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EXPLAIN BACKGROUND *as Senator etc. Solicitor General for Scotland, Lords as relevant to experience of Rule of Law issues: including the role of the Public Prosecutor.*

Start with DEFINITION; STATEMENT OF INGREDIENTS ***RETURN TO IT:***

The Rule of Law

NO SHARED MEANING We all use words or expressions like "democracy", "human rights" and "The Rule of Law". But it is not clear that we all share an agreed understanding of what they mean. Perhaps the least well understood is with the concept of "The Rule of Law".

THE TRUE CHARACTERISTICS Here – I am not describing the situation that prevails in the UK or in Europe or in any particular jurisdiction. There are huge differences in different jurisdictions; and there are many occasions when the ideal of the Rule of Law is departed from, not only in times of War or National Emergency. I am trying to identify the characteristics that you must look for in a State to see if the Rule of Law can properly be said to apply. It is also important to realise and accept that there can by exceptions to the general principles – provided that the exceptions are properly and democratically approved.

It is also important to acknowledge that there are some societies in which the Rule of Law is observed meticulously; but others in which it is observed imperfectly. There is a spectrum: it is not simply a case of Either/Or.

PROCESS But perhaps the feature of the Rule of Law that I wish to emphasise FIRST here is its essential character. The Rule of Law properly understood is, for the most part, a matter of **PROCESS** not of **CONTENT** – though sometimes the two may appear to overlap. I know the word **PROCESS** sounds extremely dull, even lawyerly (as in Due Process) but it is the entirely accurate term to distinguish between the ***content*** of the law, on the one hand, and the legal means (**the *procedure***) by which one can protect and vindicate one's rights, either by positively claiming them, or clarifying them, or by using them as a shield against someone trying to violate them.

EXAMPLES Let me offer an example. Different countries/jurisdictions share the view that murder is a serious crime. However, the definition of murder varies substantially from one country to another. The USA has *degrees* of murder; the UK does not. Some jurisdictions desiderate an *actual intention* to kill as a necessary

ingredient of the crime of murder: some deem an actual intent from, say, an intention to inflict life-threatening injury *plus* death resulting.

The penalties for murder also vary: some prescribe capital punishment. Some don't. Exactly the same applies to other crimes, including the crime of **Rape**. Indeed, even within one jurisdiction, the definition of Rape (i.e. the listing of the essential elements that have to be proved) may be altered: that was done by judicial decision in Scotland a few years ago: force out; absence of consent in; and Parliament is always able to re-define any crime, including Rape.

The fact that two different jurisdictions have different definitions of particular crimes does not in any way mean that the Rule of Law obtains in one jurisdiction but not in the other. That is because the ingredients of a crime, as understood within any particular jurisdiction, or the character of the punishment for that crime, are a matter of CONTENT not of PROCESS.

Exactly the same applies to the fact that in some jurisdictions certain conduct is treated as seriously criminal whereas in others it is not. One obvious example is **homosexual conduct** between adult males: criminal in some countries; not in others. Criminal at one time;not at another e.g. in UK from 1885 – 1960 (?) – not so now.

Similarly, some jurisdictions make it criminal to have sex outside marriage, especially in Islamic States. Or to lend money on interest: usury.

However, one feature of the Rule of Law that straddles the line between PROCESS and CONTENT is that the law must apply equally to everyone. If the law of the State creates categories of people who are above the law, then the Rule of Law is absent. For example, if there is a rule that, say, policemen cannot be prosecuted for assault, then the Rule of Law is imperfect. But – even there – one can have a reasonable, justified and democratically approved exception e.g. that policemen/ambulance drives/fire-fighters/emergency services generally can exceed the speed limit when travelling to an emergency.

