that the rule of law has been slackened in countries where social conflct is endemic and such a slackening may have to be tolerated for the duration of the conflict. However, it is totally unacceptable that the rule of law should be abolished, on a permanent basis, even in those societies that are troubled by internal conflict. Where this has happened, as it has in South Africa, we can be confident that the objectives of the ruling party have little to do with securing law and order and a great deal to do with maintaining power and suppressing dissent to official policies. The more-or-less permanent abolition of the rule of law means that those in power have substituted despotism for political freedom and that they have equated opposition with disorder. The degree of adherence to the rule of law is a reliable guide to the degree of freedom enjoyed in modern society.☐

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by Michael Cowling

LIBERALISM AND A BILL OF RIGHTS

1. Operating on the basic assumption that liberalism is premissed upon securing the greatest amount of freedom for individual members of society, it becomes vital to examine exactly how such freedom can be secured within the confines of social and political co-existence.

2. Within a social context liberalism is achieved by defining and establishing a number of fundamental civil liberties that balance the rights and duties of the various individual members of a given society.

3. Within a political context it is necessary to secure these fundamental rights and liberties in favour of the individual against the government of the day.

4. This is achieved by ensuring the greatest possible number of checks and balances on the exercise of governmental powers without undermining the ability of the government to operate effectively.

5. This has traditionally been achieved by separating power so that those institutions who wield it are able to act as checks upon each other.

6. This idea of separating power is one of the cornerstones of democracy and usually takes the form of dividing up power between he who makes the law (the legislature), he who carries out the law (the executive) and he who applies the law (the judiciary).

7. If one were to assume a situation where all these powers were concentrated in a single person such as, for example, an absolute monarch, it would not be possible to guarantee fundamental human rights and liberties. This is because, even if this particular monarch is genuinely committed, from a practical point-of-view, to the protection of the individual's human rights, there is nothing in theory to prevent him from changing his mind at a later stage. Thus, one cannot talk of human rights where the same person who makes the laws is responsible for carrying them out as well as applying them.

8. Thus, any constitution must aim towards some form of separation of these basic powers viz legislative, executive and judicial. It thus becomes necessary to examine how this is achieved in practice.

9. In this regard there are two basic constitutional models that fall to be examined viz those modelled along the lines of the UK Westminster system (incorporating the Rule of Law) and those modelled along European or US lines (incorporating a Bill of Rights).

10. These two models have, in a very general sense, the same broad objectives viz protecting fundamental rights and liberties of the individual by separating the three traditional constitutional powers and the institutions that wield those powers. Each will be examined in turn, although it is conceded that the models will only be described in highly superficial and rudimentary terms.

11. The Rule of Law approach proceeds on the basis of three separate but interrelated principles viz (a) the predominance of law — which incorporates the notion that all are subject to the law — even the lawmakers — and hence no person (or government official for that matter) may act outside the law. (b) The notion of equality before the law in the sense that the law should be applied in an equal and general manner. This presupposes that no-one is automatically exempted from the operation of the law — including the government and government officials. (c) The third principle is concerned with the question of remedies and holds that fundamental human rights and liberties are most effectively protected by an impartial judicial body (i.e. judges and the courts) applying the ordinary law of the land.

12. Overall these three principles imply that the government is subject to the ordinary laws of the land and that the latter are clear and pre-announced. Further, the characteristic of generality of law and the fact that rules of law must be objectively and impartially applied by independent courts is seen as a means of excluding arbitrary power on the part of the government over the individual. This is because the Rule of Law demands that the government. should treat its subjects in accordance with clearly-established pre-announced laws and not simply as it pleases.

13. How does this operate in practice? Each of the various arms of government will be dealt with in turn:

(a) **the executive** — in regard to the executive arm of government, the rule of law presupposes that government officials may exercise only those powers which have been conferred upon them by law. Thus they do not enjoy any inherent or automatic rights or privileges merely by reason of the position they occupy. As a result the courts are charged with carefully scrutinising government action and may set aside any act that is not lawfully authorised;

(b) **the judiciary** — judges must be seen as the vehicles by which the rule of law can be effected. They must enjoy independence of influence from the other two arms of government and must apply the law in an impartial and objective manner;

(c) **the legislature** — it is in relation to the legislative arm of government that problems concerning the practical operation of the rule of law arise. This is because the rule of law recognises that the legislature is supreme which means that it can enact any legislation it pleases. Thus, if the legislature in clear terms enacts oppressive legislation that deprives individuals of their fundamental rights and liberties, then the courts have no alternative but to apply that legislation. However, although there are no formal legal checks on the power of the legislature to enact any legislation it pleases, there does exist an important political constraint upon which the practical operation of the rule of law rests. This is the fact that a legislature in a democratic society is assumed to express the will of the majority of the people and hence any government that rides roughshod over the rights and freedoms of the individual will be voted out of power.

