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The Rule of Law in the Age of Terrorism – An Audit

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1 – The Age of Terrorism

This paper is a reflection on the meaning and significance of the rule of law in the age of terrorism.

In a previous life, I thought it was safer to explore notions of the rule of law in an historical context. That context was the penal colony of New South Wales during the period of convict transportation from 1788 – 1840. I argued that the colonists used the rule of law to achieve a political transformation from penal colony to free society.¹ I thought the distance from the present would make for a more dispassionate analysis of the rule of law. Perhaps I will now disprove the adage that as you grow older you become wiser.

I now want to explore the history of the present, or at least the last few years since 9/11. Timothy Garton Ash observed that at the end of the twentieth century the Cold War had ended and “Western values” of “freedom, human rights, democracy, and the rule of law” had triumphed. But he goes on to argue that the 21st century really began with September 11 and that terror has brought about a crisis for the free world.² Other bombings by Islamic terrorist organisations in Bali, Madrid and London led to responses from Australia, Britain and the United States - exemplars of “Western values” - to trade those values at a heavy discount for security. On international markets - the United Nations, the law of war, human rights, torture, the Geneva conventions, and on domestic markets - the separation of powers, the rule of law, preventive detention, due process, freedom from warrantless access to financial records, search and wiretapping - all sold at substantial discount.

In the year 2000, the idea that the United States and its partners in the coalition of the willing would face allegations like those in the following list would have seemed preposterous. Leading

¹ *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Camb U P, 1991)

² *Free World: America, Europe and the Surprising Future of the West* (Vintage, 2005) chapter 1, esp 8ff.

up to the year 2000, the worst we seemed to face was the Y2K bug. The list of allegations includes the following:

- (i) Commencing an illegal war in Iraq;³
- (ii) The torture of Iraqi prisoners at Abu Ghraib;
- (iii) Secret rendition of suspected terrorists to countries known to use torture and the use of secret prisons and inhumane interrogation methods – including water-boarding - by the CIA. The Justice Department has refused to hand over documents relating to the secret prisons and the interrogation methods used in those prisons to Congress;⁴
- (iv) Failure to follow the Geneva Conventions in relation to detainees held at Guantanamo Bay;
- (v) The use of inhumane interrogation techniques at Guantanamo Bay;
- (vi) The use of Guantanamo Bay to avoid judicial oversight of the circumstances of the detention at Guantanamo Bay;⁵
- (vii) The unlawful detention of US citizen Jose Padilla in the navy brig at Charleston until the eve of a court review of his detention;⁶
- (viii) The use of “national security letters” by the CIA and the Pentagon to access the financial records of Americans suspected of terrorism;⁷
- (ix) The unlawful wiretapping of US citizens suspected of terrorism by the National Security Agency. The Justice Department has now announced that it will seek court approval for wiretaps, but the detail of the approval process, and whether it is individualized warrants or a programmatic approval remains unclear. The change of policy occurs in the context of a forthcoming review of the system by the House and Senate Intelligence Committee and a pending decision from the US Court of Appeals.⁸

³ Sands, *Lawless World*, ch 8.

⁴ “The Imperial Presidency” *New York Times* 7 January 2007. In this instance, the President asserted a right to open first class mail without a court order. See the case of Canadian terrorist suspect, Maher Arer, who was detained in New York Airport and then sent to Syria where he was beaten and imprisoned. He has since been cleared of any involvement by a Canadian enquiry. The US Administration disputes the Canadian assessment: “Canadian to Remain on US Terrorist Watch List” *New York Times* 23 January 2007

⁵ “Retreat and Cheat” *New York Times* 21 January 2007.

⁶ (Cite) *New York Times* (date)

⁷ “Military Expands Intelligence Role in US” *New York Times* 14 January 2007 and “Cheney Defends Efforts to Obtain Financial Records:” *New York Times* 15 January 2007.

⁸ “Court to Oversee US Wiretapping in Terror Cases” *New York Times* 18 Jan 2007.

- (x) The use of “presidential signing statements” to assert that the Executive does not accept that it is bound to follow certain provisions of legislation passed by Congress.⁹

2. Even after a number of these allegations had surfaced, in 2005 US Secretary of State, Condoleezza Rice delivered a lecture to the Egyptians at American University in Cairo where she stressed the importance of the rule of law for Egypt:

We are all concerned for the future of Egypt’s reforms when peaceful supporters of democracy — men and women — are not free from violence. The day must come when the rule of law replaces emergency decrees — and when the independent judiciary replaces arbitrary justice.¹⁰

Two years later, commenting on her January 2007 visit to Egypt, the *New York Times* accused the Secretary of State soft-peddling on abuses of the rule of law in that country. The report detailed recent internet coverage of Egyptian police sodomising a bus driver with a broomstick, and hanging a woman by her knees and wrists from a pole in the course of interrogation. The *New York Times* speculated that in the face of current chaos in the middle-East, that the Secretary of State was prioritizing stability over democracy. That may well be but it may be too that she realizes that the Egyptians might respond by saying that she should look in her own back yard. A lot of what has been done in the name of the war on terror is based on claims of emergency decrees and dubious claims to rely on war powers, allegations of torture and inhumane interrogation techniques continue, the President regularly asserting his “signing statement power” to dispense with legislative provisions he disputes, and Attorney-General, John Ashcroft, abridging the Freedom of Information Act by “discreetly slipp[ing] into the Federal Register a new directive allowing eavesdropping on conversations between lawyers and some clients.”¹¹ As commentator Frank Rich put it;

As long as terror still lurked, the White House argued, legal superpowers would be required to vanquish the shadowy enemy. To the White House, the other two branches of government, the judicial and the legislative, were just too feckless and untrustworthy to do their part in the battle between good and evil. And so even as we were tracking down a heinous enemy, Osama bin Laden, who operated out of a cave, our government started moving our own legal system into a cave of sorts.

⁹ “The Imperial Presidency” *New York Times* 7 January 2007. See too ‘Retreat and Cheat’ *New York Times* 21 January 2007.

¹⁰ *New York Times* 16 Jan 2007

¹¹ Rich, *The Greatest Story Ever Sold* (Penguin Press 2006) 35.

Bush issued an executive order to set up military tribunals in which neither the verdicts, evidence, nor punishments ever had to be revealed to the public.¹²

The intervening years have seen something of a pushback. The Bush administration has had three significant rebuffs from the US Supreme Court in relation to war on terror detainees: *Rasul*, *Hamdi* and *Hamdan*. In another cases from the War on Terror - *Padilla* - and the power to issue warrantless wire taps, the Administration has chosen to retreat rather than risk defeat in the courts. *Hamdi* was released back to Egypt after he won the right to challenge his detention in court.¹³

The US has not been alone on this course. Other partners in the Coalition of the Willing have suffered at the hands of terrorists. Australian and British citizens were killed and wounded in terrorist bombings in Bali and in London. They also face many of the same allegations about the legality of their responses to the terrorist threat. The tortuous politics surrounding the Britain's decision to go to war in Iraq are described in some detail by Philippe Sands. After an ambiguous advice from the Attorney-General, Lord Goldsmith, the British chief of defence staff sought clear legal advice as to the legality of the war so that "the military chiefs and their soldiers would not be put through the mill at the International Criminal Court."¹⁴ The Attorney-General, gave a short second advice which Sands criticises for its inconsistency with the earlier advice, and for wrongly thinking that the Prime Minister rather than the Security Council could certify non-compliance with a UN resolution. In any event, Sands points out that the condition precedent in the advice – that there needed to be hard evidence of non-compliance - could not be satisfied in the face of the views of Blix and Al Baradei. In Australia, despite large demonstrations in the Australian capital cities against war in Iraq in January and February 2003, Australian commandoes were apparently on active duty in Iraq even at the time of the demonstrations.