A difficult question arises in circumstances such as those that prevail in traditional Islam in regard to proof of rape. The Shari'a requires four male eyewitnesses, all being Muslims in good standing, to prove rape. This – being a rule about quantity and quality of evidence – looks like an adjectival law, a matter of Process. But it becomes effectively a matter of substance in that it really means that it is almost impossible to convict a Muslim man of Rape. The problem is highlighted by the fact that – assuming the rapist is not married to the victim – the victim is deemed to be admitting intercourse with a man not her husband. Because Rape cannot be proved she is held automatically guilty of sex outside marriage and can be very severely punished for it. It is difficult not to regard that as a serious breach of the Rule of Law. That is because it does not treat

all citizens as equal before the law. The same applies to any rule, such as in traditional Islam, that means that the evidence of a woman in a court of law is worth less than that of a man. (Or a non-Muslim versus a Muslim).

It is also of the ***essence*** of the matter that the Law is created, amended and authorised by the people; applies to everyone, and IS applied to everyone equally and impartially.

CHARACTERISTICS

We can properly say that we live under The Rule of Law (as it is understood in the Common Law systems) if our State has a legal system, which has the following essential **characteristics**:

[1] **Sovereignty:** the Law must be made by and for the people: of course, that is an ideal, in the sense that the whole people cannot gather under one roof and determine the details of any new or revised Law. So each State has to have machinery for making the Sovereign Will of the people the ultimate determinant of the content of the Law. The people must be able to change the Law. The machinery may and does vary from State to State: thus you may have Referendums, a basic Constitutional Law, an elected Parliament, with universal suffrage, or other machinery (e.g. electronic means) for ensuring the people have the ultimate control of what the content of the Law is (even an unelected chamber).
But this permits giving up a degree of sovereignty: E.C.H.R., E. Ct. of H.R. & E.U.

[2] **Knowing what the Law is**:
The Law must be knowable: in other words, the content of the Law (both Criminal and Civil) must be published by the State in such a way that all citizens can discover what rights and responsibilities are given to, or imposed upon, them by the Law. Electronic means have made this so much easier in recent years. That said, it would be entirely unrealistic to expect every citizen to be able to discover the law for himself: and that points to another important characteristic of the Rule of Law, namely that there has to be in society an independent legal profession accessible to those who need legal advice/representation (see below).
There can be gap between the Law as written and Law in practice

[**2A**] *Nullum crimen//nulla poena sine lege*

[3] **Equality before the Law**:
The Law must be applicable equally to all citizens, to all juristic persons (e.g. companies) and to all public bodies and officials, including Ministers of the Executive. Even more important, the law must be APPLIED equally and impartially: this creates the need for ***independent*** judges, prosecutors and an independent Legal profession.

[4] **Access to Justice**:

The citizens must be able to claim (assert and vindicate) their rights in ***independent*** Courts (or Tribunals). *Ubi jus ibi remedium.* This requirement (along with #[2 & 3]) means that there must be a body of competent and independent lawyers, or at least paralegals, available to advise and represent citizens in understanding and pursuing their rights. That also carries with it the need to have some system whereby the poor have real access to competent legal advice. Ideally, the Rule of Law requires some form of Legal Aid for those who cannot afford to pay for lawyers. That can include, for example, a public defender for criminal cases. Civil cases raise many problems, given the other demands on the public purse.

[5] **Independent Judiciary**:
The judges who decide all questions of rights in Courts and Tribunals must be independent and competent. To be "independent" the judges must have security of tenure: that means that no judge can be dismissed for the reason that the Government or other public non-judicial body regards his/her judicial decisions as unacceptable. Judges must not be able to be dismissed except for misconduct or unfitness: and the judgment as to whether or not any judge has been guilty of misconduct, or is unfit, must be made by a body of persons independent of Government. Judges must be properly paid to eliminate the risk of bribery. They must be trained and experienced in the application of the Law.
Appointment Commission: Lord Advocate excluded: tenure

[6] **Independent prosecutors** (ideally) True independence depends upon security of tenure etc. But the best foundation is a tradition of independence respected by the Executive and inbred in the prosecutors.

[7] **Public Justice**:
The Courts must be ***open*** to the public, including the Press. Judgments/Decisions in contested cases must be delivered in public and the judges must give ***reasons*** explaining their decisions. No person or agency of any kind can be allowed to make private representations to judges about the rights of citizens, except in accordance with published Rules of Court governing the procedures of the Courts.

