of law*”. From there we move to Judge John M. Walker of the United States Court of Appeals, Second Circuit. He considers the rule of law from a different perspective. He sees it as an essential role for those countries who have strong and independent judiciaries, to support judiciaries who do not have the experience and benefit of independence and who are unable to fulfil their vital role in upholding the rule of law. Buttressing Judge Walker’s paper is the remarkable paper of Justice Tassaduq Jilani of the Pakistan Supreme Court. It is a great tribute to him and other Justices in the Pakistan Supreme Court who, in much difficulty, have been prepared to stand up for the rule of law. Similar praise can be given to Aitzaz Ahsan, the former President of the Pakistani Supreme Court Bar Association, who presents the next paper in our portfolio of papers on the rule of law. Without the support of the Bar, judiciaries, whose independence is being attacked by the executive, cannot hope to hold their ground.

We then progress on to how the rule of law can be re-established in the International Criminal Tribunals which the United Nations have set up to try those who have gravely

breached human rights in the deep troubles which were experienced in the former Yugoslavia, Rwanda and Sierra Leone. It is here that the paper from Justice Hassan Jallow as the Chief Prosecutor for the International Criminal Tribunal of Rwanda brings further perspectives to the rule of law. Not only have the International Criminal Tribunals offered fair trials to those accused of atrocities against human rights—to establish, beyond anything else, that no-one is above the law—but by demonstrating fair and open trials there has become a confidence in re-building legal systems in these troubled places.

The last paper in our portfolio is the paper delivered by Professor Jayakumar, formerly Singapore Minister for Law and Deputy Prime Minister, and now Senior Minister and Co-ordinating Minister for National Security. The important point which Professor Jayakumar makes is that, in applying the rule of law, each society has to balance individual rights against the rights of society. As Professor Jayakumar acknowledges, Asian societies like Singapore, generally give greater importance to the interests of the community rather than the rights of the individual. As his paper argues, this does not mean that the pillars of the rule of law: an independent judiciary, the right not to be arbitrarily arrested and the right, when arrested to have a fair trial, are not adhered to. As Professor Jayakumar asserts, the rule of law cannot be applied in the same way in every society. It is not simply an ideal, which floats above to guide mankind. It has to be rooted in the social, cultural and economic norms of the society, which it seeks to serve, and it is part of the good governance of that society. While this may produce different results in different societies there must always be an independent judiciary and an equality of all citizens before the law. As Professor Jayakumar concludes:

“This, then, is the essence of Rousseau and Locke: free society requires rules; rules require free society. For free society to thrive, we need the global capacity to work together toward common values. International cooperation is one part; wise governance within individual countries is another. There must be a will, internationally and domestically, to do all that is necessary to allow freedom under the law to flourish.”

The publication of these papers is most timely. Never before in my lifetime has the rule of law been so important in the conduct of human affairs. Sixty years ago the Universal Declaration of Human Rights (touchingly called by the Chairman of the UN Commission, Eleanor Roosevelt, who drafted it, as *“the Magna Carta of all mankind”*) was signed in Paris on 10th December 1948. So it is in the 60th anniversary celebrations we are revisiting its canons:

“Whereas, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”

and reminding ourselves, pursuant to its Article 1, that:

“All human beings are born free and equal in dignity and right.”

Yet in painful contrast to the Universal Declaration of Human Rights—a Declaration intended to be the phoenix arising out of the ashes of most gross breaches of human rights exposed, in all its dreadfulness, in the aftermath of World War II—we read the findings of the just published Report of the Eminent Jurists Panel, created in an initiative of the International Commission of Jurists, on “Terrorism, Counter-terrorism and Human Rights”:

“This report catalogues, with deep concern, the extent to which the responses to the events of 11 September 2001 have changed the legal landscape in countries around the world. It documents how States have reacted to the threat posed by terrorism and concludes that as a result of the cumulative impact of counter-terrorism policies that are being pursued, the international legal order based on respect for human rights, built up painstakingly during the second half of the last century, is in jeopardy. This report reflects this concern and the urgent need for action by governments to repair the damage that has been done.”

Amongst its findings are that “many current counter-terrorist measures are illegal and even counter-productive”, that the “framework of international law is being undermined”, that the “failure of States to comply with their legal duties is creating a dangerous situation wherein terrorism, and the fear of terrorism, are undermining basic principles of human rights law” and most concerning of all that “the evidence worldwide [shows] that the erosion of international law principles is being led by some of those liberal democratic States that in the past have loudly proclaimed the importance of human rights”.

