In defence of the Rule of Law.
Challenging the erosion of the legal certainty and fairness that business needs
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In defence of the Rule of Law

IMAGINE A COUNTRY in which a minister could overturn a court ruling simply by saying that the government disagreed with it. Everyone would regard a government that used such a power as showing no respect for the rule of law. And it would cut no ice to say that the power had been granted by the legislature. We would say that the legislature had no business making such laws.

Yet, that country is the United Kingdom – or at least it would be but for a 5:2 majority decision of the Supreme Court earlier this year in the now famous “Black Spider Memos” case.

That case related to the Freedom of Information Act 2000 which, on its face, appears to allow a cabinet minister or the Attorney General to overturn a court decision requiring a public body to disclose information. In 2012, the then Attorney General, Dominic Grieve QC MP, exercised this power by issuing a certificate that had the effect of vetoing the court-authorised disclosure to the Guardian newspaper of letters written to government ministers by the Prince of Wales.

A challenge to this veto eventually reached the Supreme Court presided over by Lord Neuberger.

In his judgement, Lord Neuberger observed that “a statutory provision which entitles a member of the executive to overrule a decision of the judiciary merely because he does not agree with it… would cut across two constitutional principles which are also fundamental components of the rule of law”. The first is the “basic principle that a decision of a court is binding as between the parties and cannot be ignored or set aside by anyone, including (indeed it may be fairly said, least of all) the executive”. The only exceptions are that a court ruling may be overruled by a higher court or by an Act of Parliament.

Secondly, “it is also fundamental to the rule of law that decisions and actions of the executive are… reviewable by the court at the suit of an interested citizen”. Again, there are some exceptions – but these are “jealously scrutinised”.

Lord Neuberger commented that, as interpreted by the Attorney General, the relevant part of the Freedom of Information Act (section 53) “flouts the first principle and stands the second principle on its head”. In March 2015, the Supreme Court overturned Mr Grieve’s veto decision.

Section 53 provides that a certificate of the kind issued by the Attorney General can only be issued if the minister has “reasonable grounds”. Lord Neuberger accepted that the Attorney General’s grounds appeared reasonable. He also accepted that the expression “reasonable grounds” could, as a matter of ordinary English, mean simply “cogent grounds”. However, having regard to fundamental constitutional principles, he decided that the expression should be given a narrower meaning that would prevent the Attorney General from, in essence, overriding a prior court decision.
Other members of the Supreme Court agreed that the Attorney General’s certificate should be set aside, albeit on somewhat different grounds, and it was in that way that the Supreme Court upheld the rule of law. But the decision was far from unanimous. In the Divisional Court, three judges headed by the then Lord Chief Justice, Lord Judge, had previously taken a different view. So did two members of the Supreme Court. Their position was that Parliament meant what it said when it allowed ministers to veto disclosure. According to Lord Wilson, one of the two dissenters, the decision of the Court of Appeal (which the majority in the Supreme Court were upholding) did not just interpret section 53: “It re-wrote it. It invoked precious constitutional principles; but among the most precious is that of parliamentary sovereignty, emblematic of our democracy”.

So who is right? Is it Lord Wilson, faithfully interpreting the letter that Parliament has enacted? Or Lord Neuberger, using fundamental constitutional principles to steer back to a result that upholds the rule of law? Was Lord Wilson failing to restrain an overmighty executive? Or was Lord Neuberger engaging in what Lord Tebbit has called “judicial imperialism”?

There is more to the rule of law than the rule of lawmakers but it is a subtle and perhaps even elusive concept, dependent more on instinct than book-learning. That is why it is so fragile and vulnerable to attack.

It is ironic that this should be so in 2015, the year when we in Britain, together with others around the world, are celebrating the 800th anniversary of Magna Carta. King John could have had no idea that some of the provisions of the short-lived peace treaty he agreed with his barons at Runnymede in 1215 would come to be incorporated into the laws of many countries. He would have been equally surprised, and doubtless dismayed, to learn that its enduring legacy would be the principle that no-one is above the law – the rule of law, in essence. But that is what has happened and we find ourselves at one and the same time both celebrating the rule of law and worrying that it is under threat.