[8] **Challenging Executive action**:
The actions, including the intended actions, of the Executive, of the ***police*** and of other public and private agencies must be able to be challenged and reviewed in the Courts on the basis that they are actions not authorised by the Law.

[9] **Court decisions to be respected**:
Once the Courts have delivered the final judgment in any litigation, the citizens and all agencies of the State affected by that decision are bound by it and must respect and act in accordance with it.
Nixon & Watergate tapes: Archibald Cox

THE RULE OF LAW: general

I have to begin with some basics with which you are all no doubt familiar – but it is ESSENTIAL to keep a firm grip on these basic concepts. [Otherwise you fail to see the wood for the trees].

The **PHILOSOPHICAL** basis of "The Rule of Law", and indeed of **DEMOCRACY**, is found both in the maxim of Roman Law, ***sic utere tuo ut alienum laedas***; freely translated as ' you are free to live your own life as you wish provided that, by doing so, you do not wrong or harm others'.

In **GOVERNANCE** terms, it found its clearest expression in the Gettysburg Address, by Abraham Lincoln in November 1863,
"Fourscore and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal. [Now we are engaged in a great civil war, testing whether that nation – or any nation so conceived and so dedicated, can long endure. We are met on a great battlefield of that war.] ***We…hereby resolve that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, and for the people, shall not perish from the earth."***

The essence of it, in **GOVERNANCE** terms, is therefore that the people, through some form **Machinery** e.g. of delegation to elected representatives whom they have freely chosen, determine what the Law shall be, and that that Law must be framed in such a way as to enable all people to pursue ***Life, Liberty and the Pursuit of Happiness***.

(But consider the House of Lords – *apparent* exception)

That in turn is a quotation from The American Declaration of Independence in 1776, ["***We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness***"]. The original draft was by Thomas Jefferson.

These concepts are all derived from the ENLIGHTENMENT, the 17th and 18th centuries flowering of philosophical, political, religious and economic thought in Europe. Despite the references to GOD in the Declaration of Independence and the Gettysburg Address, the thinking was essentially **SECULAR**. It is of the greatest importance to recognise what I believe to be the fundamental distinction between "WESTERN" Jurisprudence and the Jurisprudence of ISLAM, which teaches that Islam is a religion and a way of life based on the commandments of Allah contained in the Holy Qur'an, and the Sunnah of the Prophet of Islam,

Muhammad. The *corpus juris* of Islam, the Shari'ah, is based upon **DIVINE GUIDANCE.** It prescribes what is right (*Halal) and what is wrong (Haram).* So whereas in the WEST we can change the punishments for certain "Crimes" – e.g. Adultery or Apostasy, these punishments are prescribed in Islam and cannot be altered by a "democratic" vote. The HOLY QUR'AN and the SUNNAH prescribes – and men cannot alter – although there may be differences of interpretation.

E.G We made homosexual conduct "LEGAL "

*Leaving aside the MERITS, we **COULD** enact such a Law: the parliament/legislature of Iran could **NOT – while remaining true to traditional Islamic jurisprudence***

SO I speak only about **THE RULE OF LAW** as understood in the West.

In **LEGAL** terms the relations between citizens, and between citizens and the State, should be regulated by **known, ascertainable and enforceable law**, and not by taking personal steps, mounting vendettas, using brute force etc.. The law has to be **published.** That does not mean that it can, in a complicated world, always be expressed in terms that everyone can understand: that is an impossibility.

That leads to the need to publish the law in a form that is accessible, at least to educated persons, who can understand the law itself and can explain it to the persons possibly affected by it, e.g. the parties to a dispute, or to someone who wants to start a business and needs to know if his intentions are subject to regulation in such matters as Planning, Licensing, Employment Law, including Regulations, Health and Safety Regulations, TAX (VAT) etc. etc.

EQUALITY: It applies to rulers and subjects alike[1].

Indeed its real importance as a constitutional matter is that it applies as between the State and the citizen – or "everyone", as it has come to mean, under the European Convention on Human Rights and our own Human Rights law. Thus "everyone" includes non-citizens, such as those foreign national detained – without trial – at Belmarsh Prison[2].