Thus of particular worry to the Eminent Jurists Panel was the admitted use of torture, including the US use of ‘waterboarding’ on detainees in Guantánamo Bay Detention Center—a practice described by the previous US Administration as “an ‘enhanced’ interrogation technique” and a “valuable tool in the war on terror. . . that had a proven record of keeping America safe”. In the result US “officials expounded the claim that the laws of war may be invoked outside of an armed conflict. . .”—all being part the ‘War on Terror’. As the Panel observed:

“Torture violates the principle of human dignity that lies at the heart of the broader international human rights framework, and as such is never acceptable. The absolute prohibition on torture, whilst not always respected in practice, has been part of the global consensus for decades.”

It is in considering this ‘erosion’ of international law principles, ultimately the erosion of the rule of law, that the papers of Lord Phillips and Lord Bingham and those of Lord Goldsmith and Aaron Schildhaus are so important. As Lord Bingham demonstrated, citing a case in the English House of Lords over 65 years ago and heard at the most precarious stage of World War II, the rule of law should never be “silent” even “amid the clash of arms”. As both Lord Phillips, out of his responsibilities as Lord Chief Justice, and Lord Goldsmith, out of his responsibilities as Attorney General, lucidly argue that adherence to the rule of law is not an impediment in the protection of society against terrorism but the best means of ultimately depriving the terrorist of his status and support.

“Respect for human rights must, I suggest, be a key weapon in the ideological battle. . . . The British Human Rights Act and the United States Constitution are not merely. . . . safeguards. They are the foundations of the fight against terrorism.”

Lord Phillips

“We must show that our values of democracy, tolerance, acceptance of diversity and justice are strong. This battle for ideas and values is. . . of the greatest importance. . . It means that our basic freedoms and values should not be seen as obstacles to protecting us. . . . but ultimately a part of the solution. Above all we must uphold, and be seen to uphold, the Rule of Law.”

Lord Goldsmith

As Aaron Schildhaus, out of his responsibilities as the current Chairman of the Section of International Law of the American Bar Association, rightly argues any law “*which discriminates against, humiliates, or demeans segments of the population is the rule of law gone wrong*”. As cited by Justice Jillani, Martin Luther King said “*Injustice anywhere is a threat to justice everywhere.*” This is why the steadfast opposition of the American Bar Association Section of International Law, of the American Bar Association itself and of other Bar Associations in the USA to the serious breaches of the rule of law being perpetrated by the US government, has been so important in getting the United States of America, and most particularly the new US Administration, to start to return to the rule of law and to take up again its world leadership in democracy.

To understand further how the rule of law can be protected at times when the executive is trying to rob the judiciary of its independence there is much to be learned and admired in the papers of Justice Tassaduq Jillani of the Supreme Court of Pakistan and Aitzaz Ahsan, the former President of the Pakistan Supreme Court Bar Association.

“ . . . no democracy can survive without an independent judiciary. No democracy will survive without law.”

Aitzaz Ahsan

Of equal importance Justice Jillani underpins the argument of Lord Phillips and Lord Goldsmith

“ . . . when the law enforcement agencies roughsod the law in the name of terror it amounts to playing on the wicket of the terrorists who wreak violence in disregard to law

[and then citing the former Chief Justice of Israel, Aharon Barak]

. . . the struggle against terrorism is not conducted outside law but within the law. Terrorism does not justify the neglect of accepted legal norms.”

Justice Jillani

It is, therefore, a great tribute to the peaceful dignified but persistent support of Members of the Bars of Pakistan that Chief Justice Iftikhar Muhammad Chaudhry, eighteen months after his unlawful removal from office, was re-instated in March of this year.

In addressing the application of the rule of law relating foreign sovereigns Lord Hope brings out new dimensions. In the first Pinochet Judgement, the House of Lords reached the rather simpler conclusion that the immunity possessed by a Head of State from legal process in another state, in respect of functions performed by that Head of State, did not extend to crimes of torture or hostage taking because, as a matter of international law, such acts could not be regarded as proper functions of the Head of State. In contrast the third Pinochet Judgement of the House of Lords held that it was only after the UN Convention against Torture and other crimes was enacted by the UK Parliament into UK law in December 1984 that President Pinochet could no longer rely on the protection of state immunity. Thus the protection afforded in the UK under sovereign immunity to Heads of State, who have committed those crimes not covered in the UN Convention against Torture, still prevails. More concerning, if this principle is followed in countries who have not taken the UN Convention on Terrorism into their national law, then Heads of State, who have committed torture or other breaches of human rights on their countrymen will remain protected by sovereign immunity. It is, therefore, heartening to note the Interna-

tional Criminal Court has indicted President Omar al-Bashir of Sudan and issued a warrant for his arrest on charges of war crimes and crimes against humanity accusing him of “intentionally directing attacks against an important part of the civilian population of Darfur, murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians and pillaging property”. President al-Bashir will no doubt remain in Sudan or otherwise out of reach of the International Criminal Court but he is the first Head of State, still in office, to be so indicted—Slobadan Milosevic (the former President of Yugoslavia) and Charles Taylor (the ex Liberian Leader) both being indicted after being forced from power.

