

# The Rule of Law

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The continental tradition treats the word 'law' as synonymous with 'legislation'. The common law tradition treats the same word as synonymous with 'liberties'. In this fundamental sense, English law and continental law are not merely different, but direct opposites.

Europe prides itself at tracing the origins of its legal tradition to Ancient Rome: and in fairness, there is much in that heritage to be proud about. But the constitutional basis of it is the famous maxim of Justinian: *Quod principi placuit legis habet vigorem* – 'whatever pleases the Prince has the force of law' (Institutes 1.2.6). Their law, with all its virtues, remains a creature of the state and may be changed or abolished by the state.

The basis of our constitution is the very opposite of Justinian's. Symbolically, our constitutional credo has been formulated by a great common law judge rather than a great king or emperor, when in the 13<sup>th</sup> century Chief Justice Bracton declared: *Rex non debet esse subhomine, sed sub Deo et sub lege, quia lex facit regem* – 'the King can be under no man, but under the God and Law; for it is Law that makes the King'.

Such is the basic constitutional dilemma faced by every society: to be governed by the rules or by the rulers. Those are the only two conceivable bases of government, and no third way has ever been invented. The dilemma is as ancient as the very ideas of law and state. Consider, for example, the Biblical description of Ancient Israel being governed only by the Law (and the Judges administering it): "*In those days there was no king in Israel: every man did that which was right in his own eyes.*" The people then demand to have a king, so "that we also may be like all the nations". God obviously dislikes the idea, a prophet protests vociferously that people's liberty and property will no longer be safe; but the people defy all reason, and God reluctantly chooses as good a king for them as you could wish for. Sure enough, his reign ends most unhappily in tyranny and civil war. Sir John Fortesque refers to the Book of Kings to explain the peculiarity of English Constitution in *De Laudibus Legum Anglie*, c. IX (In praise of the laws of England).

Of course, there is something to say, and a lot has been said, on both sides of that eternal argument. All we need to know for the present purposes is that England has made that choice, and enshrined its preference in the Constitution under the name of the Rule of Law. Of course, our system does allow for a limited government, just like the alternative system allows for limited law. The point is that, in our system, the law comes first. Ultimately, ours is a nation governed by rules, not by rulers: by right, and not might; it is not the state that makes the law – it is the law that makes the state. Where there is a dispute between the sovereign and a subject, the law treats them equally, like any other two parties in a legal dispute. There is no presumption that the government is lawful. There is no presumption that a rebellion is unlawful. Both must be judged on their merits.

Nowadays, after centuries of testing both systems in practice, nearly every constitution in the world declares the principle of the rule of law. But it was not always so; and even today, what they mean by rule of law is not the same as what it means in the English Constitution. The whole point of the Common Law is that a principle, once declared to be law, has to be consistently applied to every

practical controversy; and from that, the whole body of law grows. The famous marvels of the common law grew up as logical extensions or practical safeguards of that principle: the sacred rights of liberty and property, trial by jury, habeas corpus, ‘innocent until proven guilty’, punishment, the right of access to justice, etc.

Thus, individual freedom and limited government were always inherent in the rule of law. The individual is free to do anything unless it is expressly prohibited by law; and the government (indeed, any ‘public authority’) is forbidden to do anything unless it is expressly authorised by law.

To enforce the latter principle, the Common Law developed a system of ‘prerogative writs’ whereby the lawfulness of any government activity may be challenged and remedied in court. Any unlawful decision of any ‘public authority’ can be quashed by a writ of *Certiorari* (Quashing Order), any unlawful practice prohibited by a writ of *Prohibito* (Prohibiting Order), and the authority can be compelled to do its legal duty by a writ of *Mandamus* (Mandating Order). Those three ancient ‘writs’, now renamed ‘orders’, and incorporated in the procedure of ‘judicial review’. But the most ancient, important and famous of all prerogative writs remains elevated above the ordinary procedure, as it has always been; for it protects the liberty of the subject. That is of course, the writ of Habeas Corpus (Produce the Body).