Of course the State both makes the law and enforces it, so at once the difficulty arises: How can the State that makes the Law also be subject to it?

The answer is that there has to be in practice (or by convention) a true **Separation of Powers**.

The concept of Separation of Powers is not a single, unique and unchanging concept. For example, it is very differently understood in the Uk and the USA. (parliamentary v. Presidential system)

[1] JDB Mitchell Constitutional Law

[2] see the House of Lords case summarised below

But what is ESSENTIAL is that the **Judges** must be **independent** of the Executive and of the Legislature. In particular they must not be able to be dismissed by the Executive, the Government. But the same must apply to the prosecuting authorities. They may have to be instruments of the State – but they have to be independent of it. (Consider the case of the tax police in Russia and Yukos Oil).

[But even in a country like U.K. the legislature, at the bidding of the Government, may reverse the decision of the highest court – as in the *1964 Burma Oil* case, where the decision of the House of Lords - that the Government had to pay compensation to people whose oil installations in Burma were destroyed by government forces to stop them falling into the hands of the advancing Japanese ("Scorched Earth Policy) – was reversed by the passing of the *War Damage Act of 1965*: but this was a War case; and the rules tend to be treated without the usual respect when the country is at war or its actions in a war situation are under scrutiny: indeed that is one of the justifications offered in the Belmarsh Case – because of the so-called 'War on Terror'.]

Governments have additional – but LEGAL – powers

A Government may have a huge discretionary power e.g. to declare war, to sign treaties, to grant a Pardon, to withdraw from treaties, to derogate from internationally agreed Conventions and the obligations imposed thereby – what we call a Prerogative Power. So in effect the law is – in these respects - that the Government is <u>*above*</u> the law: certain of its decisions are simply not "justiciable"; this type of 'Law' can be controlled only by Parliament – or in the last resort by people taking to the streets or simply voting parliament out of office. And of course the Government may persuade Parliament to give it extraordinary powers – by enacting Statutes that contain the so-called *Henry VIII* Clauses. Similarly the Government can go to Parliament to seek and sometimes obtain *Retrospective* rights.

NOTE: *We are probably about to remove the Prerogative power that allows the PM (the Executive) to declare war – with possible exceptions in the case of self-defence or other immediate emergency.*

And it is possible to give certain people extraordinary rights "privilege rights" like the right of counsel to say things in Court, or of an MP in Parliament to make assertions about matters under debate, without being able to be sued. Privilege may be absolute or qualified. Absolute privilege applies to statements made in Parliament. Qualified privilege in effect means that the 'victim' of the assertion cannot recover damages for slander unless he can prove that the assertion was made with 'malice'.

Bear in mind that there is seldom any such thing as a law so clear that its application to a particular set of circumstances is beyond argument. Or to put it more accurately, the law is often open to

interpretation and how it should apply to a particular set of circumstances is also open to debate and to differing opinions. But that means INTERPRETATION by an independent judiciary.

Note also: ***Equality of Arms*** When the subject appears before a court and the State is on the other side – using taxpayers' money to engage lawyers (internal or outsiders) – the citizen should not be disadvantaged by having a poorer legal team.

It is important to realise that in (within) the U.K. the Government is not bound by ***international treaties*** that it has signed. Strictly speaking, the provisions of such treaties can be enforced in the Courts by citizens only if they have been incorporated into the domestic law of the U.K. A good example is the European Convention on Human Rights. It is incorporated into domestic law by the Human Rights Act 1998 (and the Scotland Act 1998); but even after such incorporation, the Courts cannot *overrule* an Act of Parliament that infringes the European Convention on Human Rights: The Courts cannot strike it down and declare it null and void (as in USA). The Courts can only declare the Act to be incompatible with the Convention and leave it to Parliament to amend the law accordingly.

However, the Government will usually regard itself as bound by international legal instruments such as the Convention of Torture and Convention on Rights of Asylum.

Consider Scottish Case re the right of prisoners to vote.

But, subject to that, the ***Government and Parliament can be effectively bound*** by European Law, whether of the Council of Europe - i.e. the European Convention on Human Rights OR by the law of the EU.