The basic principle is widely accepted. It is when we move beyond the principle to consider its implications that people begin to question it.

Take open justice, another fundamental concept. Nobody would regard it as an absolute: there must always be exceptions in the public interest. But how narrowly should these exceptions be drawn?
In May 2014, Mr Justice Nicol made an unprecedented order ahead of a terrorism trial at which he was to preside. While he was still teaching law at the London School of Economics, Mr Nicol, as he then was, wrote a well-received book on media law in which he said that “justice must… be seen before it can be said to have been done”. And yet, years later as a judge, he was persuaded that an entire trial should be heard in private with the two defendants not even named.

Needless to say, his order was challenged by the media. A month later, three members of the Court of Appeal ruled that the defendants could be named. Announcing the court’s decision, Lord Justice Gross described the rule of law as “a priceless asset of our country and a foundation of our constitution”. He continued: “One aspect of the rule of law – both a hallmark and a safeguard – is open justice, which includes criminal trials being held in public and the publication of names of defendants… No more than the minimum departure from open justice will be countenanced.”

As his previous writing indicates, Mr Justice Nicol also acknowledges the need for open justice but he clearly believed in May 2014 that other public interests outweighed this need. The Court of Appeal disagreed.

Even so, some of the trial was heard with the public excluded. Reporters were present but ordered not to report some of what they heard. Both defendants were convicted of possessing bomb-making manuals but one was cleared of planning to mount a Mumbai-style gun attack in London after claiming he had a “reasonable excuse” for what he did. Reporters were not allowed to report the grounds on which he had put forward that defence.

Media organisations have since launched a further challenge to these reporting restrictions. It remains to be seen whether they will succeed in this and whether the public will ever be able to understand why one defendant was acquitted of the more serious charge.

The threat to the rule of law in the United Kingdom is particularly concerning since it has never been more important globally.

As Ban Ki-moon, the Secretary-General of the United Nations, said in June 2014, “the rule of law, at the national and international levels, is both a development outcome in its own right and an enabler of other outcomes.” He continued: “The rule of law prevents corruption, illicit financial flows and transnational organised crime… And realising the rights of every man, woman and child for well-being, security and justice will require coherent and effective rule of law.”

As a global law firm, we at Linklaters could not agree more.
The celebrations surrounding the 800th anniversary of Magna Carta are drawing to a close. As sponsors of the British Library’s outstanding Magna Carta exhibition, we have participated in the debates about Magna Carta and its legacy and have been encouraged by them.

Anniversaries come and go, and the celebrations are now drawing to a close, but we believe that we should hold on to the sense of purpose that debates around Magna Carta and its legacy have rekindled in many. Now is a good time to take stock of the integrity, fairness and certainty that the rule of law brings to the UK and to those who choose to invest or live in this country.

A renewed sense of purpose in protecting the rule of law for the benefit of this and future generations is in everyone’s interests. It should not be the preserve of anniversary years but an enduring and constant priority.

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IN THE UNITED KINGDOM, the rule of law is a concept sometimes taken for granted.

We expect laws to be public – so that we can find out what they say. We expect them to be certain – so that we know where we stand. We expect them to be prospective – so that we won’t be breaking laws that don’t yet exist. We expect them to be universal – so they’ll apply to all who come within their ambit. And we expect the government to be under the law – not above it.

These principles represent the cornerstones of our liberty. They are appealed to the world over, especially by those who live in countries that are still fighting for the same rights. They are one of the main reasons why global businesses and investors turn to and base themselves in the UK, benefiting our economy and themselves thanks to the legal certainty that our institutions and English law bring to their activities.

Yet, for all of our historical pedigree of having given the western world the modern concept of the rule of law, all is not well. Though it may not be very obvious, the very foundations of the rule of law in the UK are weakening.

The issue is not limited to alleged failings in the availability of legal aid or human rights cases that are often featured, and quite rightly so, in the headlines of our media, but one which strikes at the very heart of the principle and that has many wider implications.