After considerable experience dealing with IRA terrorism – but always treating IRA actions as criminal offences and denying them the "legitimacy" of "POWs"¹⁵ - the British Government passed new laws after 9/11, laws allowing preventive detention of terrorism suspects and control orders to govern the movements of people who were suspected of terrorist activities. This legislation was expanded – although not to the extent sought by Prime Minister Blair - after the London bombings in July 2005.

¹² *Ibid* at 38-9.

¹³ "White house Shifting Tactics in Spy Cases" *New York Times* 19 January 2007.

¹⁴ *Lawless World* (Penguin 2005), chapter 8.

¹⁵ *Ibid* 151, 153-4.

In 2002, the *Criminal code Act* 1995 was amended to define terrorism and create a large number of new anti-terrorism offences. Australia followed suit with similar legislation in December 2005.¹⁶ In 2005, further amendments added the new powers to enable preventive detention and control orders, as well as provisions to stop and search terror suspects, and to obtain documents. The legislation was introduced in late October 2005 and rushed through Parliament in December 2005, on the urging of the government that there were a dozen or more people it wanted to put on control orders prior to the Commonwealth Games due to be held in Melbourne in February-March 2006. At the time of writing, one control order had been issued in August 2006.¹⁷ No one has been subjected to a preventive detention order. The control order provisions of the Australian Act have been challenged on constitutional grounds and the case is presently part-heard in the Australian High Court.

So how do the Coalition of the Willing countries stand seven years into the 21st century in relation to “Western values” and particularly the rule of law? If the allegations are correct, there have been serious legal breaches. At best, these countries have pushed the envelope of legality to the nth degree, and while they may have been compliant with the letter of the law, they have breached principles and values which have already significantly compromised their own legitimacy. The War in Iraq has already led to the political demise of Prime Minister Blair and the defeat of the Republicans in the 2006 mid-term elections. While the Howard Government in Australia seems to have fared better, polls indicate that it will lose the late 2007 election. There seem to be the first signs of a rolling back of the tide on some of the rule of law issues. There are threats of court action in Germany against former Secretary of Defence, Donald Rumsfeld. The Australian Foreign Minister and Attorney-General are named as defendants in the Australian Federal Court for failing to exercise their discretion properly on behalf of the Australian detainee at Guantanamo Bay, David Hicks, in circumstances where British detainees, some of whom had also been charged, have been released.

Public criticism also seems to be mounting. Frank Rich acknowledges the failure of the US press to scrutinise the US government closely enough in the immediate aftermath of September

¹⁶ *Anti-Terrorism Bill* 2005. The first tranche of terrorism offences were inserted into the *Criminal Code Act* in 2002. See Division 101 ff.

¹⁷ D Neal, “The Strange but True Case of Jack Thomas (Aka “Jihad Jack”). Paper delivered to the Governing and Living in a Time of Terror Symposium, Boalt Hall Law School, September 2006.

11. On the other hand, at the turn of the year 2007, as the footnotes to the list of allegations show, hardly a day seems to go past without a front page story, news analysis, or editorial (or all three) on some aspect or other of government illegality in its war on terrorism. Sometimes all three. This is likely to increase as the committees of the new Congress grill government officials.

In Australia, the David Hicks case has become a cause celebre. Large public demonstrations against continued detention of Hicks took place in December 2006 and his US military defence counsel has become a TV star. One of the leading broadsheet newspapers, the Melbourne Age, is running a campaign to have Hicks repatriated and has a website with a chronology of the case, interviews with US prosecution and defence counsel, a copy of the *Military Commissions Act* of 2006, the 2007 Rules of Procedure for the Military Commission, a write in poll on Hicks' detention, other court documents, and photographs of conditions at Guantanamo Bay.¹⁸ It is an extraordinary development that someone accused of being a terrorist in Afghanistan, where Australian troops were deployed shortly after Hicks was arrested, should be the focus of such a high level of popular support. The applicability of the Geneva Conventions, compliance with the canons of due process and delay in bringing suspects to trial have rarely been hot topics at Christmas in Australia. On the other hand, there is a strong tradition of giving people a fair go, and the detention of Hicks has certainly hit that button.

¹⁸ "The Trials of David Hicks" <http://www.theage.com.au/multimedia/hicks/main.html>.

2 The Rule of Law

What is the meaning and significance of the rule of law in the post-September 11 era?

For ease of reference, I will use a slightly modified version of the theoretical points I made in my earlier book and use them to audit the meaning and significance of the rule of law in the age of terrorism. The structural elements of the rule of law are relatively unproblematic but that it is clearer to state them at the beginning.

Assessing the significance of the rule of law is more difficult. Hay and Thompson argued that for eighteenth century England, the absence of standing armies and paid police forces, English ruling classes relied heavily on the rule of law in the establishment and maintenance of political authority. I explored these ideas about law and power in the transformation of a new British settlement - the penal colony of New South Wales - into a free society over a period of some 50 years. Others have explored similar themes in relation, for example, to the emergence of new political orders in Eastern Europe after the collapse of the Soviet Union. But standing armies and a large variety of police, intelligence and security agencies are a commonplace of 21st century executive government. They influence the perceived legitimacy of government action. These agencies have the ear of executive government and they “know” what has to be done and to protect citizens. They are impatient of the checks and balances involved in the separation of powers and the rule of law. This impatience had been apparent through the 1990s when the war was against crime, and neo-conservatives had been chafing at the restraints on sovereignty imposed by the United Nations and the rulings of “activist judges”. This was interesting development and break from one of their founding fathers – F A Hayek – who took the trouble to state his liberal position and warn that conservatives could be very radical with institutions protecting liberal individualism.¹⁹

One of the effects of 9/11 was that security would trump freedom and a lot of its institutional protections, at least in the immediate post-9/11 phase. Politicians knew they had to do something and were hostage to the warnings of their security forces lest – in the light of a further attack - they be blamed for refusing advice which might have prevented it. So in the age of terror, political legitimacy might be tied more to the knowledge and expertise of the military and police advisers than to the separation of powers and the rule of law. Or it might be for a while.

¹⁹ “Why I am Not a Conservative” In *The Constitution of Liberty* (University of Chicago Press, 1960).

As Martin Krygier has pointed out, governments need to ensure the security of their citizens.²⁰ In emergencies, the rule of law contemplates unusual measures. War time powers exemplify this point. But Lord Acton was always right about the corrupting effects of power. It is good to agree with Condoleezza Rice that there comes a time when the rule of law must replace emergency decrees, even assuming that the potentially endless “war against terror” justified either the description “war”, or the use of the array of special powers said to flow from the declaration of the “war on terror”. And there are very significant questions about whether the response to 9/11 has made us more or less secure.²¹

Structural Elements of the Rule of Law

Seventeenth and eighteenth century English politics laid heavy stress on the rule of law. Hay and Thompson claim that the rule of law underpinned political authority in England.²² They are joined in that assessment, as will be seen, by an impressive list of contemporary seventeenth and eighteenth century authorities and by historians.²³ The rule of law occupied a central role in the struggles and settlements of the seventeenth century and their consolidation in the eighteenth century. What they all mean by the phrase, how importantly they regarded it, requires careful examination. This examination forms essential background for understanding the importance of the same ideology in the age of terror.