The position of the Crown – even as the holder of land – is very complicated: e.g. the Planning Laws do not apply and "The King can do no Wrong". No Equality of Arms principle in planning Enquiries: State or LA pays from public funds: objector from private funds. Now regulated by Statute; and there are many calls for further reform.

Separation of Powers: Do the courts MAKE Law?

(1968: Mitchell, "As makers of law, the courts have declined in importance")

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At one time, constitutional lawyers would have said 'No', except that they filled in the gaps, interpreted the statutes to clarify ambiguities, and over long periods of time created law by extending or restricting 'doctrines, on topics such as *Common Employment*, or the *Right to Die* on which the Legislature had remained silent – whether by accident or by design. There was ***no loosely worded Constitution***

giving judges the power to invoke ill-defined concepts such as Liberty, Fairness or even Justice. **Contrast USA & *Roe v Wade* (privacy)**

The gradual build up of a Written Constitution has changed that and is continuing to change it. The most striking examples are the *European Convention on Human Rights (plus the Human Rights Act*) and the *European Communities Act 1972*. There are various other statutes which are to all intents and purposes unable or very unlikely to be repealed, e.g. the *Statute of Westminster*, the *Canada Act*, the *Scotland Act, 1998*. But there are other **Conventions and Treaties** that enable judges to 'make' law: e.g. European Conventions on Torture, on the Rights of the Child and other International instruments (e.g. on Refugees, Asylum Seekers) that judges are entitled to *consider* when 'interpreting' our own law, whether it is statutory or derived from our 'Common Law'.

The principal feature of such Instruments is that they are vaguely worded: and the vaguer the wording the more scope there is for creative interpretation by Judges: *so they make law by interpretation*. Concepts like 'Fair trial', 'family life', 'privacy', 'reasonable time' etc. etc. give plenty of scope for Judicial Law-making. The Supreme Court of the USA provides many exx. (See my book, '***Law, Justice and Democracy'***). So in the 21st Century there is – in UK - much more scope for Judicial law-making and for Judicial activism than there was traditionally.

Note the rise in importance of "***Judicial Review***" and the development of notions such as '***proportionality***' as a means of testing the ***vires*** of Ministerial acts.

But there are limits: see the Fox-Hunting case in which people went to the High Court to have a Statute struck down on the basis that Parliament had exceeded its powers. They failed. The Court seems to have taken the traditional view that they cannot look behind a Statute that has received the Royal Assent.

Of course, **underneath any system of law, there lies a political reality**. Governments must have and exercise powers that the ordinary citizen cannot have or exercise, e.g. the power to tax or to regulate planning issues, the power to prosecute and to order the police to investigate and sometimes to act, the power to appoint judges or to hold people in prison – but only in accordance with the existing, known and published Law. Powers that are available to Government alone have to be conferred by Parliament and the Courts will ensure that they are exercised within any limits that Parliament has imposed. Additionally Governments and Local Authorities and Health Authorities etc. have public resources – especially money – that give them *effective* power that the ordinary citizen does not normally have.

NB The prerogative power to declare war…

It is interesting to NOTE that the House of Lords (the Court) decided that it could overrule its own previous decisions – and it has done so. It also

decided to change the long-standing rule that the Court had to interpret any Statute purely on the basis of its own words and could not look at the proceedings in Parliament or – exceptionally – at the *travaux preparatoires.* This is law-making, although it is law-making ***in relation to Process*** – but ***Process*** can be vital and can make all the difference: *ubi remedium ibi jus*.

Discuss (supra) the difference between rights and obligations in law (the substance of the law) and "due process"; ubi jus ibi remedium. e.g. "murder is a crime": that is a statement of the substance of the law: but "no person may be convicted of murder unless he has been convicted by a jury on sufficient evidence and in accordance with established procedures applied by an independent judge" THAT is a rule about 'process'.

Note the growth – in UK - of Administrative Tribunals to regulate Pensions, Dismissal from Employment, Sex discrimination, Racial Discrimination, Planning, Immigration – and NOTE the frequent attempts to introduce OUSTER provisions to prevent review by the Courts.

