DEFENDING THE RULE OF LAW IN CHALLENGING TIMES:

A LEGAL & PHILOSOPHICAL DISCOURSE

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SUMMARY

The argument is often made in times of emergency that a change in the scale and nature of the harms that threaten a society justifies a change in that society's scheme of civil liberties and that this process is best understood in terms of "striking a new balance between liberty and security". This heavily utilitarian, consequentialist school of thought reflects the ghastly words of Tony Blair in the aftermath of 9/11: "the rules of the game have changed".

This Paper adopts the position that any adjustment of rights requires substantive justification. As Jeremy Waldron notes, "if security outweighs liberty now in a way it did not outweigh it on September 10th, 2001 then there must be complicated reasons why that is so". Accepting this complexity that lies at the heart of a discussion on the rule of law, the analysis offered in this paper is one within a classical liberal human rights conception of the rule of law.

Thus, the paper begins by examining the philosophical underpinnings of a liberal conception of the rule of law. Writers such as Isaiah Berlin and Immanuel Kant are referenced in building up a picture of a system where the rights of the individual are paramount and where all human beings are afforded equal moral status.

The paper then proceeds to detail, in a more formalistic manner, the basic requirements for a standard system of law and order. Specific emphasis is placed on the requirements of certainty and non-retrospectivity.

The substantive part of the Paper deals with two areas where the epoch-defining "War on Terror" has had a huge impact on the rule of law. First, emergency powers provisions will be considered. In particular, the European Court of Human Rights' (ECtHR) approach to derogations of power under Article 15 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) will be critically assessed. It will be argued that the entire balancing framework of liberty vs. security is illusory and ultimately destructive of a liberal conception of human rights and the rule of law. Thus, it will be argued that the normalcy-rule, emergency-exception paradigm in which the discussion of emergency powers inevitably takes place fails to take appropriate account of the complexities of a modern "public emergency" and indeed the normative force of emergency powers on the rule of law generally.

The second issue considered in detail is the use of torture, a practice which has had a regrettable re-emergence in recent years. The question will be asked whether torture is ever justified within a modern democratic society predicated upon the rule of law? In particular, the effect of entertaining Alan Dershowitz's idea of torture warrants on the rule of law will be analysed critically. Ultimately, it will be argued that legalising torture would have a

corrosive effect on the democratic structures of the modern state and all efforts should be made to stamp out the direct and indirect practice of torture in the aftermath of the War on Terror.

In conclusion, it will be argued that a human rights-based analysis of the rule of law is a necessary barometer by which to judge the measures taken by a State to counter the real threat of terrorism. Facile justifications for a change in the existing scheme of liberties based on a necessary "re-balancing" should be avoided. Rather it is submitted that an honest enquiry as to the human rights compatibility of a given measure is critical to ensure that fear and suspicion do not become the hallmarks of our society.

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I. Introduction

"*Where-ever law ends, tyranny begins*"

- John Locke *Second Treatise of Government* (1690)

If humanity in the early years of the 21st Century is to glean but one lesson from the thousands of years of civilization that have passed before us, it should be the simple acknowledgment of the sheer power of ideas. Ideas of all hue and vintage have sparked revolutions and riots; inspired nations to doom and disaster; threatened powerful empires and orthodoxies; and imbued cultures and continents with the confidence and arrogance to dominate faraway lands. Quite simply, the power of ideas to change, swiftly or gradually, the very nature of the world around us cannot be underestimated. To this end, Ludwig von Mises wrote presciently in 1927:

It is ideas that group men into fighting factions, that press weapons into their hands, and that determine against whom and for whom the weapons shall be used. It is ideas alone, and not arms, that, in the last analysis, turn the scales.

Moreover, ideas as to how society should function are at the very core of law. Every statute, Constitution or Charter is a representation of where power lies in a given society. The distribution of resources, the

apportionment of guilt and the values of the populace all rely upon a governing system of law. From ancient Roman law to modern human rights treaties, there has been an omnipresent recognition, as Locke posits above, that without law there is no order.

Nevertheless, law can be used as the very vehicle of oppression often manifested in the imposition of coercive order upon civic society. It is axiomatic that Apartheid South Africa, Mugabe's Zimbabwe and Hitler's Germany all functioned with, and depended upon, legal authority. Thus, laws, or more precisely the ideas behind those laws, have given effect to man's tyranny as well as his emancipation.

Without question, in the 21st Century, an era defined thus far by "The War on Terror", assessing the *role* of law in the world is of the utmost importance. The weakness of international law to hold powerful real-politik interests to account may be contrasted with the increasing sophistication of domestic extra-judicial dispute mechanisms coupled with the general growth of the administrative State. A priori, innovative cross-border legal regulatory regimes, in one form or another, are now needed to tackle the epoch-defining issues of our age: climate change; global financial regulation; and the emergence of new economic powers.

Within this geo-political maelstrom, it is propitious that this paper seeks to tackle the age-old question of what exactly we mean by the rule of law. As

referenced above, questions of power and punishment; State and society; control and liberty are all at the core of this endeavour. The view offered herein is unapologetic in its conception of the rule of law through the prism of human rights.

To this end, the structure employed first briefly examines the philosophical underpinnings of such a conception of the rule of law. Indeed, a philosophical approach is of paramount importance given the intensely nebulous use and abuse of the concept of the rule of law in modern societal discourse often to the detriment of human rights.

Significantly, philosophy grows out of a desire to replace opinion with knowledge, and rhetoric with reason. For a philosopher, it is not sufficient to simply hold a belief on faith, one must be able to give a rational account of one's convictions. In essence, philosophy aims to replace civic faith with rational knowledge. Clearly such a quest for knowledge leads to inevitable tension with the same civic pieties that regularly exalt the concept of the rule of law without ever meaningfully grasping its nature.

Building on this philosophical underpinning, the second part of the paper will attempt to more precisely define what is meant by the rule of law with specific reference to the characteristics that delineate our modern conception of the rule of law.

The substantive part of the paper will consider the threat to a human rights-

based rule of law paradigm by terrorism and, more precisely, counter-terrorist measures. Issues of emergency powers and torture will be considered in detail.

II. Philosophical Underpinnings of a

Conception of the Rule of Law based on Individual Rights

At the heart of Western freedom and democracy is the belief that the individual man, the child of God, is the touchstone of value, and all society, groups, the state, exist for his benefit. Therefore the enlargement of liberty for individual human beings must be the supreme goal and the abiding practice of any Western society.

Robert F. Kennedy, Day of Affirmation Address

University of Cape Town, June 6, 1966

Human rights might best be described as the rights which provide the necessary conditions to allow societies accord human beings their full dignity. A dignity realised by a right not simply grounded in the interests of the right-holder but by a moral right whose virtue is the consideration of the duties we owe to each other. This sense of "a right" is best described in a context in which nature is conceived as creating moral imperatives. Such a conception, predicated upon values of individual human liberty such as tolerance, respect, equality, dignity and freedom, provides a context for the evaluation of the rule of law in a given situation. The relatively recent development of international human rights law provides a normative framework for such a conception to be fostered.