Discussions about the rule of law take place in a twenty-first century context, where the phrase has importantly different connotations from those which it had for seventeenth and eighteenth century English people. Whereas a commentator like Hayek concerned himself with legal certainty in the context of the dangers he saw in the discretions exercised in the welfare state,²⁴ seventeenth and eighteenth century concerns focused on battles between king and parliament, the royal prerogative, the independence of the judiciary and the rights of free-born Britons,

²⁰ “The Rule of Law: An Abuser’s Guide” in A Sajo (ed), *Abuse: The Dark Side of Fundamental Rights* (Elsevier, 2006)129 at 150-2.

²¹ D. Cole, “Are We Safer” 920060 53:4 *New York review of Books* 9 March 2006. See too L. Richardson, *What Terrorists Want* (Random house, 2006) who argues that “the declaration of a global war on terrorism has been a terrible mistake and is doomed to failure.” (xxii) Ms Richardson grew up in Ireland and had close contact with IRA sympathizers. She has long academic experience in the study of terrorist organizations and teaches on terrorism at Harvard University.

²² D. Hay, ‘Property, Authority and the Criminal Law’ in D. Hay *et al.*, *Albion’s Fatal Tree* (Pantheon, New York, 1975), 17; E.P Thompson *Whigs and Hunters* (Pantheon, New York, 1975).

²³ See nn, 12 and 13, below.

²⁴ F. Hayek, *The Road to Serfdom* (University of Chicago Press, Chicago, 1944), and *op.cit.*, n.6.

guaranteed by the British constitution.²⁵ The older debate takes up the rule of law in a political configuration very different from that of the twenty-first century. At the beginning of the seventeenth century, the monarch was still powerful and exerted extensive control over both the parliament and the courts. The conflict centred on the relative powers of these three. While at bottom many of the same issues run through both debates - individual liberty in particular, constraints on authority, and the idea of rule by rational principles rather than the arbitrary wishes of some individual or group - different historical conjunctions throw up importantly different settings for the operation of the rule of law. For English settlers in New South Wales, conflicts over the extent of the governor's powers - a governor who stood in the place of the king in the colony but wielded more power than any king since James I - conjured up seventeenth century demons about royal tyranny. While some of the claims of the Imperial Bush Presidency are reminiscent of Charles I, most Americans do not make the historical connection with tyranny.

But aside from the differences generated by different historical contexts, additional problems arise from the widely divergent political viewpoints of the various commentators who invoke the phrase, the rule of law. While it's rhetorical force has sounded loud and long in the halls of conservative and liberal political thought, it was also taken up in the 1970s and hotly debated among Marxist historians.²⁶ Can they all be talking about the same thing?

Both time and political viewpoint affect the *meaning* of the rule of law. But its *significance* varies too. For example, according to Hay, the rule of law weighed more heavily in the political life of seventeenth and eighteenth century England than it did in the nineteenth or twentieth centuries. Vivid memories of the turmoil of the Civil War and its aftermath produced an almost

²⁵ J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, Cambridge, 1957). The collection of essays edited by Pocock, *Three British Revolutions: 1641, 1688, 1776* (Princeton University Press, New Jersey, 1980), shows the influence of his thesis. See too H. Nenner, *By Colour of Law: Legal Culture and Constitutional Politics in England 1660-1689* (University of Chicago Press, Chicago, 1977); A. Mockler, *Lions Under the Throne* (F. Muller, London, 1983); M. Landon, *The Triumph of the Lawyers: Their Role in English Politics 1678-89* (University of Alabama Press, 1970); C. Hill, *The Intellectual Origins of the English Revolution* (Oxford University Press, Oxford, 1980); Hayek, *op.cit.*, n.6.

²⁶ The debate was started by E.P. Thompson, *op.cit.*, n.7 and Douglas Hay, *op.cit.*, n.7. Extrapolations and criticisms from Marxists and non-Marxists have been numerous. Among them see: J. Brewer and J. Styles, *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (Rutgers University Press, New Jersey, 1980); S. redhead, 'Marxist Theory, the Rule of Law and Socialism' in P. Beime and R. Quinney, *Marxism and Law* (Wiley, New York, 1982), 328; S. Picciotto, 'The Theory, of the State, Class Struggle and the Rule of Law' in *ibid.*, 169; N. Poulantzas, 'Law' in *ibid.*, 76; A. Hunt, 'Dichotomy and Contradiction in the Sociology of Law' in *ibid.*, 74; D. Brown and G. Zdenkowski, *Prison Struggle* (Penguin, Melbourne, 1982); a. Merritt, 'The Nature and function of Law: A Criticism of E.P. Thompson's *Whigs and Hunters*' (1980 *British Journal of Law and Society*, 7, 194; M. Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977 *Yale L.J.* 86, 561; P. Anderson, *Arguments Within English Marxism* (New Left Books, London, 1980); B. Fine, *Democracy and the Rule of Law* (Pluto Press, London, 1984).

ridiculous scrupulousness for legal form in the 1688 revolution.²⁷ The seventeenth century reliance on the ‘ancient constitution’ and on the rule of law as the protectors of English liberty - underlined not only by the *Bill of Rights* but also by the *Act of Settlement* of 1701, which protected the independence of the courts by granting life tenure to judges - left a powerful legacy to the Whig consolidators of the eighteenth century.²⁸ It was a legacy which allowed England to be governed by the gentry without a standing army or a professional police force.²⁹ The changes of the nineteenth century (e.g. the dominance of the laissez-faire ideology, the growth of a capitalist industrial structure, the advance of police forces and prisons, and changes in the electoral franchise) and the rise of the welfare state in the twentieth have meant that the rule of law occupies a different and arguably less central place in the legitimation of political authority. But what does the rule of law mean in the age of terrorism? The answer to that question begins in understanding the meaning and salience attached to the rule of law by people in late eighteenth century England.

At the most general level, people distinguish between the rule of law and rule of men. Properly understood, the opposition means to suggest that government operates on the basis of general rules laid down in advance - the first element of the rule of law conception - rather than *ex-tempore* decisions by the ruler. The antithesis is somewhat misleading in that it suggests that law is self-executing; it conceals the inescapable discretion involved in the application by human beings of general rules laid down in advance of specific situations. The tension between the requirement of generality and the vagaries of individual cases is accommodated by a second element implicit in the rule of law; the requirement that the rules be applied rationally. Properly understood, the idea that we are ruled by law, not by men, signifies the restrictions imposed by the rule of law on rulers, not the reign of an impersonal order of rules. ‘The laws ensure that reasons rule and not particular passions, but they are invented and maintained by men and can prevail only when men are guided by reason to the public good and not by passions to private ends.’³⁰

The power of the rulers is subjected to constraints against arbitrariness. What they do must be justifiable in terms of the pre-existing general rules. Societies where the rulers’ power rests

²⁷ H. Nenner, *op.cit.*, n.6; D. Hay, *op.cit.*, n.7.

²⁸ Lawrence Stone argues that the consequence of judicial independence was to free the judges to develop the country ideology of individual liberty in the eighteenth century, clearly exemplified in the General Warrants Case. See his, ‘The Results of the English Revolutions of the Seventeenth Century’ in J.G.A. Pocock, *op.cit.*, n.10, 23.

²⁹ Hay, *op.cit.*, n.7.