JUDICIAL INDEPENDENCE

Appointment: ordinary judges; Office holders, e.g. LCJ and Lord President. *Judicial Appts. Board* ***Contrast*** USA Sen. Jud. Ctte.
Dismissal. Appointment ***ad vitam aut culpam***: Scotland Act – my role in re dismissalPromotion/demotion
Qualifications: U.K. versus Continental systems
Payment must be high to avoid bribery; pensions
Giving reasons - in contested cases.
Rights of Appeal
Juries "One-offs"

Note that there are other mechanisms, Ombudsman, Judicial Inquiries, Committees of Parliament, Audit Commission - all Public but Independent.

Access to Justice
Legal Aid i.e. FREE, if necessary
Competent Lawyers: "Cab Rank Rule"
Contrast USA

Public Justice
Courts to be open to the public and ***even more so*** the Press/Media e.g. in sexual cases or case involving children.

Challenging Executive action: Judicial Review

Respect for, and enforcement of, Court Decisions
Action by the police, the "bailiffs", Contempt of Court in respect of Court Orders, Police powers of arrest.

CASE LAW

A very recent case provides an excellent example of the independence in the U.K. of the Judiciary. In a recent article I summarised the case – which is very complicated – in the following terms:

"Britain's highest Court rejects anti-terrorism law

"The background

In December 2004, the United Kingdom's supreme Court, (namely, the judges constituting the Appellate Committee of the House of Lords) delivered judgement in a case brought by some men who, despite not having been convicted, or even charged, with any criminal offence, were being detained in Belmarsh prison, on the authority of the British Home Secretary Their situation was summarised by the senior judge, Lord Bingham of Cornhill, in these words:

" The appellants share certain common characteristics which are central to their appeals. All are foreign (non-UK) nationals. None has been the subject of any criminal charge. In none of their cases is a criminal trial in prospect. All challenge the lawfulness of their detention. More specifically, they all contend that such detention was inconsistent with obligations binding on the United Kingdom under the European Convention on Human Rights, given domestic effect by the Human Rights Act 1998".

Because of its obligations under International Law, the British Government had no power to expel them from the country, even although Government Ministers believed, largely on the basis of intelligence information, that the men posed a terrorist type of threat to the United Kingdom.

"Detention without trial

Detention without trial, and without charge, is effectively prohibited under Article 5 of the European Convention on Human Rights. However, following the events of 9/11, the British Government exercised its right to derogate from Article 5, on the basis of the Government's assessment of the risks posed to the country's security by certain people resident in the country. The Government persuaded Parliament to enact the Anti-terrorism, Crime and Security Act 2001 and, in terms of Section 23 of the Act, made an Order (the Human Rights Act 1998 (Designated Derogation) Order 2001), by means of which the Government acquired statutory powers to detain, without trial, aliens believed by ministers to pose a terrorist threat to the U.K. It was under that Order that the Home Secretary ordered the detention of these men.

"Discrimination

Article 14 of the European Convention on Human Rights provides that the other rights expressed in the Convention are to be secured without discrimination on any ground such as sex, race...national origin etc. The Order did not empower Ministers to hold British citizens without trial: so

it was plainly discriminatory. Although the Government derogated from Article 5, it did not derogate from Article 14.

“The Government loses the case

The judges (by 8 votes to one) decided that the Order was illegal and that section 23 of the 2001 Act was incompatible with the Government's obligations under the European Convention on Human Rights. The precise reasons for the decision need to be studied in the judgments of the eight judges who determined the result. The reasons are given, in some 130 pages, on the website of the House of Lords .

The thinking behind the decision

Although there is no room here to explain the whole reasoning, it may be of value to quote from some of the judgements: in them, the judges sought to articulate deep constitutional truths about the role of Government and the limits to executive power, the independence and primacy of the judges in explaining and applying the law, and the overriding importance of the Rule of Law in the vindication of fundamental human rights and the protection of Democracy. The passages following (with, where necessary, explanations in italics) are from the judgements delivered by three of the judges .