Habeas Corpus dates back at least to Magna Carta, and probably earlier. The Habeas Corpus Act 1679, sometimes mistakenly credited for creating the system, merely introduced a few additional procedural safeguards. The legal tradition links it with the famous C. 39 of Magna Carta: “No freeman shall be taken or imprisoned or disseised (wrongfully deprived) or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or by the law of the land.” Accordingly, an imprisonment or detention of any kind can always be challenged as unlawful – and that is the essence of the habeas corpus procedure. Anyone who knows about such imprisonment can apply for the writ, and a High Court judge is always available to issue it urgently, ordering the custodian to bring the prisoner before the court and show the legal basis of imprisonment. Unless satisfactory justification is provided, the prisoner must be freed by the court there and then.

All this seems simple and natural enough: but history is full of examples of how great political and economic interests were smashed to pieces by a writ of habeas corpus. It was by using habeas corpus that the Common Law courts fought and won their jurisdictional war with the terrible Court of High Commission and other Courts of Equity (‘equity’ as opposed to the common law). The Common Law judges would not recognise their jurisdiction to imprison people for breach of their injunctions, and as a rule, would not miss an opportunity to free their prisoners by habeas corpus.

In *Somerset’s Case* (1772) ( (1772) 20 State Tr 1, (1772) Lofft 1), a certain customs officer bought a black slave in America and brought him to England. The slave, Somerset, was kept in a ship bound for Jamaica when his ‘imprisonment’ was challenged on Habeas Corpus. Although slavery was widespread in many parts of the Empire, the captain of the ship (represented, like the other side, by some of the most eminent lawyers of the age) could provide no proper justification of it in English law. So the court of Kings Bench ordered Somerset’s release. Because of the common law rules of precedent, this meant no less than an outright prohibition of slavery anywhere in England and Wales. Upon setting his foot on English soil, any slave would now become free – 93 years before Abraham Lincoln’s emancipation of the slaves in the USA.

Another celebrated constitutional case of the same era was that of, *Entick v Carrington* (1765); which highlighted other aspects of the Rule of Law. The case was essentially that the Government had no legal right to issue a search warrant against the subject (in that particular case, against a political pamphleteer John Entick in order to suppress alleged sedition). Lord Chief Justice Camden gave judgement for Entick, and held this government's practice of issuing such warrants over the past 80 years to have been unlawful:

*"If it is law, it will be found in our books. If it is not to be found there, it is not law."*

So, the rule of law as understood on the basis of *Entick v Carrington* includes the following practical elements:

- The law is entirely blind to the government policy and to any reasons of state—indeed to any political considerations.
- Long-standing practices of the government may still be illegal, even if tolerated by the subjects and the courts over many decades. Time does not make them legal.
- The law on the other hand, recognises constitutional rights of the subjects, such as the right to property or personal liberty; and gives a high priority to the protection of those rights.
- Every official is personally responsible for the lawfulness of his actions. It is no defence for him that such were his orders or that he was acting in an official capacity.
- The last of those principles has been particularly important in shaping our constitution, and stands in stark contrast to continental systems of law. Most other legal systems, as well as the international law, recognise the doctrine of 'state immunity'. As a rule, an official or a former official cannot be prosecuted or sued in an ordinary way for things he did as an agent of the state.

The English law knows no such immunity. On the contrary, power and responsibility are inseparable; and once you are vested with any amount of power, the corresponding amount of responsibility goes with it. Like anybody else, any official may be sued for trespass, theft ('conversion' in Civil Law), false imprisonment, malicious prosecution, etc. He may be imprisoned for contempt of court; until recently, he could be executed for high treason — not an extraordinary end of many political careers in English history. Contrast that with the fact that officers of Europol (the EU's police force) today enjoy immunity for anything they do or say in the course of their duties — including while on English soil.

In English law, it has always been considered right and proper that a position of power must be an uncomfortable position, and this approach is reflected in many aspects of our Constitution. For example, judges are selected from the best lawyers; but they are paid far less than lawyers of their level would earn in private practice. The whole system is designed to discourage self-interested people from assuming a position of power. The same approach was taken to its extreme with the highest political offices: those who dare to draw the symbolic sword of the State and use coercion against their countrymen must, by doing so, literally risk their heads.