The Universal Declaration of Human Rights was adopted on the 10th of December, 1948 as a direct response to the horrors of World War II. In

effect, the UDHR and documents such as the International Covenant on Civil and Political Rights comprise a contemporary human rights doctrine embodying a belief that all human beings possess fundamental and equal moral status enshrined within the concept of human rights. It is this very idea of equality which forms the bulwark of a conception of the rule of law grounded in human rights.

While the full significance of human rights may only have been codified 52 years ago, the development of this concept of the rule of law is punctuated by the emergence and assimilation of various philosophical and moral ideas most influential of which was the Enlightenment concept of Liberalism. This section explores a number of Liberalism's great thinkers and critics and how their views have impacted upon the theory and practice of contemporary international human rights.

It is contended at the outset that the core tenets of liberalism – natural rights, moral autonomy, human dignity and equality – provided a normative bedrock for, as Judith Shklar notes, "a political doctrine with one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom." This normative bedrock informs notions of the rule of law grounded in respect for personal liberty.

Liberalism provides numerous conceptions of personal liberty. Thus, Benjamin Constant recognised the distinction between Ancient Liberty and

Modern Liberty. The former being simply a liberty to directly influence politics through debates and votes in the public assembly. In order to support this degree of participation, citizenship was a burdensome moral obligation requiring a considerable investment of time and energy. The Liberty of the Moderns, in contrast, was based on the possession of civil liberties, the rule of law, and freedom from excessive state interference. Representative democracy would replace the direct participation of old; a necessary consequence of the size of modern states.

Isaiah Berlin developed Constant's distinction within an overarching liberal structure of value-pluralism. For Berlin, liberty was both positive and negative. He defined negative liberty, as the "liberty" used by Thomas Hobbes, namely the absence of coercion with an individual's private actions by an exterior social-body. In contrast, positive liberty, drawing on the Aristotelian definition of citizenship, may be understood as one's role in choosing who governs the society of which one is a part. Ultimately, Berlin declared that both concepts of liberty represent valid human ideals, and that both are necessary in any free and civilised society. Nevertheless, Berlin recognized the dangers inherent in the susceptibility of positive liberty to give rise to authoritarianism in the guise of State paternalism.

This fear of the State's coercive power is a key facet of Liberalism. Thinkers such as John Locke firmly express the view that individuals possess natural rights, independently of the political recognition granted them by the state.

It was this Lockean tradition which underpinned the American Constitution's affirmation of the inviolability of life, liberty and the pursuit of happiness.

Judith Shklar goes further in her discussion of the broader concept of the Liberalism of Fear which has "at its apex the concept of freedom" such that "limited government and the control of unequally divided political power constitute minimal conditions without which freedom is unimaginable in any politically organised society." While these conditions are undoubtedly necessary, she contended that the liberalism of fear can in fact give rise to undesirable irrationality in the polis. An example of such irrational fear of the State is evident in the development of the Tea Party movement in the United States in opposition to universal healthcare out of ostensibly a "fear of Big Government".

Returning to the origins of rights-based rule of law discourse, it is submitted that the contribution of German philosopher, Immanuel Kant, has been profound. Indeed many of Kant's central themes of moral philosophy remain highly prominent in contemporary justifications for human rights. Thus, Kant in "*The Groundwork of the Metaphysic of Morals*" provides a means of justifying human rights as the basis for individual self-determination grounded within the authority of human reason. Kant expresses this theory as "the categorical imperative" which he formulates in the following terms: "act only on that maxim through which you can, at the same time, will that

it should be universal". Therefore the universality of moral principles governing human relations is a prerequisite for individual moral autonomy and fundamental equality. In essence, this is tantamount to a pure form of equality where moral right is treated as an end in itself. In this way a world of rational beings is possible as a "kingdom of ends" where every member, by his own maxims or self-imposed rules, becomes a legislating member in a universal kingdom of ends. The formal principle of these maxims is "So act as if the maxims were to serve likewise as the universal law of all rational beings" It is contended that such an interpretation, while highly abstract, accords with the modern conception that human rights are rights which we universally hold as autonomous and equal human beings. Equally the categorical imperative ensures that, as De Ruggiero notes, "the individual is more than a mere individual, because his conscience represents for him a law, an authority, in which are already expressed the universal elements of his nature."

A critique of Liberalism's universalist theory of human rights is offered by cultural relativism. Relativists state that human rights, as enshrined particularly in the International Covenant on Civil and Political Rights, are fundamentally Western in origin and thus are inapplicable to the problems of other parts of the world where traditionally collective human rights or culturally-sensitive norms were the predominant themes of a particular society. This argument, in part, led initially to the creation of the Covenant

on Economic, Social and Cultural Rights and more recently to the development of so-called "Third Generation rights". While the debate between universalism and cultural relativism is a distinct issue in itself, the caveat remains that even in modern human rights discourse; Liberalism's universalist preconceptions of rights do not attract unanimous approval.

Liberalism can also be contrasted with the competing utilitarian ideals espoused by John Stuart Mill. Utilitarianism seeks to achieve the "greatest happiness for the greatest number". The failure to place the individuals' rights at the centre of this matrix is a serious cause for concern. Indeed John Rawls in "*A Theory of Justice*" rejects the very idea that the happiness of two distinct persons could be meaningfully counted together since it entails treating a group of many as if it were a single sentient entity. Unfortunately, the utilitarian exercise of balancing the rights of the individual against those of the wider society has come to prominence in recent years in judicial evaluations of human rights particularly in the European Court of Human Rights. As will be discussed below, Jeremy Waldron has highlighted the fallacy of the balancing of individual liberty with national security in the context of anti-terrorism laws.

Notoriously, Jeremy Bentham also claimed that to speak of natural rights "is simple nonsense: natural and imprescriptible, rhetorical nonsense – nonsense upon stilts." For him nature provides a background against which

we wish that there were such things as rights, but they do not exist until law creates them.

Notwithstanding difficulties of irrationality and a lack of cultural sensitivity, liberalism adopts a strong defence of equal rights since citizens must have rights in order to preserve their freedom and protect themselves against abuse. In this regard, a liberal society is, as Shklar notes, necessarily "a democratic one since without enough equality of power to vindicate one's rights, freedom is but a hope." It will later be posited that it is this democratic principle which links human rights and liberty with the rule of law.