“Lord Hope of Craighead

"It is impossible ever to overstate the importance of the right to liberty in a democracy. In the words of Baron Hume, Commentaries on the Law of Scotland respecting Crimes, 4th ed (1844), Vol 2, p 98: "As indeed it is obvious, that, by its very constitution, every court of criminal justice must have the power of correcting the greatest and most dangerous of all abuses of the forms of law, - that of the protracted imprisonment of the accused, untried, perhaps not intended ever to be tried, nay, it may be, not informed of the nature of the charge against him, or the name of the accuser."

"These were not idle words. When Hume published the first edition of his Commentaries in 1797 grave abuses of the kind he described were within living memory. He knew the dangers that might lie in store for democracy itself if the courts were to allow individuals to be deprived of their right to liberty indefinitely and without charge on grounds of public interest by the executive. The risks are as great now in our time of heightened tension as they were then."

Later Lord Hope added, "[The] margin of the discretionary judgment that the courts will accord to the executive and to Parliament where this right (the right to liberty)

is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to government and to the legislature. We are dealing with actions taken on behalf of society as a whole, which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate. It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society that respects the principle that minorities, however unpopular, have the same rights

as the majority. The intensity of the scrutiny will nevertheless vary according to the point that has to be considered at each stage as one examines the question that was referred to the Special Immigration Appeals Commission ("SIAC") under section 30 of the 2001 Act. This is whether the Derogation Order and Part 4 of the 2001 Act are incompatible with the appellants' Convention rights."
….[The] fact that the European Court will accord a large margin of appreciation to the contracting states on the question whether the measures taken to interfere with the right to liberty do not exceed those strictly required by the exigencies of the situation cannot be taken as the last word on the matter so far as the domestic courts are concerned. Final responsibility for determining whether they do exceed these limits must lie with the courts, if the test which article 15(1) lays down is to be applied within the domestic system with all the rigour that its wording indicates…(The test in Article 15 -the Article permitting derogation - is that derogation is permitted only to the extent strictly required by the exigencies of the situation"))... "
Lord Hope continued: " I am content ….to accept that the questions whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament. The judgment that has to be formed on these issues lies outside the expertise of the courts….. But in my opinion it is nevertheless open to the judiciary to examine the nature of the situation that has been identified by government as constituting the emergency, and to scrutinise the submission by the Attorney General that for the appellants to be deprived of their fundamental right to liberty does not exceed what is "strictly required" by the situation which it has identified. The use of the word "strictly" invites close scrutiny of the action that has been taken. Where the rights of the individual are in issue the nature of the emergency must first be identified, and then compared with the effects on the individual of depriving him of those rights. In my opinion, it is the proper function of the judiciary to subject the government's reasoning on these matters in this case to very close analysis. One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency."
Lord Hope then concluded, "I … would allow the appeals. I would quash the Human Rights Act 1998 (Designated Derogation) Order 2001. I would declare that section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with the right to liberty in article 5 of the European Convention on Human Rights on the ground that it is not proportionate, and that it is incompatible with article 14 of the Convention on the ground that it discriminates against the appellants in their enjoyment of the right to liberty on the ground of their national origin."

“Lord Hoffman's judgement included some passages that emphasise the importance of basic human rights and vindicate the essential role of the judiciary in a Democracy:
Paragraph (97): "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values,

comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory." (In saying that it was for Parliament to decide, Lord Hoffman was referring to the right of the Courts to decide if the Act of Parliament is "incompatible" with the European Convention on Human Rights, but it is then for Parliament to decide what had to be done with the legislation that the Courts have decided is incompatible with the European Convention on Human Rights)].

Referring to the arguments ("the submissions" made by the Attorney General), Lord Hoffman said:

"I do not accept the full breadth of the Attorney General's submissions. I do not in particular accept the distinction that he drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true…. that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

"Lord Bingham made the same point, "I do not in particular accept the distinction which he (the Attorney General) drew between democratic institutions and the courts.