This ruthless model of ministerial responsibility survived, in essence, till very recently, when the New Labour and the Cameron Tory governments sunk into the very opposite of it. Any fault was now blamed on the advice of faceless civil servants (who, by convention, could not even answer); if

the fault was particularly monstrous, a named civil servant was made a scapegoat. This was a murder of the noble constitutional tradition whereby every Minister was personally responsible for everything happening in his department, with or without his knowledge or consent. An oversight by a civil servant mandated the resignation of a Minister, to give way to someone who would be able to better manage his servants. A resignation, indeed, was not even a punishment, but rather an escape. For culpable misconduct or corruption by the Minister himself, the liability was criminal; and the penalty for high treason was death.

There is nothing sentimental about justice. Our ruthless constitutional doctrine of ministerial responsibility would be condemned without hesitation, by any modern Employment Tribunal, not to mention the European Court of Human Rights. Yet without it, we would never have developed democracy. And if any further defence of it is needed, we should only recall the names of its last victims: statesmen whom a British judge ruthlessly sent to the gallows merely for the way in which they exercised their ministerial powers. Their names were Hermann Goering, Joachim von Ribbentrop, Alfred Rosenberg, and many others.

Indeed the Nuremberg Trial was the latest great landmark in the history of the rule of law. It did involve a major legal controversy. The Nazi leaders operated within the continental legal tradition, which views law as no more than a creature of the state, a 'command of the prince'. They were, perhaps, the most consistent followers Justinian ever had: whatever pleased the Fuhrer had the force of law. Sure enough, being Germans, they had put their legislation in perfect order, had followed the correct procedure to repeal or suspend the inconvenient laws, and had passed sufficient Enabling Acts to enable almost anything. Each of them acted within the powers conferred on him by legislation, and in strict accordance with its relevant provisions and paragraphs. Furthermore, each acted in official capacity and under the orders of superiors; if there ever was a case for state immunity, it was this. From the point of view of a continental lawyer, they were innocent.

Of course, one could always rely on our Soviet allies to hang them anyway. But to pass a lawful judgement upon them, one needed common law judges from Britain and America – judges who knew that there was a Law above and beyond legislation, and that no 'state immunity' or 'order of the prince' could shield one from responsibility for his own actions.

The Nuremberg judgement was thus a victory of the Common Law over the continental legal positivism. There have been those who criticised it as a mere 'lynching party' of victors against the conquered, or excused it as an exceptional procedure adapted in exceptional circumstances to punish exceptional evils. But in truth, it was a triumph of justice which needs no such excuses. The common law nations applied to Germany the same law they had always applied to themselves; and passed the same sentence over German ministers which had so often been passed over English ministers. Every public official in England, from the Prime Minister to the lowest clerk in the borough council, bears legal responsibility for his actions no lesser than that of the defendants at Nuremberg trials. The rest is simply a question of punishment fitting the crime.

There is only one exception to that principle, and that is an exception which proves the rule. The English version of 'state immunity' is the Royal Immunity. It begins and ends with the monarch. 'The King can do no wrong' says the maxim of law, which sounds rather despotic and may, indeed, be rooted in the despotism of some forgotten ancient times. It is all the more remarkable how the common law, on consistent application of its first principles, has turned this maxim inside out. For many centuries now, 'the King can do no wrong' means simply that no official can justify his illegal

actions by the orders of the state (the King). He cannot escape responsibility by saying he was under King's orders, because the King can do no wrong, **so his illegal orders are always void.**

Taking the same principle to its logical conclusion, the development of the Constitution reached the point when the monarch has hardly any real power and only acts on advice of others. Those who advise her are fully responsible, with their heads if necessary. But the Queen can do no wrong, she cannot be held responsible, and under the English constitution it inevitably follows that she has no real power – **except the power as the embodiment and Guardian of the Constitution.** It is her duty to uphold the Constitution, and therefore to reject unconstitutional advice from her Ministers when she knows it to be so.