The rule of war

Something is rotten in the state of Denmark, say **Ian Pease** & **Francis Neate**

It's the "nearest we are likely to approach to a universal secular religion", thus writes the late, great and sorely missed Tom (Lord) Bingham in his book *The Rule of Law*. If that's true, how assiduously are we keeping the faith? Ian Pease & Francis Neate debate below how the rule of law can be upheld in that most critical of decisions—that to go to war.

Ian Pease
- Present system is wholly inadequate
- Parliament needs an independent source of legal advice

I-wreck the rule of law

On 20 March 2003 the UK entered one of the most controversial wars of modern times. Prior to the commencement of the second Iraq war there had been a weekend of protests with hundreds of rallies in about sixty countries. Prime Minister Tony Blair was unmoved, stating that he did not "seek unpopularity as a badge of honour…but sometimes it is the price of leadership and the cost of conviction". As it subsequently turned out, that conviction appears to have overridden the evidence.

The post mortems on that war have been numerous, the latest under the chairmanship of Sir John Chilcot is currently in train, however, one could not watch the evidence given by Lord Goldsmith on 27 January 2010 without the utmost concern for the procedures that are presently in place to guard the rule of law. There is no more serious a decision that a country takes than to declare war on another. Legally the country has to act in accordance with international law. Presently this is determined on the attorney general's advice (Lord Goldsmith in the case of the Iraq war).

However, it is patent from the attorney's testimony that the present system is wholly inadequate. For example in July 2002 Lord Goldsmith gave the prime minister his unsolicited (and apparently "unwelcome") written advice that war could not be justified on the grounds of self-defence or humanitarian crisis. There had to be a further resolution from the Security Council that Saddam was in material breach of an existing resolution.

Now the probity of the advice that Lord Goldsmith gave for the justification for war is not really in issue, rather it's the process and procedure that were gone through to reach that conclusion.

First one of the tenets of the rule of law is that, as Lord Blackburn is reported to have said: "It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause…" And yet the position of the attorney general blurs this distinction. The attorney general is a political appointment in the hands of the prime minister and, as Lord Goldsmith's responses to the Iraq enquiry show, he regarded the prime minister as "his client". However, where legal advice is called for in the advent of war, there needs to be a more obviously objective source. The attorney general's advice to the prime minister was before the House at the time of the Iraq War Debate on 18 March 2003 and was apparently influential in the vote on the motion for war.

> **"What is required is totally independent & transparent legal advice with the credibility to be taken seriously"**

The moral high ground

There has to be a new regime set up. While the government may legitimately retain an appointed legal adviser, I would suggest that Parliament needs an objectively more independent source of legal advice before voting on key questions that have a legal component.

This would be in accord with a general trend, the last government established the Monetary Policy Committee of the Bank of England and also gave the UK Statistics Authority independence and the present chancellor of the exchequer has established an Office for Budget Responsibility. We now need equivalents in the legal advice field.

In my view the answer is at once evident and the body is in existence already. There is no reason why legislation cannot be framed that forces the government to present its case and evidence to the Justices of the Supreme Court and allows other bodies with *locus standi* to attempt to refute it or present contrary evidence or argument.

The objection may be made that certain of the evidence may not, for security reasons, be publishable. That I readily acknowledge, however the courts already have procedures that allow that evidence to be assessed and where possible made public (see the Binyam Mohamed case). In any case such an argument is only likely to apply to a limited ambit of evidence in such a scenario. There is no indication from Lord Goldsmith's evidence that he saw / took cognizance of a substantial body of secret evidence in reaching his judgment.

Underlying my suggestion is the vital importance of transparency. As with any trial, it is impossible to determine whether or not government is fair if its decision-making process is secret. What is required is totally independent and transparent legal advice with the credibility to be taken seriously.

While transparency in the economic field is to be welcomed, I would argue that its revealing light needs to shine upon the

information and advice that government uses to take key decisions on war and peace. The processes that I have set out above will ensure that is done.

This country has a habit of muddling through with institutions and procedures evolved for a previous age. Unfortunately difficult circumstances highlight the deficiencies—like strong sunlight penetrates the threadbare curtain. We are stuck with a system that part-conflates legislature and executive. Under these circumstances the best that can be achieved is to fully inform the legislature before crucial votes. In the "court of public opinion" it would be practically impossible for Parliament to vote for a war that the Supreme Court had ruled as illegal.