³⁰ J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, New Jersey, 1975).

predominantly on physical force (e.g. reliance on the army, hit squads, terror and secret police) do not operate on the basis of the rule of law. I do not mean to suggest here that governments which do adhere to the rule of law in theory and in practice, do not rely on physical force. The monopoly on the use of legitimate physical force is a fundamental claim of modern political authority. But to say that the state can and does resort to physical force in the ultimate case is a very different thing from saying its power depends predominantly or in large measure on physical force. Legitimate power makes normative claims on the obedience of its subordinates based on reasons of religious or secular principles. This differs from obedience based predominantly on fear of physical coercion. The rule of law is a way of organising power, not the opposite of power. It is, however, the opposite of *arbitrary* power.³¹

If reasons rule, the notion of reasons is wider than the general legal rules of the society, such as thou shalt not kill or thou shalt not steal. Does Shylock's contract entitle him to his pound of flesh? Would the law of attainder prevent convicts or former convicts from suing in New South Wales? How are the general rules elaborated to bridge the gap between them and the particularities of a given case to be adjudicated? We have already seen that the general legal rules have to be applied rationally but the notion of rationality at work here is of a specialised kind. Legal rationality superimposes a specialised process of argumentation on the general conception of rationality. Cases, as Coke said, are not to be decided by natural reasons 'but by the artificial reason and judgment of the law'. Law has special traditions, forms and styles of argument, judgments about appropriate analogies, hierarchies of authority, references to precedent and so on. Only a certain sort of rationality will be admitted in legal argument from general rules to particular cases.³²

Although most of these points logically apply to anyone in society, the rule of law theme usually focuses on the relationship between governors and governed. Thus, while the first strand in the rule of law concept emphasises that governors may only act pursuant to pre-existing rules, the obverse is that the governors are also *bound* by the rules. But there is still more to it than this.

³¹ Thompson's critics have attacked him for over-stating the dichotomy between law and power. I will discuss this aspect of the debate in ch.8.

³² E. Coke, 'Prohibitions del Roy' 1 77 E.R. 1343. See Pocock, *op.cit.*, n.15, for the provenance of the phrase. Blackstone also uses it, and refers to judges as living *oracles* of the law, *Commentaries* I, 77. Many volumes have been written on legal reasoning. See, e.g., J. Stone, *Legal Systems and Lawyers Reasonings* (Maitland, Sydney, 1964). See too M. Krygier, 'Law as Tradition' (1986) *Law and Philosophy* 5, 237 for his discussion of legal styles of argument.

Sometimes stated as equality before the law, and sometimes that nobody is above the law, the rule of law framework does not allow irrelevant exemptions - on account of wealth, position, ability to pay a bribe, etc. - where the rules otherwise apply. The principle does allow classification of people to whom particular rules apply, within limits of generality; once these are established they apply equally to all those affected.³³ But the important part of this principle, established in the seventeenth century struggles between the Stuart kings and their parliaments, is that everyone, including the king, is bound by the rule of law. More importantly, it meant - and still means - that executive government may only do what has been authorised in the form of law by Parliament. In New South Wales - and this became a vital point - it meant that colonial governors and their officials could be sued in the courts if their actions were not backed by law.

The third element of the rule of law concept is the courts. The rule of law connotes more than the rational application of general rules, at least in the case of complex societies, and certainly in English usage of the term. A king who sat and adjudicated personally, applying the general rules according to the dictates of legal rationality, would be described either as practising only a very attenuated form of the rule of law, or as overlooking an essential aspect of the rule of law, a differentiated legal system. As understood in England, and systems deriving from the English system, the rule of law involves courts, judges and a legal profession independent of the executive. The courts provide the mechanism through which executive actions can be examined against the standard of the general rules applicable to the society. Theoretically a king, a governor or officials could assess their own actions in terms of the laws. If law was the mechanical process that it is sometimes supposed to be, this might work. But people intuitively mistrust those who are judges in their own cause, an intuition which correctly identifies the flexible nature of legal rules. Fidelity to the rule of law requires independent forums for adjudication, a key part of the modern understanding of the separation of powers.³⁴ It places the courts between citizens and governments.

³³ For example, Hay stresses equality before the law of all social classes, at both ends of the social scale. He goes on to notice, however, that this only operated where the laws were applicable, thus masking the class nature of eighteenth century legislation, *op.cit.*, n.7, 33. Jennings makes a similar point in his rebuttal of Dicey: see his *The Law and the Constitution* (University of London Press, London, 1933); and see H. Jones, 'The Rule of Law and the Welfare State' (1958) *Columbia L.R.* 58, 143. Hayek, *op.cit.*, n.6, 154 says classification is permissible so long as those inside and outside the designated category agree to it.

³⁴ For Blackstone, the term separation of powers meant the division of government between King, Lords and Commons, *Commentaries* I, 52ff. He did, however, attach great importance to the independence of the judges and the courts in applying the settled law, *ibid.* I, 136-8, 257-71. I am indebted to David Lieberman for his assistance with Blackstone. See too, D. Lieberman, "The Mixed Constitution and the Common Law" in M. Goldie and R. Wolker (eds), *The Cambridge History of Eighteenth Century Political Thought* (Camb, 2006) 317, esp 331- 6. Other eighteenth century writers, D. Hume, *Essays: Moral, Political and Literary* (Oxford University Press, Oxford, 1963), 39; and W. Paley, *The Principles of Moral and Political Philosophy* (London, 1814), lay a similar stress on the separation of powers.

To this point we have established that the rule of law has at least three elements: general rules laid down in advance, rational argument from those principles to particular cases, and, at least in a developed form, a legal system independent of the executive for adjudication of disputes involving the general rules.

It is important to see what this promises, and what it does not. First, the rule of law is compatible with the existence of morally bad general rules. If, for example, the general rules are racist, such as those of the American South during slavery or in South Africa under apartheid, then the operation of courts applying those rules in a rational way will still signify the existence of the rule of law. Stalin's terror, Nazi Germany and other examples are often cited in connection with this point either to deny that these cases are examples of the rule of law because of the fundamental immorality of the rules,³⁵ or to deny Thompson's claim that the rule of law is an 'unqualified human good'.³⁶ This is not the place to rehearse the long debate over whether fundamentally immoral rules count as law.³⁷ For present purposes, I simply want to declare my legal positivist stance on this point and say that fundamentally immoral rules can count as laws. So, to take the South African case, I would regard the apartheid laws as morally repugnant but laws just the same.³⁸

What follows from this is that in such systems, the rule of law exists and enforces morally repugnant laws. It also follows that in such situations the claim that the rule of law is an unqualified good may not amount to much. But it does amount to a constraint on arbitrary power, a not inconsiderable advantage over death-squads, disappearances, and mass executions, to nominate some more extreme examples of arbitrary power. Regimes, which in fact rely on the rule of law, do accept limitations on what they might otherwise do. In this limited sense, the rule of law does seem to be an unqualified human good.

But the rule of law has to be practised, not just preached. The examples noted above can only dubiously claim to operate under the rule of law. To be valid the claim to adhere to the rule of

³⁵ L.L. Fuller, *The Morality of Law* (Yale University Press, New York, 1964), 159-162; *contra*. A. Goodhart, *op.cit.*, .6; W. Friedmann, *The Planned State and the Rule of Law* (Melbourne University Press, Melbourne, 1948).

³⁶ E.P. Thompson, cf. Redhead and Anderson, *op.cit.*, n.11.

³⁷ The primary disputants here are L. Fuller, *op.cit.*, n.16, and H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) *Harvard L.R.* 71, 593 and *The Concept of Law* (Oxford University Press, Oxford, 1961).