In contrast, Marx, referring to the Hegelian view of "abstract freedom", considers that abstract liberal democratic rights conceal a certain reality which he later referred to as "base". For him, the appearance of equality is positively dangerous. Thus, human rights represent the *separation* of man from man rather than the true *emancipation* of man. This criticism of human rights and liberalism, however persuasive, does not stand up to careful practical scrutiny as Marx's alternative, predicated on the actualisation of freedom through the dissolution of the State, may be regarded as far-fetched given the embedded nature of the State as a juridical entity in modern society.

Nevertheless, democracy is not, in itself, liberty, since without an accessible, fair and independent judiciary coupled with a multiplicity of politically active groups, liberalism is in jeopardy. In this respect, Alexis De Tocqueville decried the dangers of an apathetic citizenry within a democracy. In his view, it was "far more important to resist apathy than anarchy or despotism, for apathy can give rise, almost indifferently, to either one." In the modern era of widespread political apathy, we must actively protect against the erosion of liberties in the face of apathetic disinterest.

To conclude, the individual rights-focused principles of Liberalism effected significant, even revolutionary, political upheavals in the very fabric of law and society. In the 18th Century such ideals were enshrined in documents such as the United States' Declaration of Independence. Similarly, the concept of individual rights continued to resound in the 19th Century as exemplified by Mary Wollstencraft's "Vindication of the Rights of Women".

In the first half of the 20th Century, the ideals of Liberalism failed to prevent nationalist war-mongering and the rise of totalitarianism that ended in the senseless loss of life in places such as The Somme, Gallipoli and Normandy.

The utter devastation of both World Wars directly resulted in the Universal Declaration of Human Rights. The preamble of that document stresses that recognition of "the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and

peace in the world". Those laudable ideals were not new, but rather reflected a deeper, neglected liberalism of Locke and Kant, Berlin and Constant. In the post 9-11 age, it is critical to ensure that neither the UDHR nor the liberal ideals that underpinned it are forgotten amidst the War on Terror. As De Ruggiero writes: "*Freedom is not an ornament nor a luxury but a responsibility, a sacrifice, a discipline*." That is the age-old duty for those who defend liberty and freedom.

III. Defining the Rule of Law

A. The Rule of Law as a Nebulous Concept?

In recent times, the phrase "rule of law" has attracted admirers as varied as politicians, lawyers, economists, and scientists. With such diversity of proponents, the inherent danger subsists that definitional variations of the rule of law will cast doubt on the underlying precept thereby precipitating the relegation of the rule of law to meaningless verbiage.

Indeed Joseph Raz has commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system. John Finnis has described the rule of law as "[t]he name commonly given to the state of affairs in which a legal system is legally in good shape". Judith Shklar has suggested that the expression may have become meaningless thanks to ideological abuse and general over-use:

> "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 need therefore be wasted on this bit of ruling-class chatter."

Jeremy Waldron, commenting on *Bush v Gore,* in which the rule of law was invoked on both sides, recognised a widespread impression that utterance of those magic words meant little more than "Hooray for our side!"

Brian Tamanaha has described the rule of law as "an exceedingly elusive notion" giving rise to a "rampant divergence of understandings" and analogous to the notion of “Good” in the sense that "everyone is for it, but have contrasting convictions about what it is".

Legislatures across the Western world have long recognised the extreme difficulty of formulating a succinct and accurate definition suitable for inclusion in a statute, and preferred to leave the task of definition to the courts if and when occasion arose.

Economists Hoff and Stiglitz take a narrow view of the concept suggesting that by the rule of law “[they] mean well-defined and enforced property rights, broad access to those rights, and predictable rules, uniformly enforced, for resolving property rights disputes.”

The core of the existing principle is, it is submitted, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws prospectively promulgated and publicly administered in the courts. This statement, even if accurate as one of general principle, cannot be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public such as family law disputes involving minors. Nevertheless, it is forcefully submitted that any derogation calls for close consideration and clear justification. This formulation expresses the fundamental truth

propounded by Thomas Paine in 1776,

"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."

B. Rule *of* Law Vs. Rule *by* Law

The dichotomy between the appearance of proper adherence to the rule of law by those who actually seek *rule by law* is captured succinctly in the transcript of the trial of Romanian dictator, Nicolae Ceaucescu, and his wife, Elena. The 1989 Romanian Revolution was a week-long series of increasingly violent riots and fighting in late December 1989 that culminated in the overthrow of the Soviet-backed Government. Amid bloody street battles on the 22nd of December, an angry mass of people stormed Ceausescu's offices. The once-revered leader fled by helicopter, but was seized outside the city. In a trial held in secret, Nicolae and Elena Ceausescu were accused of ordering the deaths of 60,000 people. The verdict, sentencing the Ceausescus to death, was read out after only a few hours. The Court stated that they had ten days to appeal, but the sentence was to be carried out immediately, a final ironic nod to Kafka. The edited transcript of the Ceausescus' trial reads as follows:

Chief prosecutor

Esteemed chairman of the Court, today we have to pass a verdict on the

defendants Nicolae Ceausescu and Elena Ceausescu, who have committed the following offences: crimes against the people. They carried out acts that are incompatible with human dignity and social thinking; they acted in a despotic and criminal way; they destroyed the people whose leaders they claimed to be. Because of the crimes they committed against the people, I plead, on behalf of the victims of these two tyrants, for the death sentence. [He then reads from a bill of indictment, listing genocide, destruction of state buildings and undermining the economy].

Prosecutor

Did you hear the charges? Have you understood?

Ceausescu

I do not answer, I will only answer questions before the Grand National Assembly. I do not recognise this court. The charges are incorrect, and I will not answer a single question here.

Prosecutor

Note: he does not recognise the points mentioned in the bill of indictment.

Ceausescu

I will not answer any question. Not a single shot was fired in Palace Square. Not a single shot. No one was shot.

Prosecutor

By now, there have been 34 casualties.

Elena Ceausescu

Look, and that they are calling genocide.

Prosecutor

In all district capitals there is shooting going on. The people were slaves. The entire intelligentsia ran away.

Elena Ceausescu

The intelligentsia of the country will hear what you are accusing us of.

Prosecutor

Nicolae Ceausescu should tell us why he does not answer our questions. What prevents him from doing so?

Ceausescu

I will answer any question, but only at the Grand National Assembly, before the representatives of the working class. Tell the people that I will answer all their questions. All the world should know what is going on here.

Prosecutor

What are you really?

Ceausescu

I repeat: I am the President of Romania and the Commander in Chief of the Romanian Army. I am the president of the people. I will not speak with you provocateurs any more, and I will not speak with the organisers of the putsch and with the mercenaries. I have nothing to do with them.

Prosecutor

Please, make a note: Ceausescu does not recognise the new legal structures of power of the country. He still considers himself to be the country's President and the Commander in Chief of the Army. Why did you ruin the country? Why did you export everything? Why did you starve the people?