In this paper, we point to key areas threatening the rule of law within a business context, threats that have progressively emerged over the last twenty years or so. We are an international law firm with a strong UK base and a long history of helping clients invest in the UK. We witness, on an almost daily basis, situations where the legal certainty and fairness that makes the UK a destination of choice for international capital is falling short. We believe that the consequences of this in the longer term could be very serious.

We are concerned about things that fall below the parapet and that sit deep in the gargantuan amount of new rules and regulations. Things that lie away from major scrutiny but that persistently chip away at what the rule of law is ultimately expected to offer – certainty and fairness.

Specifically, we see five threats to the rule of law in the UK: that of excessive executive power; that of retroactivity; that of uncertainty; that of unmanageability; and that of changes in the burden of proof.

The rule of law is being undermined by the letter of new laws that are inconsistent with its spirit.
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THE CONCEPT OF the rule of law was popularised by Victorian constitutional lawyer Professor A V Dicey. Lord Bingham of Cornhill, who served as Lord Chief Justice for England and Wales between 1996 and 2000 and later as senior law lord, and who is widely regarded as the most distinguished judge of modern times, offered perhaps its most authoritative definition.

Summing up the rule of law in a sentence, Lord Bingham said it meant that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.

Lord Bingham expanded this into eight principles.

First, “the law must be accessible and so far as possible intelligible, clear and predictable”. This is a restraint on legislators and also on judicial activism.

Second, “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”. This does not mean that those exercising executive, regulatory or judicial functions must be automatons lacking the ability to take decisions in individual cases. But any discretion granted by law must be limited and must not be exercised in an arbitrary fashion.

Third, “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”. Equality before the law is rightly seen as a cornerstone of the constitution.

Fourth, “ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”. This is a fundamental and long-standing principle of public law. It is the basis of judicial review of executive and regulatory decisions.
“The law must be accessible and so far as possible intelligible, clear and predictable”.

Fifth, “the law must afford adequate protection of fundamental human rights”.

Sixth, the state must provide a way of “resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”. Lord Bingham recognised that, even at the time he was writing, this was more of an aspiration than an achievement.

Seventh, “adjudicative procedures provided by the state should be fair”.

Finally, said Lord Bingham, “the rule of law requires compliance by the state with its obligations in international law as in national law”.

These principles are much invoked but consistently challenged at the coalface of the law’s interaction with business. In that context, our key concerns centre on the first two principles: predictability and restricted discretion.
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THE GOVERNMENTAL, regulatory and law enforcement authorities must have sufficient powers to perform their functions. But the rule of law should impose limits on such powers. It requires that law-making be clearly separated from the executive and law enforcement functions.

Historically, this requirement has largely been observed but the trend is now heading in the wrong direction. Consider the following:

> New legislation has increasingly been expressed in broad terms that go well beyond the scope of the underlying problem. On occasions, in response to concerns, assurances have been given that the prosecuting authorities will not take action in relation to situations falling outside the purpose of an Act. But is this adequate? Prosecuting authorities require a certain amount of discretion so as to enable them to apply common sense and prioritise their work but broadly drafted laws have the effect of allowing such authorities to decide what the law is. This creates uncertainty and leaves significant unregulated power in the hands of these authorities.

For example, as its name suggests, the Proceeds of Crime Act 2002 was primarily intended to assist in the thwarting of money laundering but it criminalises things that have nothing to do with this. For example, according to the ordinary English meaning of its words, a teenager who is given what he or she knows is a pirated copy of music by a friend commits the offence of acquiring criminal property. This has presented the courts with a dilemma. In 2012, Mr Justice Mitting said that he could “not conceive that Parliament intended” to criminalise such conduct and, on this basis, he decided that the Proceeds of Crime Act should not do so. We may applaud his common sense but he made no effort to square the wording of the Act with his conclusion and, in an almost identical case a year earlier, Mr Justice Lloyd Jones had reached the opposite conclusion.