³⁸ Those adopting this approach in the context of the rule of law include Goodhart *op.cit.*, n.6, and Friedmann, *op.cit.*, n.20; J. Raz, *The Authority of Law* (Clarendon Press, Oxford, 1979), 210-14, 219-29; and Wade in his introduction to A. Dicey, *op.cit.*, n.6, xciii.

law must correspond reasonably closely with the actual practice of government in that society. Ideals which exist only in political rhetoric or in a constitutional document do not equate with the rule of law. The essentially operational flavour of the phrase should suggest that the practice must show fidelity to the ideal. If, at a minimum, the rule of law requires known principles laid down in advance but the practice is that the rules are not ‘public’ or are invented *ex post facto*, then this is not the rule of law but a fraud.³⁹ Arbitrary power is impatient of such standards, valuable as against power because of the demands they make for justification. Insofar as a regime such as that of South Africa under apartheid in practice conformed to the procedural canons of legality, then that society was governed by the rule of law, notwithstanding the repugnant nature of its apartheid legislation.⁴⁰ Fuller’s attempt to avoid this conclusion by reliance on a requirements of certainty - that the apartheid laws are so vague in some cases as to make it impossible to determine whether a particular citizen is bound by them - is not convincing.⁴¹ Determination of a person’s racial category is no more and no less certain than a host of other laws that no one thinks to question, be they tax laws or the criminal code. For example, the law respecting self-defence and provocation in murder, the most serious crime and hence the one where the highest degree of certainty should be expected, depends on very fine judgments about necessity of the action in terms of the immediacy of the threat, the reasonableness of the force used, degree of the response, the degree of the provocation, etc. Similarly, thousands of disputes about the application of tax laws do not yield the conclusion that their uncertainty nullifies their status as laws. Other examples from all branches of the law would show the point over and again. Some degree of uncertainty is inherent in the application of general rules to particular cases. There is a limit on the degree of uncertainty but it is sufficient here simply to say that these limits allow enough room for the application of immoral rules. Seen this way, the rule of law offers a certain structure of power, in which the executive government has to justify its actions in terms of the general rules and legal argumentation to an independent legal system. This will not protect the governed from immoral general rules but will protect them from arbitrary interference by government.

³⁹ Poulantzas has correctly attacked the notion that Stalin’s terror can stand as an example of socialist legality, *op.cit.*, n.11, 190. Goodhart makes a similar point in relation to Hitler, *op.cit.*, n.6, 947-50. See too Jones, *op.cit.*, n.18, 149.

⁴⁰ Fuller’s eight canons of legality are set out in *op.cit.*, n.20, 33-41.

⁴¹ *Ibid.*, 159-62.

Finally, and this point follows from the preceding points, the rule of law does not promise absolute certainty or ‘right’ answers, at least in the sense of a right answer in arithmetic.⁴² As already seen, the nature of general rules laid down in advance means that a particular instance will require reasons and arguments to act as a bridge from the general rule to the particular situation. The variety of circumstances to which the general rules may be applied means that very often the outcome will not be clear in advance of adjudication. The very fact that two well advised litigants are prepared to spend large amounts of money to take their case to court, that learned judges at a variety of levels in the court system, from trial court to appeal court (or appeal courts in some cases) differ, should be enough to demonstrate this point.

Legal logic does not have mechanical precision. It is closer to moral or political decision-making than it is to reasoning in the ‘hard’ sciences.⁴³ It draws on rules, principles and policies which have a great deal more play in them than arithmetical logic. Words and devices like ‘reasonable’, and ‘necessary’ allow rational people - and judges - to differ without being arbitrary. In the end, the right decision is determined structurally rather than by reference to ‘absolute truth’. Decision rules based on judicial majorities and court hierarchy determine what the ‘right answer’ is. It is not to the point that the politicians or drafters who drew up a statute disagree with the court’s interpretation. That is a commonplace among disappointed litigants and frustrated legal drafters. Some such people of late have accused “activist judges” of improperly substituting their views for the clear provisions of a statute or well-established precedents. However, this is a very difficult case to establish, especially where ambiguities in the statute or constitutional provisions require fine judgments about the application or meaning of the rule in a particular factual setting and the appropriateness of that interpretation of the rule in an unusual and changing circumstances. While proponents of executive power in the “War on Terror” rely on arguments of necessity based on the special circumstances post-September 11, they seem unwilling to accept court rulings which deny the executive the wide scope it might claim in a conventional war or on the battle field.⁴⁴

To summarise the main point, the rule of law does not promise absolute or even nearly absolute certainty but decision-making within a specific type of procedural framework. And within this

⁴² See J. Stone, *op.cit.*, n.17, and R. Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, 1987), for extended recent analyses of judicial reasoning, a major pre-occupation of jurisprudence. Picciotto points out the inherent tension between general rules laid down in advance and the requirement of certainty, *op.cit.*, n.11, 177; cf. Hayek, *The Constitution of Liberty*, *op.cit.*, n.6, 206.

⁴³ See T. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, 1962).

⁴⁴ J Yoo, *War by Other Means* (Page?)

framework of general rules, legal argumentation and personnel independent of the government, there will be considerable room for different people to arrive at different results while still being faithful to legality. Although a great deal of the legitimating rhetoric surrounding the law suggests something more mechanical, legal reasoning is more art than science.

The Cultural Significance of the Rule of Law

The structural elements of the rule of law may be found in many different societies. But in English eyes, especially in the eighteenth century, the rule of law had much fuller meaning, a meaning which was the legacy of English history. While it is possible to separate the rule of law into two aspects - one structural and one cultural - as various writers have suggested,⁴⁵ the people with whom we are concerned saw the rule of law as an integrated entity which under-pinned the British policy. To understand the rule of law through the eyes of seventeenth and eighteenth century Britons, we must appreciate not only its key structural elements but also its centrality in their political ideology.

Under the tutelage of J.G.A. Pocock, historians of seventeenth century England have stressed the overwhelming importance of the 'ancient constitution' in the political struggles of that epoch. The relative powers of the king, parliament and the courts occupy the centre stage. Argument about these issues takes its referents not from theories of a social contract but from England's 'ancient constitution', lost in the mists of time, which set the pattern of the relationship between king, parliament and courts, over a very powerful subtext about English birthrights. As one historian summarised it, 'the Revolution Settlement was first and foremost the Rule of Law. It was the triumph of the common law and lawyers over the king, who had tried to put prerogative over the laws.'⁴⁶

The drama opens at the beginning of the seventeenth century with Sir Edward Coke, judge of the King's Bench and the foremost legal figure of his day, at the feet of his monarch telling him that even the king is subject to the law. The details of the story are better told elsewhere⁴⁷ but here is the stuff of powerful icons, coming from a judge appointed and dismissible by the king. The

⁴⁵ See the discussion of this issue in *The Rule of Law in a Penal Colony*, ch.4. text accompanying notes 107-112.

⁴⁶ M. Landon, *op.cit.*, n.10 at 9, and the works cited at n.10.

⁴⁷ Mockler, *op.cit.*, n.11, 197; Hunt, *op.cit.*, n.11, 92.

idea of the separation of powers was not even a speck in Montesquieu's eye at this point,⁴⁸ and life tenure for judges, a product of the experiences of the seventeenth century, still almost one hundred years away.⁴⁹ Coke's legacy for the purposes of this story lies in his assertion that no person, including the king, is above the law. Even then the sense of this had to be qualified by reference to the king's prerogative, which clearly was part of the law, a prerogative that would be whittled away in the course of the century. Confinement of this prerogative, so that the king could then neither make laws by proclamation nor offer dispensations from the parliament's legislation, made it clear that the king could not make laws.