Ceausescu

I will not answer this question. It is a lie that I made the people starve. A lie, a lie in my face. This shows how little patriotism there is, how many treasonable offences were committed.

Prosecutor

We have always spoken of equality. We are all equal. Everybody should be paid according to his performance. Now we finally saw your villa on television, the golden plates from which you ate, the foodstuffs that you had imported, the luxurious celebrations.

Elena Ceausescu

Incredible. We live in a normal apartment, just like every other citizen. We have ensured an apartment for every citizen through corresponding laws.

Prosecutor

Mr Chairman, we find the two accused guilty. I call for the death sentence.

Counsel for the defence

Even though he — like her — committed insane acts, we want to defend them. We want a legal trial. [Addressing the defendants:] You have acted in a very irresponsible manner; you led the country to the verge of ruin and you will be convicted on the basis of the bill of indictment. You are guilty of these offences even if you do not want to admit it. Despite this, I ask the court to make a decision that we will be able to justify later as well. We must not allow the slightest impression of illegality to emerge. Elena and Nicolae Ceausescu should be punished in a really legal trial.

Prosecutor

I have been one of those who, as a lawyer, would have liked to oppose the death sentence, because it is inhuman. But we are not talking about people.

After that the television broadcast is cut off, the speaker announces that the verdict is the death sentence.

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The most striking aspect of this chilling transcript is that a trial, however improper and corrupt, took place in the first place. Why did the revolutionaries, pent on the overthrow of dictatorship, not summarily execute the Ceausescus? Why did they go to the trouble of enlisting judges, court reporters, defence and prosecution counsel at an hour when the fate of the Revolution hung in the balance?

Ultimately, one can say that the power of a "trial" to legitimate their broader revolutionary endeavours weighed heavily on those conspiring to overthrow the regime. Conversely, this aching desire for legal legitimization of incongruous *illegal* acts has been invoked by many oppressive authorities against the forces of revolution, peaceful or otherwise. The power of legal justification has been harnessed by many notorious world leaders from Stalin (The Show Trials) to Robespierre (The Reign of Terror) to arguably George W. Bush (The Guantanamo Bay Military Tribunals). Such legal fictions act to serve not only the interests of propagandists and apologists but also the aims of securing domestic order through the control of civil society *by* law.

Notably it was Karl Marx, in an early work,who expressly referred to this power of law to stymie any substantive change in the make-up of

governance structures within a society.[1] While the general Marxist disdain for the ideas of the Enlightenment has long since largely been discredited, there is merit in the view that rule by law can be effectively utilised as a supreme instrument of control.

Orderly control of society is not, *prima facie*, a bad thing. Where such control can be detrimental to society as a whole arises in circumstances where the authorities charged with the implementation of law are not open to independent account or, more drastically, when the terms of the law itself crosses the intractable line of unjustifiably and disproportionately infringing esoteric mores of inherent human liberty at the core of a liberal conception of the rule of law. These circumstances define when the rule *of* law becomes rule *by* law.

While "the rule of law rests on scrutinizing evidence of past behavior to establish accountability, confer justice and deter bad behavior in the future", no bright line or binary distinctions may be drawn between these two distinct but amorphous spheres of legal order. To fully comprehend the

[1] "The establishment of the political state and the dissolution of civil society into independent individuals – whose relation with one another on *law*, just as the relations of men in the system of estates and guilds depended on *privilege* – is accomplished by one and the same act. Man as a member of civil society, unpolitical man, inevitably appears, however, as the *natural* man. The "rights of man" appears as "natural rights," because conscious activity is concentrated on the *political* act. Egoistic man is the passive result of the dissolved society, a result that is simply found in existence, an object of immediate certainty, therefore a *natural* object … Finally, man as a member of civil society is held to be man in his sensuous, individual, *immediate* existence, whereas *political* man is only abstract, artificial man, man as an allegorical, juridical person. The real man is recognized only in the shape of the egoistic individual, the true man is recognized only in the shape of the abstract citizen." Marx, *Zur Judenfrage (On the Jewish Question)* 1844

signals which distinguish these two concepts, one must first question what are the fundamental characteristics of the rule *of* law and subsequently counterbalancing this concept with both liberty and democracy in a tripartite configuration in order to establish where the road between the rule *of* law and rule *by* law divides.

C. Fundamental Characteristics of the Rule of Law

The formalistic requirements of the rule of law may be conveniently broken down into a series of non-exhaustive sub-rules. These requirements exist in tandem, and indeed are co-terminus, with a liberal conception of the rule of law predicated upon human rights discussed above.

(i) Accessibility

First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it. The European Court of Human Rights has also put the point very explicitly:

"… the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case … a norm cannot be regarded as a 'law' unless it is

formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

Given the legislative hyperactivity which appears to have become a permanent feature of our governance, the sheer volume of current legislation raises serious problems of accessibility, despite the internet. The torrent of criminal legislation in recent years has posed very real problems of assimilation. Not all of this legislation is readily intelligible. Whether derived from statute or judicial opinion the law must be stated in terms which a judge can without undue difficulty explain to a jury or an unqualified clerk to a bench of lay justices. And the judges may not develop the law to create new offences or widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment, for that would infringe the fundamental principle that a person should not be criminally punishable for an act not proscribed as criminal when the act was done.

(ii) Laws should be applied on the basis of principle not arbitrary discretion

The second sub-rule is that questions of legal right and liability should

ordinarily be resolved by application of the law and not the exercise of discretion. The broader a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification. These are requirements which law in Western states almost always satisfies, because discretion imports a choice between two possible decisions and orders, and usually the scope for choice is very restricted.

There can, first of all, be no discretion as to the facts on which a decision-maker, official or judge, proceeds. An assessment of the facts may of course be necessary and will depend on the effect made by the evidence on the mind of the decision-maker. The assessment made may be correct or it may not, but if the evidence leads the decision-maker to one conclusion he has no discretion to reach another. Similarly, most so-called discretions depend on the making of a prior judgment which, once made, effectively determines the course to be followed, and leaves no room for choice. Even the least constrained of judicial discretions - such as the award of costs - is governed by principles and practice. There is in truth no such thing as an unfettered discretion, judicial or official, and that is what the rule of law requires.

(iii) Laws should apply universally save where exceptions are justified

The third sub-rule is that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. While some special legislative provision can properly be made for some categories of people such as children, prisoners and the mentally ill, based on the peculiar characteristics of such categories, legislation directed to those with red hair as incompatible with the rule of law. In much more recent times various laws across Europe not only tolerated but imposed disabilities on the exercise of religious belief by Roman Catholics and Jews, and disabilities not rationally connected with any aspect of their gender on women.