"Conclusion

What this case illustrates so powerfully is that, in a democracy, a truly independent judiciary will not hesitate to pronounce a judgement against the Government in the clearest possible terms - even if, as in this case, it judges that the Government has acted illegally and, even with the consent of Parliament, has transgressed the rights not just of British citizens but even of aliens that the Government regards as dangerous. It is as clear an example as we have seen in many, many years of the strength of judicial independence in the United Kingdom. All democrats, as well as constitutional lawyers, are now waiting to see if the Government accepts the inevitable and repeal or amend the legislation." END OF ARTICLE

What happened after the Lords gave judgement is also very instructive. The Government announced that is proposed to introduce new regulations, the effect of which would be that the Secretary of State (the Interior Minister) would have a power to detain not only foreigners, as was so under the Regulations considered by the House of Lords, but would had the same power to detain British citizens on the same grounds. Thus, on the one hand, the Government accepted the judgement – insofar as it said that the current Regulations were flawed and illegal – but responded by doing the minimum necessary to remove

the illegality while retaining – and indeed extending - the power of detention. So the element of *discrimination* that the Judges criticised was removed; but the power to detain was to be greatly *increased*. This has led to a great political outcry and the Government may well find difficulty in persuading Parliament to grant the Secretary of State the new powers that he seeks. The ball is currently back in the political forum: it very likely to return to the Law Courts.

QUESTIONS

Take my Books – both of them.
Law, Justice and Democracy, to illustrate the broad themes.

Criminal Appeals to illustrate the 'knowability' of the Law.

Legislative transparency

Pre-Legislative Process

Reference of issue/subject matter to a body like The Law Commission
Green Paper/ Consultation Document (possibly including draft bill)
Publishing DRAFT BILL – for pre-legislative scrutiny.
by – Committees (e.g. Justice 1, Education, Environment committees)
- interested bodies (e.g. Law Society, NFU, Teachers' bodies
- Public/Media comment

Reports by such bodies
White Paper (possibly including re-draft of bill)

LEGISLATIVE PROCESS (All proceedings open to public; and **Website**)
www.parliament.uk

1st Reading;
2nd Reading;
(Library Staff produce a research paper)
Explanatory Memorandum (HR. Financial implications). Global Warming!)
Notes on Clauses: now available to all
Examination and Report by Standing/Select Committee
Parliamentary Committee (possibly of Whole House)
Report Stage
3rd Reading
Bill to Pass
All stages repeatable in Second Chamber
Possible "*ping pong*"
Royal Assent
Everything is on the website: supra

Role of Courts
Subordinate Legislation: review of *VIRES*
Legislation by Devolved legislatures – *ditto*
(In many countries) review of **constitutionality**
In UK: "compatibility" with European Convention on Human Rights.

Possibility of Declaratory Judgments: especially *re* Devolved Legislation

Right to a Fair Trial (Article 6)

- No retrospective criminal responsibility (*Really a Rule point*)

- Art.6 is all about PROCESS: convictions are not overturned.

- It is the overall result that matters FAIRNESS OVERALL: the proceeding will be considered as a whole. Account will be taken of the appeal possibilities and proceedings. ***This concept allows may issues to be taken into account, even if not specified in Art 6.***

- Equality of Arms (not *precise* equality): a reasonable opportunity to present each side's case. *Time to prepare...*

- Independent and Impartial Judiciary: *many exx.*
  The test is essentially subjective: what would the reasonable, informed observer think/ question/suspect re impartiality?

- Proceedings should be Adversarial in character – to permit challenge, contradiction and counter-evidence. All parties must be heard.

- Public hearing- *purpose: to avoid secret justice*.

- **Full disclosure** of the case to be met – including documents: duty of prosecutor to make all relevant material available to Defence (failure not necessarily amounting to a "violation" of A. 6). *N.B. Scottish tradition that L.A. is a Minister of Justice.*

- All parties allowed to be **present** at all times: *principle only.*

- Right to **participate** effectively in the proceedings.

- **Fair Rules of Evidence**: *WIDE* Margin of apprcn. **Torture!** Right to Silence; and inferences from silence.

- Right to a **Reasoned Judgment.** *(Not by JURY)*

- Determination within a **Reasonable time** *complexity, conduct, urgency*

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[3] L & N means that the Govt. effectively controls the public space, countering crime, public disorder, corruption, providing prisons & rehab. Permitting demonstrations, campaigns etc.