Francis Neate
- Limited time for legal opinion in build up to war
- Debates about how Iraq war started unlikely to have future relevance

The impossible dream

Ian raises an important question for discussion, however I fear he is naïve in the solution he proposes. Does he really believe that all relevant facts will be before the Supreme Court when it rules on the legitimacy of a decision to go to war? Governments are habitually "economical with the truth" as the British Cabinet Secretary Robert Armstrong so memorably put it during the Spycatcher trial in 1986.

We need only remind ourselves of the comment of the coroner in the inquest into the deaths by friendly fire of British soldiers in Iraq, in which it took four years for the cockpit tapes from the US plane to be disclosed. He said that the Ministry of Defence had been "less than open", judicial-speak for not telling the truth, certainly not the whole truth.

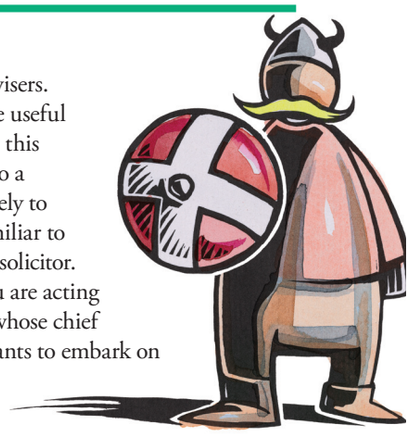
The only people likely to be putting the facts before the Supreme Court in the process envisaged by Ian are the government and its servants. Maybe we are too wedded to our system of teasing out the facts, relying on two or more opposing parties to present their respective versions and how they should be interpreted. The Saville Inquiry is an extreme example of how complicated this can be. In the case of a decision to go to war, it would take far too long to establish the relevant facts.

In his book *The Rule of Law*, Lord Bingham deals with Ian's proposition far more authoritatively than I can, and on the basis of fundamental principle—the independence and impartiality of the judiciary. He refers to "a legislative proposal…in 1928 which would, if enacted, have permitted a minister, if it appeared to him that a substantial question of law had arisen, to submit the question to the High Court...the proposal was subject to a sustained attack by the judicial members of the House of Lords." He quotes Lord Merrivale: "It is no part of the business of his Majesty's Judges, and never has been part of their business, at any rate since the Act of Settlement, to have any advisory concern in the acts of the Administration; or to take any part in advising the Administration." Lord Bingham goes on to cite other examples of the importance of maintaining the Judiciary's distance from government. A healthy scepticism about the bona fides of governments lies at the heart of *The Rule of Law*.

> "A healthy scepticism about the bona fides of governments lies at the heart of the Rule of Law"

I do not have a straightforward solution to this problem of how to determine the legitimacy of a decision to go to war. The starting point has to be an examination of the process followed in the case of Iraq. We need to start by asking and answering the following questions. First: who is the attorney general's client? Surely, not the prime minister, nor the cabinet? It is probably best to suggest that the client is Parliament, whose members represent the voters. The mere use of the word "client" provides the answer to the second question: what is the attorney general's role? Clearly he is an adviser, not an advocate and certainly not a judge. Third: how should the attorney-general's opinion be delivered? Surely not in the form of a summary prepared by the government's public relations advisers.

It may be useful to transpose this question into a situation likely to be more familiar to a practising solicitor. Suppose you are acting for a client whose chief executive wants to embark on a course of action which may constitute a criminal offence. You consult counsel, who in a detailed written opinion considers the case for and against, concludes that both sides of the argument could be right, but says that on balance he favours the conclusion that it is not a criminal offence. The chief executive wants you to attend the Board meeting and say simply that in counsel's opinion it will not be a criminal offence, no more than that, and without providing counsel's written opinion to the rest of the Board, albeit at the risk of losing a client. The answer is obvious, albeit at risk of loss of a client, those who have to take responsibility for the decision must be made aware of all the implications of the legal advice. Secrecy, closely followed by window-dressing, are the first resort of those who want to manipulate the decision-making process.



I need hardly add that all this is only relevant in the case of an offensive war. In the case of a defensive war, there would be neither time nor need for a legal opinion. However, the future holds more complicated challenges. The Israelis started the vogue for pre-emptive "defensive" wars—you anticipate your opponents' attack by attacking them first. Then Mr Blair invented the concept of the humanitarian war. In neither case has the law begun to address the issues, nor is it ever likely that there will be time for a legal opinion to be delivered before any such war is started. I rather suspect that our debates about how the Iraq War was started are unlikely to have much relevance for the future. NLJ

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