It would be comforting to treat this sub-rule as of antiquarian interest only. But it would be unrealistic, as the treatment of non-nationals here and elsewhere reveals. The position of a non-national with no right of abode differs from that of a national with a right of abode in the obvious and important respect that the one is subject to removal and the other is not. That is the crucial distinction, and differentiation relevant to it is unobjectionable and indeed inevitable. But it does not warrant differentiation irrelevant to that distinction.

Rights of habeus corpus, fair trial and due process must apply to all irrespective of nationality. For example, in the European Court of Human Rights case of *A v UK*, the British Parliament provided, in Part 4 of the

Anti-terrorism, Crime and Security Act 2001, for the indefinite detention without charge or trial of non-nationals suspected of international terrorism while exempting from that liability nationals who were judged qualitatively to present the same threat. Post 9/11, the record of the United States Government in this respect has been appalling as recognized by the American Supreme Court in cases such as *Hamdan v Rumsfeld.* As an American academic author has written,

"Virtually every significant government security initiative implicating civil liberties - including penalizing speech, ethnic profiling, guilt by association, the use of administrative measures to avoid the safeguards of the criminal process, and preventive detention - has originated in a measure targeted at noncitizens."

There is a profound truth in the observation of Justice Jackson in the Supreme Court of the United States in 1949:

"I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and

unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."

Sixty years on it must be recognized that this is not merely a salutary doctrine but a pillar of the rule of law itself.

(iv) The law must incorporate adequate human rights protection

The fourth sub-rule, that the law must afford adequate protection of fundamental human rights, stems from the human rights based conception of the rule of law offered at the outset of this paper. It is important to note that this view would not be universally accepted as embraced within the rule of law tradition. Professor Raz has written:

"A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of

law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law."

On the other hand, the preamble to the Universal Declaration of Human Rights 1948 recites that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." The European Court of Human Rights has referred to "the notion of the rule of law from which the whole Convention draws its inspiration." The European Commission has consistently treated democratisation, the rule of law, respect for human rights and good governance as inseparably interlinked.

While one must recognise the logical force of Professor Raz's contention, it is submitted that such a contention is incompatible with a view of the rule of law predicated upon human rights based classical liberal norms. A state which savagely repressed or persecuted sections of its people could not therefore be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed. So to hold would be

to strip the rule of law concept of much of its virtue and infringe the fundamental liberal ideals which underpin the rule of law.

Admittedly, there is an element of vagueness about the content of this sub-rule, since the outer edges of fundamental human rights are not clear-cut. In essence, the rule of law must require legal protection of such human rights if they are seen as fundamental to a given society.

(v) Justice should be administered in a timely manner

The fifth sub-rule provides for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. It thus recognises the right of unimpeded access to a court as a basic right, protected by the principle of the rule of law.

If that is accepted, then the question must be faced: how is the poor man or woman to be enabled to assert his or her rights at law? Assuming the existence of an independent legal profession, the obtaining of legal advice and representation is bound to have a cost, and since legal services absorb much professional time they are inevitably expensive.

It is clear from the European Court of Human Rights' judgment in *Airey v Ireland* that provision should be made for legal aid of some sort to allow proper meaningful access to justice. In addition, conditional fees, various pro bono schemes and small claims procedures have supplement the basic legal aid provisions for better or worse across European states. Nevertheless, the danger exists that the cost of obtaining redress may lead to it being denied to some of those who need it most. The rule of law plainly requires that legal redress should be an affordable commodity.

(vi) Government officials must exercise their powers intra vires

The sixth sub-rule expresses stems from the fear of the coercive powers of the State that largely underpins a classical liberal conception of the world as noted by Judith Shklar in "*The Liberalism of Fear*". It is that 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. It is indeed fundamental. For although the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply, and it falls to the executive, the government of the day, to carry those laws into effect, nothing authorises the executive to act otherwise than in strict accordance with those laws.

The historic role of the courts has of course been to check excesses of executive power, a role greatly expanded in recent years due to the increased complexity of government and the greater willingness of the public to challenge governmental (in the broadest sense) decisions. In this respect, the separation of powers is crucial in guaranteeing the integrity of the courts' performance of this role.

There are countries in the world where all judicial decisions find favour with the government, but they are inevitably places where the dominant narrative of public affairs is rule *by* law and where a liberal conception of the rule of law is but a distant utopia. Nevertheless, tension between the judiciary and the executive are intensified even in Western European States in times of emergency such as in this post 9/11 landscape. Thus in times of perceived threats to national security, governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed. This is a fraught area, since history suggests that in times of crisis governments have tended to overreact and the courts to prove somewhat ineffective watchdogs. The cautionary words of Justice William Brennan of the United States Supreme Court in 1987 remain pertinent:

"There is considerably less to be proud about, and a good deal to be

embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security … After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."

This issue of human rights and the rule of law in times of crisis will be considered in detail below.

(vii) The administration of the rule of law should be predicated on fairness and justice

The seventh and penultimate sub-rule: that adjudicative procedures provided by the state should be fair and just is admittedly rather nebulous in itself. Nevertheless, the rule of law would seem to require no less. The general arguments in favour of open hearings are familiar, summed up by the dictum that justice must manifestly and undoubtedly be seen to be done and by the observation that "Democracies die behind closed doors."

Application of this sub-rule to ordinary civil processes is largely unproblematical, once it is remembered that not all decisions are purely judicial. As the Chief Justice of Australia has pointed out, "the rule of law does not mean rule by lawyers."

There is more scope for difficulty where a person faces adverse consequences as a result of what he is thought or said to have done or not done, whether in the context of a formal criminal charge or in other contexts such as deportation, precautionary detention, recall to prison or refusal of parole. What in such contexts does fairness ordinarily require?

First and foremost decisions must be made by adjudicators who, however described, are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure, and impartial in the sense that they are, so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind. In addition, certain core principles have come to be accepted: that a matter should not be finally decided against any party until he 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 where the interests of a party cannot be adequately protected without the benefit of professional help which the party cannot afford, public assistance should so far as practicable be afforded; that a party accused should have an adequate opportunity to prepare his answer to what is said against him; and that the innocence of a defendant charged with criminal conduct should be presumed until guilt is proved.

(viii) Domestic Practice must comply with International Law Obligations

The eighth and last sub-rule is that the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations. I do not think this proposition is contentious. Addressing a joint session of Congress in September 1990 after the Iraqi invasion of Kuwait, the first President Bush said that a new world was emerging,

"a world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak … America and the world must support the rule of law. And we will."

Of course history teaches us that major democratic States do on occasion resort to legal sophistry to justify the use of force in doubtful circumstances. Irrespective of dubious State practice, the rule of law requires that a State should not adopt a course of action which it acknowledged to be blatantly unlawful, or that lawyers advising the government of such a state at a senior level would publicly support action for which they could find no legal justification. To do either would pay scant respect to the existing constitutional principle of the rule of law.