These cases illustrate several concerns. First, they involved European Arrest Warrants and so assurances regarding when domestic prosecutions will and will not be brought were irrelevant. Secondly, if Mr Justice Lloyd Jones is right, it is the prosecuting authorities who will decide whether or not teenagers are to be criminalised in practice. Thirdly, in any event, the judiciary is in the unenviable position of having either to uphold the letter of a law that goes well beyond its stated objective and confers huge practical power on the prosecuting authorities, or to ignore the letter and thus, to a degree, ignore the sovereignty of Parliament. Neither option advances the rule of law.
Regulatory authorities have ever-increasing powers to impose penalties, which may be very substantial. In November 2014, five banks were ordered to pay a total of £1.1 billion for failing to control business practices in their foreign exchange trading operations. Such fines are eye-watering but their level is not the issue. The issue is that there is no understandable scale of penalties that is proportional to the seriousness of offences and, as a result, it is almost impossible to predict the likely level of penalties in any particular case. The guidelines relating to the use of powers to impose penalties (normally issued by the regulatory authority itself) are too vague to provide any meaningful constraint or certainty.

Parliament has been prepared to grant ministers the power to amend primary legislation to an extent that would once have been considered unacceptable. Statutory provisions granting such powers have even acquired a name: “Henry VIII clauses”, so called because the Tudor King was said unilaterally to have varied the price of wine. Henry VIII clauses that are merely used to give effect to Parliament’s original intention (e.g. to change statutory penalties in line with inflation) may be justified on grounds of pragmatism but recent examples go far beyond this. The most extreme is Section 75 of the Banking Act 2009. This was passed in response to the global financial crisis and seeks to enable the authorities to take action to stabilise banks that get into trouble. This is a noble objective. However, alarmingly, Section 75 gives the Treasury power to disapply or modify the effect of any past or future enactment or rule of law without Parliamentary approval – a phenomenal amount of power delegated with very little Parliamentary resistance.

Most pernicious of all are the situations where the government gives itself the power to regulate business but compels those who are so regulated to keep government intervention secret. The government’s regulation of telecommunications is a topic of much current debate in light of the Snowden affair and the hurried introduction of the Data Retention and Investigatory Powers Act 2014 in response to a European Court of Justice decision. The Parliamentary process regarding this legislation threw light on another provision – Section 94 of the Telecommunications Act 1984. That allows the Secretary of State to direct telecommunications operators “if it appears to the Secretary of State to be necessary” in the interest of national security or international relations. The Secretary of State need not publicise such directions, and the recipients of those directions are prohibited from disclosing their existence. As a result, there is no authoritative information in the public domain about when this power has been used, to what end and with what consequences.
THE RULE OF LAW demands that no-one should be able to decide tomorrow that the law be changed so as to render illegal what I have done today. That would obviously be wrong, yet it happens:

> Vague laws and regulations allow shifting standards to be applied in retrospect to attack conduct that was not regarded as wrong, or at least not recognised as being illegal or contrary to regulatory requirements, when it was undertaken. There is scope for debate about the extent to which this has been happening but it has been a particular concern in recent years as regulators have used general principles to punish conduct in the financial markets that took place some years ago.

In an article marking the Financial Conduct Authority’s second birthday, the Times newspaper reported some of the concerns expressed by legal professionals: “The biggest worry is that the authority is retrospectively applying a post-global financial crisis morality”, the Times said. “Buccaneering behaviour that several years ago was tolerated, even encouraged, is now viewed through an enlightened prism of propriety”. One lawyer was quoted as saying that “The rule of law has been subjugated to wider policy considerations”.

> Section 58 of the Finance Act 2008 was designed to stop UK residents avoiding tax by channelling income through offshore trusts. Strikingly, it provided that the amendments made to earlier legislation “are treated as always having had effect”. More than 2,000 people who had legally taken advantage of a double taxation relief scheme were required to pay back taxes amounting to some £100 million. A human rights challenge to the retroactive aspect of the legislation was dismissed by the Court of Appeal in 2010.