14. The above approach can be contrasted with a bill of rights. Although a bill of rights and the rule of law share the same goals (viz the placing of limitations on the exercise of governmental power in order to protect fundamental human rights and freedoms) they operate differently.

15. A bill of rights is nothing more than a formal document setting out fundamental human rights and freedoms. This does not differ markedly from the rule of law since the protection of such fundamental rights and freedoms is implied by the rule of law.

16. However, a bill of rights places greater emphasis on the question of remedies than does the rule of law.

17. This is achieved in the form of a real separation of powers between the legislature, the executive and judiciary with each of these arms enjoying supremacy in its own particular sphere.

18. What is of importance in regard to the protection of fundamental human rights and freedoms is that those rights are expressly guaranteed in a bill of rights. This means that the government cannot encroach upon or in any way interfere with these rights.

19. The most significant aspect in this regard is the fact that in terms of a bill of rights, the legislature does not enjoy the same degree of supremacy as it does under the rule of law.

This is because if the legislature enacts any legislation that encroaches upon, violates, interferes with or undermines any of the rights specified in the bill of rights, the courts enjoy the power to strike down that legislation and hence set it aside to the extent that it violates such rights.

21. This is known as the testing right and has the effect of charging the judiciary, at the end of the day, with the protection of the fundamental rights and freedoms of the individual.

22. Thus a bill of rights actually complements the rule of law by providing definite remedies at the instance of the courts in order to ensure that the standards implicit in the idea of the rule of law are maintained.

23. But a bill of rights goes further than the rule of law. In the case of the latter, the legislature is free to enact any legislation it pleases and, if fundamental human rights and liberties are violated in clear and unambiguous terms by such legislation, the courts are bound to give effect to it. In contrast, in the case of a bill of rights, the legislature is free to enact any legislation it pleases subject to the very important limitation that it may not transgress, violate or undermine any of the rights and liberties set out in the bill of rights. In this sphere the courts are supreme.

24. Turning to South Africa we see that the situation in this country constitutes a classic example of the limitations of the rule of law. The South African constitution is essentially of a Westminster character and hence relies on the supremacy of the legislature along with the rule of law for the protection of fundamental human rights and liberties.

25. What are the limitations of the rule of law? This question should be answered by attempting to ascertain why the rule of law has failed to protect fundamental human rights and freedoms in South Africa. In this respect one should compare the human rights record of South Africa with that of the United Kingdom (where the Westminster system originated and developed). It is interesting to note that South Africa rates on the lowest end of the scale of human rights protection whereas the United Kingdom occupies the upper limits. And yet both countries rely on the rule of law as a means of protecting fundamental human rights and freedoms.

26. There are two fundamental differences between SA and the UK in this respect. The first is that the UK is a relatively homogeneous society which tends to reduce the need for extra checks and balances that would be required in order to deal effectively with the type of tensions that are likely to arise in a heterogeneous society such as South Africa. The second major difference is that the United Kingdom is a full democracy based on universal adult suffrage whereas South Africa can at best be described as a partial democracy.

27. This means in practical terms that there are no restraints on the legislature (which relies exclusively on the support of the minority white group) from passsing legislation that discriminates against and undermines the basic rights and freedoms of the black majority. Thus, far from placing restraints on the legislature in regard to the general protection of human rights and freedoms, the legislature must ensure the entrenchment of white privilege and hegemony at the expense of and to the detriment of the rest of the South African community.

28. So this vital political element (which provides a basis for the practical operation of the rule of law in the UK) is missing in South Africa. Translated into harsh political realities it means that there is a direct correlation between the measure of privilege conferred by the government on its white constituency and the extent of the latter's support for the government. Unfortunately such conferral of privilege is usually achieved at the expense of and by violating the rights of the unenfranchised groups. This of course, is the underlying basis of and vehicle for the entire order of apartheid legislation that has been superimposed on the South African legal system. Thus, it can be concluded that the absence of this political constraint means that the rule of law can never operate effectively in the present South African constitutional system.

29. But many people in South Africa oppose the introduction of a bill of rights on the grounds that such an instrument will serve the function of preserving existing white privilege now that majority rule is being anticipated in the future.

30. However understandable this argument might be in emotional terms (especially from the viewpoint of unenfranchised people who all along have borne the brunt of legislative supremacy of an all-white legislature) it lacks