Ultimately, these eight rules offer a formalistic framework for the existence of the rule of law consistent with a human rights based conception of that ideal. The fluidity of law dictates that these norms may be slightly amended over time to deal with differing circumstances but the overarching *de minimis* requirements of these eight sub-rules should exist as a compass for the determination of whether a particular legal provision or administrative action is taken in accordance with the rule of law. The next issue is how the rule of law in the post 9/11 world has faced considerable challenges. Thus, two particular case studies will be considered below. First, the rule of law in a State emergency with particular reference to the threat posed by terrorism. Secondly, the prohibition on torture will be considered in light of a terrorist threat.

IV. Rule of Law in an Age of Terrorism

"…amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

Lord Atkin, *Liversidge v Anderson* [1942] A.C. 206 at 211

A. Emergency Powers

In considering the modern emergency-focused justifications for the derogation of the right to liberty in the epoch-defining "War on Terror", one is reminded of the great dissent of Lord Atkin in *Liversidge v Anderson* quoted above. Three points, echoing the tenor of Lord Atkin's dicta, will be posited below. First, even in times of emergency, the concept of balancing liberty against security is illusory and destructive to the very essence of human rights. Secondly, while the excessively deferential interpretation of "public emergency" by the courts has been tempered by a more exacting standard of proportionality vis-à-vis the measures taken, the concept of providing for a derogation of human rights in times of emergency prima facie offends the liberal conception of those rights. Thirdly, emergency powers, through the process of normalisation, have a corrosive effect on the rule of law and the right to liberty. Ultimately, it will be argued that the right to liberty has suffered sustained attack during the War on Terror, a

dystopian development for all those concerned with the rule of law and the protection human rights.

The argument is often made in times of emergency that a change in the scale and nature of the harms that threaten a society justifies a change in that society's scheme of civil liberties and that this process is best understood in terms of "striking a new balance between liberty and security". This heavily utilitarian, consequentialist school of thought reflects the ghastly words of Tony Blair in the aftermath of 9/11: "the rules of the game have changed". However, it is contended that any adjustment of rights requires substantive justification. As Jeremy Waldron notes, "if security outweighs liberty now in a way it did not outweigh it on September 10th, 2001 then there must be complicated reasons why that is so". In essence substantive reasoning for adjusting fundamental rights to liberty are not, and indeed cannot, be captured within a crude balancing calculus of liberty versus security.

A simple critique of the balancing calculus is the inequality of its application. It is facile to consider that rights to liberty will be *equally* diminished for *everyone* in a time of emergency. Rather, what is involved is the diminution of the liberties of a dissident minority from the security interests of the community as a whole (of course not factoring the dissident minority into "the community"). Thus, the dishonesty of the balancing inquiry inverts the concept of societal duty - where everyone gives something up for the

common good - into a force destructive of the personal liberty of an ethnic or religious minority.

A further quasi justification offered is that the gravity of the terrorist attack/national emergency *ipso facto* justifies the diminishing of protections afforded to those charged with certain offences. Of course, the whole notion that terrorist suspects deserve less legal protections is counter-intuitive since, as Dworkin points out, punishing an innocent person for a serious offence is a great injustice which prevents the true perpetrator from being punished. Indeed Conor Gearty posits in his 2009 Hamlyn Lecture Series, "Can Human Rights Survive?", that "the single greatest disastrous legacy of the war on terror from a human rights point of view has been the supercession of the criminal model based on justice and due process by a security model based on fear and suspicion."

A third related critique of the balancing approach is that a reduction of liberty invariably coincides with an increase in the powers given to the State, itself a threat to individual liberty as expressed by Judith Shklar. The very means given to the State to combat threats posed by specific terrorist groups are utilised on broader enemies of the State. A particular example of this is the utilisation of counter-terrorism powers in the context of immigration control, addressed briefly by A.C. Grayling in "Liberty in the Age of Terror". Thus, despite the reality of home-grown terrorist threats, asylum seekers, en masse, are deemed to be a potential threat to the State.

Such an attitude is reflected in the bias against non-nationals found in the UK Anti-Terrorism, Crime and Security Act 2001, the subject of the *A v UK* case discussed below.

Ultimately, the balancing of liberty against security in a time of emergency fails to properly account for the complexities in attempting to enhance the security of society in the face of an emergency. By dishonestly presupposing that liberty is diminished equally and by failing to acknowledge the threat of abuse inherent in the granting of emergency powers to the State, the justification for a crude recalibration of civil liberties within the rubric of a balancing exercise is neither reasonable nor reasoned.

Addressing the second issue of the judicial response to the declaration of a public emergency by a State. The derogation of certain rights in such circumstances is permitted under Article 15(1) of the ECHR albeit the fact that Article 15(2) preserves the non-derogable nature of rights such as the right to life (Article 2) and the prohibition on torture (Article 3) even in a time of emergency. The European Court of Human Rights' consideration of the concept of Article 15 has two facets: the designation of a public emergency and the proportionate instigation of measures to address the public emergency.

The European Court of Human Rights, and indeed national courts, have adopted an extremely deferential approach to a national designation of a

public emergency. In the seminal decision of *Ireland v United Kingdom*, the ECtHR upheld a breach of Article 5 through the use of internment in Northern Ireland during the 1970s on the basis of an Article 15 derogation. As the Court noted: "national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."

This decision was heavily criticised by Bonner in the ICLQ who makes the point that too wide a margin of appreciation undermines effective protection of human rights. Nevertheless, Vercher in "Terrorism in Europe" takes the view that the outcome in *Ireland v United Kingdom* was not completely surprising since some years before, the Court had reached a similar conclusion in *Lawless v Ireland* by affording the Republic of Ireland a wide margin of appreciation in the declaration of an emergency despite the low level of violence involved in the IRA border campaign of 1956-62.

More recently, in *Aksoy v Turkey*, the Court accepted that Kurdish separatist violence had given rise to a "public emergency" in Turkey. The Court in *A v UK* also took a wide view of the imminence requirement in Art 15(1) stating that it "cannot be interpreted so narrowly as to require a state to wait for disaster to strike before taking measures to deal with it". This approach is in contrast with the more robust approach of the Inter-American Court of

Human Rights to determining both substantive and procedural questions about emergencies.

On the issue of proportionality, the European Court of Human Rights has been more exacting in its assessment of whether the measures taken in response to a public emergency were "strictly required by the exigencies of the situation". Thus, in *A v UK*, the European Court found that Part 4 of the UK Terrorism, Crime and Security Act 2001, which provided for the indefinite detention without trial of non-national terrorist suspects, was not proportionate to the threat posed by the terrorist threat and furthermore the choice of a discriminatory immigration measure to address a security issue failed to address the threat posed by Al-Qaeda. Thus, the deferential finding of a valid "public emergency" was linked with a closer consideration of the proportionality of the measures brought about as a result of the public emergency.