> Section 75 of the Banking Act permits the Treasury to exercise its vast powers with retroactive effect “insofar as the Treasury considers it necessary or desirable”. The only crumb of comfort offered is the statement that “In relying on this sub-section the Treasury shall have regard to the fact that it is in the public interest to avoid retrospective legislation”!

The pragmatic justification for all of this is that we live in a complex fast moving world in which legislators and regulators constantly play catch-up; and those exercising power can, of course, be challenged in court. But it is hard to see how the result is compatible with the certainty and predictability that are fundamental to the rule of law and, particularly in the present climate, the regulated community will inevitably think long and hard before challenging regulatory decisions. So, in practice, the rule of law becomes the rule of the regulator.
ALTHOUGH SOME DEGREE of uncertainty is inevitable, everyone should have access to authoritative and public sources of the law and regulation.

Unfortunately, the reality is very different. Several of the issues described earlier undermine the certainty that is needed, and there are many other examples:

> Section 7 of the Bribery Act 2010 creates a new offence of failing to prevent bribery. An organisation is guilty of that offence if someone associated with it pays a bribe on its behalf. It is a defence for the organisation to prove that it had “adequate procedures” in place to prevent bribes, but what exactly are “adequate procedures”? The Act doesn’t say. Instead, it requires the Government to “publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing”. This is another example of ministers being given considerable power to create important laws, yet that is not the most significant concern. What is of greater concern is the fact that, although the guidance is published and is helpful, it still leaves businesses in a state of considerable uncertainty as to whether or not their procedures will be considered to be “adequate”. Is it acceptable that a serious criminal offence should be so uncertain?

> So-called “principles-based regulation” of the kind employed in the financial services industry has real attractions. In particular, it seeks to avoid a box-ticking approach to compliance and it may reduce the weight of minute regulations that has rightly been the subject of criticism in the past. However, it makes it very difficult for a business to be confident that it is complying with its regulatory obligations.

> One of the most maligned examples of principles-based regulation is the Data Protection Act 1998 (also known as the “DPA”), which implements a 1995 European Directive. The DPA, described by Sir Gerald Kaufman MP as “one of the most insane pieces of legislation ever passed by [the Houses of Parliament]”, contains eight principles which UK-established businesses must comply with when handling information about living people. The first of those principles requires that such information be processed “fairly and lawfully”. The DPA sets out some preconditions for fairness but does not provide any overarching guidance on its meaning. Fairness, a subjective concept, is left undefined as a key requirement of the DPA. Instead, any business intent on complying with the DPA must refer to guidance issued by the UK Regulator (the Information Commissioner), decisions of the specialist appeals tribunals, decisions of the higher courts and the European Court of Justice and guidance issued by a panel of EU regulators, the “Article 29 Working Party”.

Businesses are in a state of considerable uncertainty as to whether their procedures will be considered adequate under the Bribery Act.
Businesses doing so may come across guidance on “accountability”, “privacy impact assessments”, “privacy by design” and “binding corporate rules and binding processor rules”. None of these concepts exist in the DPA but all are derived, to some extent, from the fairness principle and now form part of the common parlance of a small number of EU data protection lawyers, privacy professionals and regulators to which most businesses feel compelled to turn, bewildered by the runic guidance they find in the public domain.

Until now, the DPA’s uncertainties have produced good headlines, but few serious inconveniences to business: the current sanctions regime of the DPA remains relatively low key. However, under proposed revised legislation, nearing finalisation in Europe, sanctions will increase to somewhere between two and five per cent of global turnover. A well-intentioned but arbitrary requirement will thus become a potentially lethal one for businesses in the UK and Europe.
DESPITE THE UK GOVERNMENT’S recent policy of “one in, two out” aimed at cutting two poorly conceived rules for the introduction of every new regulation in certain areas, the flood of new laws introduced over the last two decades has been incessant, comfortably exceeding 2,000 per year. Although not every day brings a new Act of Parliament or new legislation from the European Union, no working day goes by without a torrent of new secondary legislation, new regulations from a myriad of regulators, new “guidance” that has some kind of legal effect and new precedents either from the courts or from the regulatory and law enforcement authorities that now exercise such wide powers.