It is fitting, therefore, to turn finally to Justice Jallow and his work, as Prosecutor, with the International Criminal Tribunal for Rwanda. It is here we can identify that:

“Establishing respect for adherence to the Rule of Law is a means of promoting peace in a society torn by armed conflict. History has repeatedly shown that justice and peace are inextricably linked, that one cannot exist without the other in a way that is sustainable.”

Justice Jallow

The International Lawyer is a particularly appropriate home for the publication of these distinguished papers on the rule of law. It is the flagship publication of the American Bar Association Section of International Law. Rule of law is a core competence of the Section, and the Section elects a Rule of Law Officer to watch over, and keep its members focused on, this important topic. As a result, Section members benefit from regular examination and discussions of rule of law themes at seasonal meetings and stand alone programs and in committee work and task force projects.

There is another reason why the Section of International Law should be associated with this publication. In a remarkable display of support for the Pakistani lawyers, whose peaceful protests, after General Musharraf had suspended the Pakistan Constitution and dismissed and arrested the Chief Justice and other Members of the Pakistan Judiciary, were broken up with violence, arrests and imprisonment, six hundred US lawyers, led by the President of the American Bar Association, Bill Neukom, and by Officers of the Section of International Law of the American Bar Association, marched in November 2007 in Washington DC from the Library of Congress to the steps of the US Supreme Court to make it known the conduct of the Pakistan Government was deeply wrong and must stop and the rule of law re-instated.

It is right, therefore, that, in publishing these papers, we should pay tribute to the leadership of the Section. It was the former Chair of the Section, Jeffrey Golden, who provided great leadership in the support of the rule of law travelling all the way from London to take part in this peaceful demonstration in Washington in support of the Pakistani lawyers. It was also under his Chairmanship that the papers from the English Judiciary and the English Attorney General were delivered at the Fall Meeting in London in October 2007 and it was he who proposed that these rule of law papers should be published. Having taken over as Chair of the Section, Aaron Schildhaus has carried forward the leadership on this project and made available a paper for us to publish. My two Co-Chairs of the Fall Meeting in London, Bart Legum and Adam Farlow, did much in developing the London programme out of which several of these papers have emerged. I express grateful thanks to Jeffrey Golden, Aaron Schildhaus, Bart Legum and Adam Farlow.

The ABA Rule of Law Initiative has been a pioneer in developing interest and support for the rule of law and kindly agreed to us publishing the papers of Justice Jillani and Mr. Aitzaz Ahsan as delivered at their Award Ceremony and Luncheon in New York in August 2008 for which I also express grateful thanks.

Of more immediate benefit has been the significant assistance of Lydia Carter of Littleton Chambers in London and Catherine M. Doll of Debevoise & Plimpton in New York. Each of them brought worthy research and scholarship to this project as the law, relating to terrorism and the rule of law, has developed in the UK and the USA—causing Lord Phillips to express special thanks in his paper to each of them. I should add that Catherine M. Doll, as the chair and moderator for the Rule of Law programs at the Section's Fall Meeting in Brussels in September 2008, where the papers by Lord Goldsmith, Ms. Vicien-Milburn, and Justice Jallow were presented, and as the bringer to us of other rule of law papers further contributed to our task, as did Lydia Carter in collating and organising the papers in London before their dispatch to the USA. Finally and most importantly none of us would have been able to move forward on this project without the unstinting support of Patricia Heard and Jessica Lee and the other members of the Editorial team of *The International Lawyer* in Dallas, Texas, who have always been ready and diligent in reviewing and revising the texts we have been sending to them from London. I express great thanks for all these most valuable contributions.

We are aware that this is not the only present publication of distinguished papers on the rule of law. For one example the World Justice Forum convened a meeting in Vienna in July 2008 to consider the 'Global Perspectives on the Rule of Law' and has subsequently published the papers delivered at that meeting. We just hope that these papers in *The International Lawyer* will add further distinction to this very important subject.

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14th May 2009