While the more exacting approach of the Strasbourg Court is to be lauded, the "strictly required" proviso imports notions of the liberty versus security balance discussed above into the ECtHR's approach to measures taken in the aftermath of a public emergency. Moreover, the compatibility of Article 15's derogation with the very concept of human rights is dubious. A liberal conception of human rights holds that those rights, predicated on human dignity and equality, apply to all with appropriate limitations in the interests of the rights of others. Thus, the holding in abeyance of certain rights in a

time of emergency is thus an affront to the very essence of human rights since those rights should apply with the same, if not greater, significance in a time of emergency. More worrying still is the fact that UN Security Council Resolutions can

Finally, turning to the third issue of the normalcy-rule, emergency-exception paradigm. Gross and Ni Aolain note that the concept of emergency itself is informed by notions of temporal duration and exceptional danger set against a background of "normalcy". However, such a "dichotomized dialectic" fails to reflect the fact that an emergency is rarely of the ideal temporal type and what starts as an emergency can transform into normality. As Conor Gearty notes, emergency laws "become essential saviours of our society, safeguards against an otherwise inevitable barbarism: in short the new common sense of our age." In this way counter-terrorism measures become embedded in the domestic legal system. An example of the contamination of the legal process by emergency powers is illustrated by the expansion of the abrogation of the right to silence in the UK and Ireland from those solely accused of terrorist offences to anyone accused of *any* "serious" criminal offence.

In conclusion, as Gross and Ni Aolain emphasise; "the ideals of democracy, individual rights, accountability and the rule of law suggest that even in times of acute danger, government is limited both formally and substantively, in the range of activities that it may pursue and powers that it

may exercise to protect the state." The once-pervasive political realist school of thought, exemplified by Donald Rumsfeld and Dick Cheney, states that legal rules and norms are too inflexible and rigid to accommodate the security needs of the state.

The derogation procedures under Article 15 of the European Convention on Human Rights and Article 4(1) of the ICCPR give regrettable credence to those who speak of the inadequacy of rights to liberty in a time of emergency. Thus, liberty may be balanced in a dishonest and crude calculus of community security and though measures must be proportionate, human rights can be legitimately abrogated for an indeterminate time during a public emergency. Rather, the opposite should be the case since human rights are just as relevant in a time of strife if not more so. One must not lose sight of the fact that the ECtHR was set up to protect human rights. It is not a mere cipher for the real-politik concerns of a State. While decisions such as *A v UK* are to be welcomed, the parameters of the debate on the infringement of liberty in the interests of security set by a normalcy/emergency paradigm and the illusory pursuit of recalibration of liberty versus security through an ill-defined balancing exercise should be condemned if we are to truly give effect to Lord Atkin's correct affirmation that law (and human rights) speak the same language in peace as in war.

B. Torture

"On the third night I lay in my blood and waste, so tired and hurt that I could not move. Three guards lifted me to my feet and gave me the worst beating yet. The guards ordered me to record my confession on tape. I refused, and was beaten until I consented." This was the account of torture by the Viet Cong given by US Presidential candidate, John McCain. Ironically, forty years later similar accounts could now be gleaned from inmates of Guantanamo Bay and Abu Ghraib. This essay will examine the international human rights framework on the prohibition on torture and enforced disappearance. First, the difficulties inherent in the definition of torture will be explored. Secondly, the "*justificatory exceptionalism"* propounded by theorists such as Alan Dershowitz will be critiqued. Thirdly, the existing human rights treatment of acts of torture will be analysed.

Ultimately, it will be posited that the judicial treatment of torture has developed in recent years away from the illusory distinction between torture and acts of inhuman and degrading treatment. Moreover, theories of exceptionalism, such as torture warrants, should not be incorporated into the normative human rights framework. Finally, it will be posited that the acceptance that torture occurs only exceptionally detaches torture from the wider coercive context in which it occurs and thus conceals the fact that a *post facto* apology may constitute justification through the back-door.

Turning first to the nature of the prohibition itself, Article 5 of the UDHR states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment." It allows for no exceptions and no derogations in time of war or national emergency. Similar language can be found in the ICCPR (Article 7) and the ECHR (Article 3) while the issue is elaborated upon in detail in the UN Convention Against Torture. The conduct prohibited by these articles often overlaps with the practice of incommunicado detention and enforced disappearance generally as has been seen by the recent use of "extraordinary rendition". In this regard, the recent International Convention for the Protection of All Persons from Enforced Disappearance, building on the work done by the UN Working Group on Enforced Disappearance, provides a framework for a similar non-derogable prohibition specifically of enforced disappearances.

It is submitted that the approach of the ECtHR to Article 3 has developed normatively in recent years. Initially the Court took a restrictive view on what constituted torture, preferring to find that states had inflicted inhuman and degrading treatment. Thus, in *Ireland v UK*, the Court drew a distinction between torture and "inhuman and degrading treatment" owing to the "special stigma" of torture and the difference in the intensity of the suffering inflicted. Despite a finding of torture in the 520-page Commission on Human Rights Report, the ECtHR remarkably held that the use of five intrusive techniques at various detention centres in Northern Ireland over a

sustained period of time constituted merely inhuman and degrading treatment. The Court also appeared to unjustifiably limit torture to cases where it was used for "an intended purpose", such as to obtain a confession. As Marks notes, this narrow view ignores the fact that torture is often about the assertion of power rather than for a defined purpose.

The contrasting approaches to the legal definition of torture can be seen in the dissents of Sir Gerald Fitzmaurice, the UK judge, and Philip O'Donoghue, the Irish judge. The former stresses the need for Article 3 to be read with some sense of proportion and objectivity pointing out the failure of Article 3 to delineate a lesser form of ill-treatment. In his view, to satisfy the test of being inhuman and degrading, the ill-treatment required would have to be substantial verging on barbarity. It is submitted that parallels can be drawn here with the so-called Guantanamo torture memos, brilliantly explored by Philippe Sands in Chapter 9 of "Lawless World". In particular, Jay Bybee, an Assistant Attorney General, wrote in August 2002 that in order to amount to torture, physical pain must be of "an intensity akin to that which accompanies serious physical injury such as death or organ failure."

A contrasting view of torture is posited by Judge O'Donoghue in *Ireland v UK*. In finding a breach of Article 3's prohibition on torture, he draws upon the practices detailed in the Commission's Report of sleep deprivation, subjecting individuals to intense noise and requiring them to stand against a

wall with their limbs outstretched for extended periods of time. Referencing contextual instances such as the burning of Bombay Street, this more holistic view of the torture claims did not find favour with the legalistic approach of the ECtHR that the line between inhuman or degrading treatment and torture had not been crossed.