The Whig inheritors of the 1689 settlement elevated the rule of law to a central place in their political ideology.⁵⁰ 'The rhetoric of eighteenth century England is saturated with the notion of law'⁵¹ for a variety of good reasons. In the first place, as the pacific nature of the 1688 revolution and its emphasis on legal form suggest, the violence of the Civil War and the ensuing upheavals had quenched the country's inclination towards violent solutions. Hence we hear the leading spokesmen of the age blunting the revolutionary justifications offered by the seventeenth century precedents and by Locke's *Two Treatises of Government*. Blackstone stressed the perfection of English laws and institutions. The balanced constitution of king, lords and commons combined the best aspect of the possible forms of government, thus inviting the conclusion that the circumstances which would justify a revolution must be very rare. Stability was the order of the day.⁵²

A second reason for the importance of law in the ideology of the eighteenth century can be found not so much in the strength of legal ideas as in the absence of a plausible alternative. As has been noticed by a number of historians, religion had undergone a marked decline as a legitimating force by the eighteenth century, leaving the role of secular priest to the assize judge and the rituals of law.⁵³ Another unavailable option, a standing army or what amounted in their

⁴⁸ The first edition of Montesquieu, *The Spirit of the Laws* was not published until 1748. Pocock argues that the idea of separation of powers was the consequence of attempts to specify more closely the functions of the legislature, executive and judiciary. Note that while Blackstone stressed the importance of independent courts, the closest he comes to the idea of separation of powers is the mixed constitution of King, Lords and Commons which, for him, combined the features of monarchy, aristocracy and democracy, *op.cit.*, n.19, 52ff. See again, Lieberman, *op.cit.*

⁴⁹ *Act of Settlement*, 170, 13 Wm. III c.2.

⁵⁰ D. Hay and E.P. Thompson, *op.cit.*, n.7; L. Stone *op.cit.*, n.10, 9; Brewer, *op.cit.*, n.40, 348. the idea emerges from the contemporary writers. See works cited in n.10.

⁵¹ Thompson, *op.cit.*, n.7, 263.

⁵² Blackstone, *Commentaries* I, 52ff. See too L. Stone, *op.cit.*, n.13, 90. Blackstone's revolution blunting ideas were rejected by the American colonists, Stone, *ibid.*, 99.

⁵³ D. Hay, *op.cit.*, n.7, 56; N. Poulantzas, *op.cit.*, n.11, 1983 ; P. Anderson, *op.cit.*, n.11, 197.

eyes to the same thing, a paid police force, supplied a third reason for the pre-eminence of the rule of law in the eighteenth century. Despite Jacobite threats, outbreaks of rioting and disorder throughout the century, and the deep fears engendered among the rulers by the French Revolution, neither a standing army nor a paid police force could be countenanced. The memories of the seventeenth century bulked large here and raised a panoply of gentry fears. First, paid police and standing armies conjured up the violence they sought to avoid. Second, they posed a threat to English liberty by raising the spectre of the French spy system. Third, paid forces threatened the balance of the constitution, because they were inconsistent with the existence of the county militia and - unlike the militia which was controlled by the local gentry - paid forces were open to control by central, executive government. Fourth, the gentry would be taxed to pay for these expensive innovations or forced to billet troops as they had been during Cromwell's time. For all these reasons, the gentry chose to rely on the rule of law and their own resources rather than resort to a standing army or a paid police force.⁵⁴

Their solution to the problem of how to govern, as a growing body of literature shows, was to base their authority on the rule of law, in particular, the criminal law rather than the force of arms.⁵⁵ The theatre of criminal justice most vividly illustrated this theory of legitimacy, a theory which can be found powerfully in conservatives like Blackstone,⁵⁶ as well as in radicals like John Wilkes, whose strategy actually depended on the adherence of his opponents to a rule of law model.⁵⁷ Whether this system was actually fair is for present purposes, beside the point.⁵⁸ What is important is the significance attached to the rule of law:

In seventeenth and eighteenth century England the law was a remarkably potent force. It was the chief means of exercising authority, the main vehicle of state power, an important way of resolving disputes and, because of the extraordinarily wide acceptance of the notion of the rule of law, a vital means of legitimizing private initiatives. ... The fiction of the rule of law commanded remarkable support and was the framework within which most conflict occurred.⁵⁹

⁵⁴ See n.46.

⁵⁵ Hay, *op.cit.*, n.7.

⁵⁶ See n. 19.

⁵⁷ J. Brewer, 'The Wilkites and the Law', *op.cit.*, n.7, and J. Brewer, *op.cit.*, n.40, 348; and Dickinson, *op.cit.*, n.38, esp.89.

⁵⁸ J. Langbein, 'Albion's Fatal Flaws' (1983) *Past and Present* 98, 1.

⁵⁹ J. Brewer and J. Styles, *op.cit.*, n.11, 20.

Although Whigs took these principles more seriously than Tories, Tories also subscribed to them even if they sometimes strayed from virtue. The rule of law occupied a central place in the political ideology of late eighteenth century England.

While I think the structural components of the rule of law remain reasonably constant since the eighteenth century, there is a real question about its potency and centrality at the start of the twenty-first century. Were the Coalition of the Willing governments too willing to prioritise security over liberty and legality in the immediate aftermath of 29/11? Are they still? I want to explore this issue in the context of the case of one of the Guantanamo Bay detainees, the Australian, David Hicks.

3 Guantanamo Bay and the Case of David Hicks

In August 2006, the new US ambassador to Australia, Robert D McCallum conducted a media round table to introduce himself to the Canberra press gallery. He was questioned about the detention of an Australian citizen, David Hicks, at Guantanamo Bay for the previous five years.

Northern Alliance personnel detained Hicks at a taxi stand in Afghanistan in late November 2001. It seems that Hicks had travelled From Pakistan to Afghanistan earlier in 2001 to do military training and support the Taliban. He left Afghanistan and went back to Pakistan prior to September 2001, but returned to Afghanistan in November 2001. According to the prosecution, he was a member of Al Qaeda and had engaged in surveillance of the US and British embassies.

Hicks was transferred to US custody in December 2001 and taken to Guantanamo Bay in January 2002. He was eventually charged in 2004 before the first Military Commission. The charges alleged conspiracy with Al Qaeda to attack civilians, coalition armed forces, and supporting the enemy (ie the Taliban and Al Qaeda) in Afghanistan in 2001. There was no charge that Hicks personally carried out or was present during any act of violence. Those charges lapsed after *Hamdan*. Fresh charges are expected.

As noted above, Hicks' case has become a *cause celebre* in Australia. The new US ambassador, himself a former US Justice Department attorney, found the Canberra press gallery anxious to question him about whether Hicks' treatment conformed with eth rule of law:

Question: Is the Administration at all troubled by the fact that he's locked up, hasn't faced a trial and is going to be locked up for a long while yet? Is that the rule of law?

McCallum: Yes, that is the rule of law under the architecture that exists for military commissions trying war criminals or alleged war criminals, and it is not at all unusual or unprecedented for such individuals to be detained pending the military commission outcome. There's another aspect, and you'll forgive me but you are asking these questions of a lawyer so you're going to get more information than you want, need or desire, but there is also I think the issues concerning international law, that allows the detention of enemy combatants

during the course of hostilities. There is no dispute that Mr Hicks was detained and captured in Afghanistan, and so I don't think there is any dispute about him being an enemy combatant in that sense. The real issue regarding military commissions, however, is the issue of his commission of war crimes for which he would be subject to certain penalties, but not the death penalty.

Question: . . . Hicks' lawyer has argued further that these are really "kangaroo courts" designed to get a conviction, and that the fair thing to do would be to put him before a court martial.