Major law firms have entire departments to keep their lawyers up to date. Legal publishers employ teams of lawyers to update and cross reference their online resources. Major banks, utilities and other business organisations devote considerable resources to tracking the regulations to which they are subject.

This is indicative of a significant problem: individuals and smaller business organisations are at a considerable disadvantage when it comes to understanding, let alone abiding by, the legal framework; and even the largest organisations find it increasingly difficult to keep up with what is expected of them, let alone to place themselves in a position where they have a realistic prospect of achieving the level of compliance that is increasingly demanded. It is questionable whether it is realistic to expect the employees of heavily regulated business organisations to be able to hold in mind all of the requirements to which they are subject or to spend the necessary time checking every possible regulatory angle before taking action.

Modern society is complex and it is unrealistic to expect that modern law will be short and simple. However, it is necessary to ask whether we have reached the point of diminishing returns. Does the torrent of new law undermine the very objectives that it is seeking to achieve? Indeed, is it undermining the rule of law itself?
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The threat of the changing burden of proof

“EVERYONE IS INNOCENT until proved guilty”; “You can only be convicted if proven guilty beyond reasonable doubt”. Most people will imagine that these statements remain bedrocks of English law but the reality is different:

> Increasingly, in the context of financial and other business offences, proof “beyond reasonable doubt” is not required. For example, under the Financial Services and Markets Act 2000 many offences (e.g. the offence of market abuse) only need to be proved on the balance of probabilities and unlimited fines may then be imposed on individuals as well as corporations. Such offences are called “civil offences” rather than “criminal offences” but this semantic difference does not alter the underlying reality: people may be severely punished on the basis of evidence falling far short of what has historically been demanded of prosecuting authorities.

> In other cases, the burden of proof is being reversed. The classic example of this is the Bribery Act 2010. As indicated above, it is for a business to prove that it had “adequate procedures” to prevent bribery not for the prosecutor to prove (even on the balance of probabilities) that the procedures were inadequate.

> Most people would regard some element of fault as being an essential component of a crime but modern legislation frequently attempts to avoid this basic requirement. One of the most recent examples of this is the proposed offence of offshore tax evasion. In ordinary English, the concept of “evasion” includes the need for a wrongful state of mind – an intent to do wrong. However, it appears that the new law will state that someone may commit tax evasion without any intention of doing so. That will certainly make life easier for the prosecuting authorities but it will be a further erosion of the protections on which we have historically relied.

These changes in the burden of proof would be disturbing on their own. But they aren’t taking place in isolation: they are linked to the changes that result in the other threats mentioned above. When coupled with the increase of executive power and vague and uncertain laws and other rules, they represent a serious erosion of the rule of law.
IF WE ARE to have any hope of resolving the concerns identified in this paper then we must begin by recognising that there are problems.

It is all too easy for governments to argue that unpredictable powers are needed to cope with unpredicted problems; that secondary legislation is quicker and cheaper than statute law; that retroactive legislation is needed to cope with fast moving situations; that principles and guidelines are more useful than tramlines; that regulators are more efficient than adjudicators; that codes are more effective than courts; that the flood of legislation is necessary and inevitable; and that changing the burden of proof is necessary to catch crooks and raise standards.

Of course there is some truth in all these claims. But we should recognise them as the start of the argument rather than its conclusion. We need to ensure that there is continual challenge and debate. Every inroad into the rule of law needs to be explained in advance. If it cannot be justified, it must not be permitted.

The rule of law can be inconvenient. It may prevent action being taken when those in authority (possibly for good reason) may want to do so; it may result in it being more difficult on occasion to take effective action in relation to perceived wrongdoing; it may result in a need to change the law as circumstances change. But this inconvenience is a price worth paying.

The rule of law is essential to many aspects of human progress, to the underpinning of economic activity and to the development of society. Over a long period, it has delivered enormous benefits, both within the UK and globally. It is a principle that we should stand up for but it is more than that: it is a practical foundation that helps the UK stand tall in the global economy.

If we strive to protect it, the rule of law will protect and benefit us.