

that the rule of law has been slackened in countries where social conflict 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 premised 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 tradi-

tional 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 im-

portant 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 passing 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

any legal, constitutional or political foundation. Justice and democracy should not be tempered by feelings of revenge. Tyranny of the majority by a minority should not be replaced by tyranny of minority groups by the majority.

31. On the contrary, the fundamental tenets of liberalism demand the protection of basic rights and liberties of the individual and this is best achieved by a real separation of powers in terms of which the judiciary is ultimately charged with such protection. To argue that (when majority rule finally comes to this country) politicians (in the form of the legislature) should enjoy exclusive powers to decide the content of legislation is to take a very narrow view of democracy. Politics is about power and politicians must necessarily pander to particular constituencies and interest groups. In the context of the heterogeneous nature of the South African society there are bound to be conflicts between these various groups and there is every likelihood of fundamental rights and liberties being trampled in the ongoing struggle — notwithstanding majority rule.

32. For this reason the function of protecting human rights and liberties should be removed from the political arena and vested in the judiciary by way of an entrenched bill of rights. It is submitted that this is the only means by which the standards and ideas behind the rule of law can be effectively put into practise.

33. A final issue that has to be considered is the question of what rights should be protected by a bill of rights. In the first place there are a number of rights that are so fundamental as to demand automatic inclusion in a bill of rights. Thus, rights such as the right to liberty, privacy and freedom of speech serve as examples. Since no right is absolute the extent and limits of each of these rights must be defined and counterbalanced by the various conflicting interests and demands that arise out of the fact of co-existence within a society. However, it is not the intention of this paper to spell out a detailed list of the various rights that should be contained in a bill of rights. However, there are two controversial areas which require attention.

34. The first concerns the question of protection of property rights. This is important in two particular respects. Firstly, a guarantee of the absolute right of ownership presupposes a capitalist type of economy. However, this is not an essential quality of a bill of rights and thus there is no reason why a bill of rights could not exist in a socialist (or more socialistically-inclined) economic system. This could be achieved by not entrenching the right of ownership of property or imposing certain conditions on the operation of the right — such as that it be subject to the public benefit. The other aspect concerning the question of property rights relates to the issue of entrenching existing privileges and inequalities. The South African situation provides a clear example of this type of problem where it can be argued that any attempt to protect property rights in a bill of rights would provide an obstacle to any attempt to bring about a more just distribution of property and wealth in the country. Thus the white group that has for so long enjoyed the benefits of privilege would continue to retain that privilege and the wealth resultant therefrom if existing property rights were to be entrenched and protected.

35. As a result of both of the above problems it can be argued that any bill of rights for South Africa should be neutral in respect of property and thus should not contain any provisions concerning property rights or should limit such rights by imposing appropriate qualifications and conditions.

36. The final aspect concerns the issue of equality. Whereas it cannot be denied that equal treatment and equality under the law is a fundamental right, a number of problems arise when attempting to define and delimit a right of this nature. This is particularly so in the case of a heterogeneous society such as South Africa.

37. In the traditional western liberal sense equality is seen in terms of absence of discrimination and equality of opportunity. The latter means that gross inequalities might exist in regard to wealth and access to education and employment so long as the purely theoretical concept of equality of opportunity was present. Thus the question of reverse discrimination falls to be considered in order to allow equality of opportunity.

38. Although this has been referred to as affirmative action it nonetheless constitutes a form of discrimination and hence offends against the principle of equality. However the fact that certain under-privileged groups required additional protection and privileges in order to compensate for past injustices is deemed to be justifiable.

39. The recognition of a fundamental right to equality in a general sense could have the effect of perpetrating inequalities in a community, such as South Africa, consisting of a wide range of diverse cultural, racial and ethnic groupings. In this sense it could well be necessary for any right to equality to take account of various group rights in order to ensure equality of treatment. The problem with this issue is that it is possible to perceive it as another form of apartheid. But it remains a fundamental issue that needs to be addressed when analysing how a bill of rights and the right to equality will operate within the South African context.

40. So, for example, if it were to be enacted in South Africa that there be only one official language, then, although this superficially complies with the requirement of equal treatment, it will nonetheless discriminate against all those whose mother tongue is not that official language. On the other hand, it can be argued that equality of treatment should demand that the language of each separate language group should be declared an official language.

41. In much the same way different laws would have to apply to various groups in order to take account of different religious and cultural traditions and practices. Thus, although the emphasis of human rights protection in a bill of rights will focus on the individual, equality of treatment in culturally and ethnically diverse societies will necessitate some form of protection of groups. The situation is extremely complex and the precise parameters of the right to equality within this context need to be given careful and detailed consideration in regard to the implementation of a bill of rights. However, it must be borne in mind that the existence of or association with particular groups must be voluntary. □