McCallum: I don't accept in any way, shape or form your view that these are "kangaroo courts", as the United States Congress will determine the appropriate procedures to be followed, he will be represented by counsel. There is, will be more due process than in any other military commission proceeding in history, and that includes the proceedings after the Second World War and other proceedings that relate to war crimes. The record of the United States and the respecting of the rule of law is better than any country in the world, and we are extraordinarily proud of it and should be, so there is no basis, no basis whatsoever in my mind to assert that there is a disregard. What does occur is that we in the United States, again from a lawyer's perspective, think is important and that is a robust and vigorous debate where people can say what they want about the rule of law requires, and through that process we ultimately come to a decision of the United States Congress, because they will pass at some point a bill that defines these processes, and they will be followed in the United States, so I think there is a misconception that there is a disregard for the rule of law, even if there are others who comment about the way they would do it in a different way.⁶⁰

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Ambassador Robert D McCallum Jr, Media Roundtable, Canberra, 28 August 2006 at <http://canberra.usembassy.gov/media/20/080/6/MccallumTranscript.pdf>. Australian Attorney-General, Phillip Ruddock seems equally enthusiastic about the rule of law, even though he has been named in a civil action in relation to his conduct of the Hicks matter. "Attorney-General Philip Ruddock says it is up to the courts to determine if a legal challenge by Australian terrorist suspect David Hicks against the government has legs. Lawyers for Hicks today sought Federal Court orders which could see the government compelled to press the United States for his release. Mr Ruddock says the government is continuing to press the US for Hicks' case to be finalised as soon as possible. "The important point is this is a country where the rule of law operates and if people believe that there is a lawful basis to bring challenges, they're free to do so," the minister told reporters. "Whether they have legs is ultimately determined by the court and these are matters that we will address in the contest of any action." *The Age* 6 December 2006.

The title of Philippe Sands' new book, *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George Bush's Illegal War* and give the clue that not everyone shares the Ambassador's assessment of the recent record; Sands is highly critical of the "legal black hole" of Guantanamo.⁶¹ How do such diametrically opposed views both so confidently invoke the rule of law? Are they both talking about the same thing? Has the concept now become so indeterminate as to be virtually meaningless? Has it always been meaningless?

In part, the disagreement stems from a series of unstated assumptions about the rule of law. Strikingly, the Ambassador – both in the quoted passages and in other passages of the conference⁶² – equates the rule of law to the will of Congress. After a robust and vigorous debate where people can say what they want about what the rule of law requires, and through that process we ultimately come to a decision of the United States Congress, because they will pass at some point a bill that defines these processes and they will be followed in the United States, so I think it is a misconception that there is a disregard for the rule of law, even if there are others who comment about (sic) they would do it in a different way.”

This sort of positivism might accord with the rule of law – in the sort of stripped down way that apartheid laws accorded with the rule of law⁶³ - but a host of objections arise even to this attenuated version. The Ambassador's claim about the adherence of the United States to the rule of law has to be discounted if the commitment is to what seems to be at best some very attenuated version of it. I want to explore some of the criticisms.

While it is true that the *MCA* has been passed by the US Congress, its denial of *habeas corpus* to people detained by the US at a location controlled by US breaches a fundamental principle in common law countries whatever its status under US law may turn out to be. The fact that the US Supreme Court held that *habeas* was available to Guantanamo Bay detainees Hamdi, a US

⁶¹ See especially ch 7.

⁶² “. . . and he's represented by counsel who are and have pushed forward issues relating to the process that he faces and that's one of the consequences of our rule of law in the United States, that we want to get it right, we want to afford him due process in accordance with the congressional mandate, whatever that may be, and so he will remain as far as current status is, he will remain detained until those issues are determined by the United States Congress.” At 5.

⁶³ See below. I have discussed this issue at greater length in *the Rule of Law in a Penal Colony* (1991) ch 3, esp 65-71.

citizen, and Rasul, a British citizen, highlights the artificiality of the attempt to exclude judicial review by locating the detainees at Guantanamo Bay.⁶⁴

The fact that a US citizen who had engaged in the same conduct as Hicks could not be tried by a military commission - its processes are restricted to aliens⁶⁵ - is a further breach of rule of law principle. It breaches the principle of equality before the law: there is no relevant distinction between a US citizen and an alien which would justify different modes of trial for the same criminal offence.

While there obviously are precedents for military commissions, the justifications for them are thin when the normal courts remain open for business. Military Commissions are not an necessary option. Australia abolished military commissions in the 1990s preparatory to the trial of people accused of Nazi war crimes.⁶⁶ Hicks committed no crime against Australian law as at November 2001, according to the Australian Government. Were he now to engage in the conduct alleged against him by charges in the first military commission, he could be tried in Australia but not by a military commission. Hicks could be charged in Australia under the *Criminal Code Act* 1995 with receiving training from a terrorist organization, for example, an offence created by the 2002 amendments to the Act.⁶⁷ However, such offences would be prosecuted by the Director of Public Prosecutions – an office independent of government and the military - under normal criminal procedure, including the unanimous verdict of a jury selected at random from the community, and normal appeal rights. Under the MCA, the Secretary of Defence convenes the commission and “details” the members of the commission all serving members of the US military with careers to think about. The Secretary also prescribes regulations for “detailing” the military judge.⁶⁸ This is in marked contrast to judges who are appointed generally and have tenure of office during good behaviour. The verdict of the commissioners need only be by two-thirds of members present, but the death penalty may only be imposed if the verdict was unanimous among the members present.⁶⁹ There is an appeal to the “convening authority” (?) for material error of law and then the case must be referred to the Court of Military Commission Review. Only after these processes have run is there a right of

⁶⁴ Cite. *Johnson v Eisenstrager*. Also cite Hamdi and Rasul. The *Detainee Treatment Act* 2005 nullified Rasul. The exclusion of *Habeas Corpus* for aliens: s7 MCA. There are Reports that THE NEW Congress is preparing to reinstate habeas. *The Age*, 20 January 2007.

⁶⁵ See s948b, c and d of the MCA.

⁶⁶ See the interview with Paul Willee QC, a former head of the Australian Military Bar: “The Trials of David Hicks” <http://www.theage.com.au/multimedia/hicks/main.html>.

⁶⁷ Section 102.5.

⁶⁸ Sections 948h-j.

⁶⁹ Section 949m.

appeal to the Us Court of Appeal for the District of Columbia Circuit, limited to the questions of whether the proceedings conformed to the standards prescribed in the *MCA* and “to the extent applicable, the laws and constitution of the United States.”⁷⁰

By both international and domestic measures, the *Military Commissions Act* procedures are a pale shadow of the due process that applies to US citizens in civilian court. Indeed, the chief prosecutor for Guantanamo quite clearly says that their case would never get out of motions in a civilian criminal court in the US because of problems of continuity with evidence and failure to give Miranda warnings.⁷¹ But those are the least of the problems.

The *MCA* allows the use of coerced confessions, provided the presiding officer determines the evidence is “what it is claimed to be.”⁷² While much of the discussion of the *MCA* has focused on the exclusion of evidence obtained by torture, the methods of interrogation falling short of torture or inhumane treatment would not satisfy the standard rules that confessions must be voluntary.

The *MCA* also allows hearsay evidence which would not be allowed in US civilian courts. The defendant bears the onus of showing that such evidence is unreliable or lacking probative value.⁷³ Hicks is held at Guantanamo Bay, thousands of miles from the site of this alleged offences and the witnesses to the facts. The case the practical problems of this are obvious. According to Hicks’ defence counsel, the prosecution in proposes to rely on statements provided by investigators who took statements from witnesses in Afghanistan. So, although the investigator can be cross-examined, the real witnesses will not be available for cross-examination. The credibility of such witnesses in the prevailing circumstances of Afghanistan would be an enormous issue in a standard criminal trial.

It seems that defence counsel have not been allowed to interview other detainees who might be witnesses. If so, and especially if prosecutors have interviewed these detainees with a view to using that evidence in prosecutions, there is a further skewing of the case.