Nevertheless, the Court in the 1990s began to shift its approach more towards O'Donoghue J.'s broader conception of torture under Article 3. Thus, in 1996 in the case of a detainee who was suspended by his arms whilst his hands were tied behind his back, the Court found the State guilty of torture (*Aksoy v Turkey*). Since then the Court has appeared to be more open to finding states guilty of torture and has even ruled in *Selmouni v France* that since the Convention is a "living instrument", treatment which it had previously characterised as inhuman or degrading treatment might in future be regarded as torture. In that case a large number of blows and humiliation of a drug suspect was sufficient to constitute torture. This broader view of torture is seen in the American Court of Human Rights decision in *Cantoral-Benavides v Peru.*

Returning to the second issue of whether torture can ever be exceptionally justified, the views of Alan Dershowitz are particularly interesting. Using the archetypal example of a ticking time bomb, he asserts that torture will, and does, take place. Thus, international human rights laws' absolute prohibition on torture is not only naïve but illiberal since it ignores the real debate of

whether torture should take place outside the legal system or within it. Drawing on the experience of Israel, he advocates that a torture warrant be obtained from a judge whenever torture is sought to be utilized. In his view, this mechanism would allow for transparency and accountability in the use of torture in Western states.

It is submitted that this argument is wholly incorrect for a number of reasons. As Dorfman points out, exceptionalism legitimates torture by process of normalization such that the notion of exceptional circumstances are likely to be extended over time eroding the normative rule of law value of the prohibition. It also switches the focus of the debate from the acts of torture to the torturer's own consequentialist justifications thereby ignoring the fact that torture is often more about the assertion of power and domination over an individual than the gleaning of information. Finally, the system of torture warrants is practically unworkable since a judge faced with evidence of an impending attack, however dubious, will be unlikely to refuse such a warrant and, in any event, in an actual ticking time bomb scenario, the time necessary to obtain such a warrant will be abrogated.

Plainly international human rights law rejects the exceptionalist argument since the prohibition on torture has been held to apply irrespective of the context or a victim's conduct. Likewise, in *Saadi v Italy*, the ECtHR rejected the argument raised by the UK, as a third party, that Article 3 risks could be balanced against security reasons for expulsion following the holding in

Chahal v UK that states cannot deport or extradite an individual who might be subjected to torture, inhuman or degrading treatment or punishment, in the recipient state.

In regard to the use of evidence obtained in breach of Article 3, the ECtHR has also adopted an absolutist approach seen in *Jalloh v Germany* to the effect that under no circumstances can evidence obtained through torture in another State be utilized in proceedings. This was confirmed domestically in the House of Lords in *A v Secretary of State Home Department* and echoed by the Court of Appeal in the Binyam Mohammed case.

Concluding with the third point, Susan Marks comments that international human rights law leaves open the possibility for torture to be justified through the back-door by its emphasis on specific events rather than on the over-arching coercive context. Citing the example of the Abu Ghraib photographs, she notes that the response of George Bush and Donald Rumsfeld was one of remorse for "un-American behaviour". However, piecemeal contrition for the acts of a "few bad apples" obscures the fact that torture invariably occurs within a wider societal framework of dehumanization. In that case, the context of an illegal invasion where anyone labeled a "terrorist" could be viewed as sub-human. It is submitted that human rights law should be careful not to succumb to the simplistic view that with the expression of regret comes the reassurance that there is nothing to worry about. To do so would allow the avowal of specific acts to

become justification for the overarching framework that allowed the torture occur in the first place.

In conclusion, the post 9/11 torture landscape presents challenges for the rule of law. The modern broad approach taken by the ECtHR in cases such as *Selmouni* reflects the laudable view that torture, in whatever form, is absolutely incompatible with a society founded on the rule of law and democracy. Exceptionalism should therefore continue to be rejected in favour of the normative advantages of an absolute prohibition. Moreover, human rights law should be wary of allowing States, through contrition, to abdicate their responsibilities to prevent the proliferation of a culture where torture pervades. Ultimately, the words of the Italian General Chiesa on receiving a request to torture a suspect in the kidnapping of former Italian Prime Minister Aldo Moro provide a stark reminder of the normative importance of an absolute prohibition on torture: "Italy can survive the loss of Moro but it cannot survive the introduction of torture."

VI. Conclusion

There has been much debate on the threat posed to the rule of law by both terrorism and indeed reactionary counter-terrorism measures. For the purposes of engaging in this debate, this Paper has adopted an unapologetically liberal conception of the rule of law grounded in a Western classical liberal tradition steeped in human rights and individual liberty.

It is clear that measures must be taken to counter the threat posed to this very conception of liberty by those who carry out indiscriminate violence and foster extremism. Consequently, the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and power which they would otherwise enjoy. An individual living in society implicitly accepts that he or she cannot exercise unbridled freedom of a Lockean state of nature and thus submits to 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 binding upon it authorise it to do.

The difficulty created by the raft of counter terrorism measures recently passed by various Western governments is that all to often such legislation is

passed in a hurried manner without due consideration of the normative consequences of the massive aggrandizement of State power.

The justifications offered that such legislation is required to strike a "new balance" between civil liberties and security interests is a veil behind which often illiberal value judgments are made which detrimentally and disproportionately effect the everyday of innocent members of a given community in the interests of the wider "common good". Such utilitarian justifications provide an insufficient basis for the flourishing of individual liberty pursuant to a classical liberal conception of the world.

In essence, substantive justification and considered public discourse are required to ensure that new illiberal laws are not passed in the names of citizens which ultimately are destructive of the rule of law. Security considerations ought not provide carte blanche for the imposition of arbitrary restrictions of the liberties enjoyed in a Western society. Valid justificatory arguments must be advanced beyond the normalcy-rule, emergency exception paradigm detailed by Gross and Ni Aolain as to why the scheme of civil liberties and human rights must be abridged.

Furthermore any abridgement of such rights must be in accordance with a legitimate public necessity. Thus, we must recognize that strip-searching *every* person accused of a criminal offence is as offensive to the rule of law as strip-searching a long term suspected terrorist detainee where no suspicion

exists that such an individual is armed (obviously the situation may be different in the case of a suspected suicide bomber). Thus, proportionality is not obviously the sole criterion by which such measures should be measured but also considerations as to the dignity of the human being, respect for human rights and concern for the normative corrosive effect that a measure, such as strip-searching, has on the rule of law within a society.

Ultimately, the rights of individuals are best affected within the due process guarantees of a State's criminal justice system. As Gearty notes the "supercession of the criminal model of justice based on due process for a counter-terrorism model based on fear and suspicion" is to be decried. Fear and suspicion are the weapons of terrorists. Western liberal democracies should not in turn deploy the same tools against their own people. The day that fear and suspicion become the hallmarks of a society is the day that a human rights conception of the rule of law dies too. To conclude with the quote of John Locke that began this Paper:

"*Where-ever law ends, tyranny begins*"