⁷⁰ See subchapter VI of the *MCA*.

⁷¹ See the interview with Colonel Morris Davis , chief prosecutor of the military commission, “The Trials of David Hicks” <http://www.theage.com.au/multimedia/hicks/main.html>.

⁷² Section 949a(D). The Rules for the Military Commissions were released on 18 January 2007, too late for inclusion in this paper.

⁷³ Section 949a(E) *MCA*.

Some of these practical problems serve to underline the more general point that justice delayed is justice denied. The chief prosecutor at Guantanamo has blamed the defence for these delays. But the detainees were not responsible for the re-invention of the judicial wheel. The charges against Hicks were not laid until he had been at Guantanamo Bay for some two years after his detention and a failure to have challenged the procedures under the first military commission would be the forensic equivalent of suicide. Defendants should not be expected to submit to a process which is radically different from the process which would be used in criminal cases and guaranteed to them international agreements.

By international standards, the US Congress has committed itself to the Third Geneva Convention. Even if the Geneva Conventions do not apply to people like David Hicks, President Bush ordered that the spirit of the Geneva Conventions be followed.⁷⁴ The treatment of Hicks appears to breach a number of the relevant provisions:

- (i) A person under detention must be treated humanely. This Article specifically precludes violence to the person, cruel treatment, and humiliating and degrading treatment. (Article 3.(1)(a))

- (ii) Detained persons may only be sentenced after a judgment passed by passed by “a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilized peoples.” (Article 3.1(d)). The specially constituted military commissions fail this test at several points. They appear to be geared to a specific conflict rather than the regularly constituted courts martial which try US service people, or the US criminal courts. Their method of selection by the Secretary of State, among other things undermines their independence. Their receipt of coerced evidence and hearsay, and denial of the right to be present, and to see and confront prosecution witnesses – among other things - breach this article. See too ICCPR, Article 14 guarantees to be informed promptly of the charges, to be tried without undue delay, to be present for the trial, to examine the witnesses for the prosecution. Hicks has been detained for 5 years and still does not know what charges he will face of when hhe will be tried.

⁷⁴ Memo, *The Torture Papers*

- (iii) Trial by a military court unless the existing laws of the detaining power allow civil courts jurisdiction. (Article 84)
- (iv) A prisoner of war must not be kept in close confinement pending hearing. The exceptions are where members of the armed forces of the detaining power could be confined if charged with a similar offence, and for good order and discipline. Investigations shall be conducted as rapidly as possible. If the prisoner is confined (ie kept in a prison cell), in no circumstances shall the exceed three months. (Article 103) Hicks has been confined for eight months in a single cell, with a frosted glass window, and is allowed out of his cell for one hour per day.⁷⁵
- (v) No moral or physical coercion may be used to elicit confessions. Hicks swore an affidavit saying that he had, among other things, been beaten while blindfolded and handcuffed, and threatened with firearms and other weapons before and during interrogations.⁷⁶ (Article 99)
- (vi) A prisoner can only be sentenced by a court following the same procedures as apply to members of the US armed forces. (Article 102)
- (vii) Some of the evidence will be kept secret from the accused. Military (but not civilian) counsel will have some of the classified evidence but not allowed to reveal it to the client. But military counsel will be hamstrung without instructions on that evidence from the client: how do you cross examine effectively about events you did not witness without instructions from your client who did witness them? (Article 105)
- (viii) It is a grave breach of the Convention to deprive a prisoner of war of the right to a fair and regular trial. (Article 130)

⁷⁵ *The Age* 28 November 2006.

⁷⁶ Copy of Affidavit on file with the author.

Some Conclusions

We might agree that the Rule of Law is a very important, even fundamental principle of political life, in Western democracies. It is also important, as Martin Krygier points out, that the protections offered by the law against terrorist threats are effective. Traditional concerns about state incursions on individual liberty may have to give way to emergencies. But there is a heavy burden on proponents of these incursions. Unless the proponents are hard put to their proof, critics are entitled to conclude that claims to prize the rule of law ring somewhat hollow. The proponents have to have to prove at least two conditions:

- (i) There has to be some genuine necessity. Typically, we do expect state incursions on individual liberty in times of war or other emergency.⁷⁷ But there needs to be more than an inflammatory accusations or high rhetoric about the necessity. The use of the term “War” in the response to the bombing of the WTC, disarmed/silenced critics of the response with tragic consequences at a number of levels. It allowed the invasion of Iraq a much easier passage than would otherwise have been the case.⁷⁸ Linking it to an attempt to bring a dirty bomb into the US, stripped one its citizens, Jose Padilla of his practical rights for years. Front page images of him in the New York Times,⁷⁹ blindfolded, ear-muffled and shackled as he was being taken to the dentist at the South Carolina naval prison exhibit one of human costs involved in rhetorical claims made at the time of his arrest, claims which vanished as Padilla’s case wound its way to the door of the US Supreme Court, before he was moved sideways into the domestic criminal courts where there is no allegation about a dirty bomb..
- (ii) The measures have to be proportionate to the necessity of the case. For example, claims that detainees held at Guantanamo Bay must be denied access to the US courts because the US is engaged in war, and that non-citizens should be denied access to those courts must depend on the realities of the circumstances. POWs detained being held behind allied lines on the fields of France during WW II, or in parts of the South in the United States during the Civil War, might not be able to

⁷⁷ See Harry and Jane Scheiber on Hawaii; Scheiber, Property Seizure

⁷⁸ Rich, *op cit.*

⁷⁹ ? January 2007

be dealt with in the normal courts because, for example, the courts may not open for business. Assuming for the sake of argument, that the “War on Terror” is a “war”, the US courts are open for business and have not missed a day. So are the Courts Martial. Those who argue for novel and extreme measures bear of heavy burden of proportioning these measures to the necessity of the case. For example, in the face of a long-running terror campaign by the IRA, the UK Government resolutely refused to deal with the IRA terrorists as anything other than criminals. It did not rely on the array of powers attracted by a state of War, despite the fact that British troops were heavily engaged in Northern Ireland for years. This is not to say that the distortions of due process introduced by *de jure* procedures like the “Devlin Courts” and *de facto* by methods used by the police and the military would have gladdened the heart of rule of law adherents. But the example says something about proportionate responses to situations of necessity.⁸⁰

While the impact of 9/11 sent shock waves through the world, the excesses of the response now seem to be generating forces which are re-asserting the significance of rule of law ideas. This manifests itself not only in the decline in the political fortunes of politicians who were the main architects of the response, but in the surge in press criticism and public opinion against the measures pursued in the War on Terror, and in the Australian context by the level of public criticism of the treatment of David Hicks and now civil suits brought against the Australian Foreign Minister and Attorney-General.

That said, legislation which breaches established rule of law principles remains on the statute books and it is now so much easier to imagine how – in the event say of another serious terrorist attack, that Coalition of the Willing countries might again be prepared to expand the power of executive government beyond prudent and justifiable limits. For the future, we may hope that the prospect of law suits against the Australian Ministers – and suits against Donald Rumsfeld and other Bush Administration officials - may curb the level of experimentation that has taken place since 9/11. And civil suits may not be the end of it. Australia has accepted the jurisdiction of the International Criminal Court and enacted serious breaches of the Geneva Conventions as part of the domestic criminal law. Those offences include many of the articles from the Geneva Convention listed above. Although the consent of the Attorney-General is required for a domestic prosecution, there may be an Attorney-General from the other side of politics in office at the end of 2007, and there is also the prospect of an international prosecution.

⁸⁰ Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (2006).