

THE RULE OF LAW IN TOTAL WAR*

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THE RULE OF LAW

THE English lawyer usually speaks of the "rule of law" where the American lawyer speaks of "due process of law." They are not exact equivalents, though they have a common origin in antagonism to arbitrary government. It is no longer necessary to show how the doctrines enunciated in the Declaration of Independence and the American Bill of Rights grew out of the English experience of the seventeenth and eighteenth centuries. It was that experience which also produced the rule of law. Later, there were divergencies. The most popular interpretation of the rule of law — that given by Dicey — related to conditions during the reign of Adam Smith which had no parallel in a United States with a still movable frontier. In the United States, also, due process of law has become, especially since the Fourteenth Amendment, the subject of a vast judicial interpretation. In Great Britain, the rule of law has been the sport of politicians rather than the joy of lawyers, and its meaning is therefore no more precise than that of the ordinary political slogan. Its essential characteristics must be sought, not in the *Law Reports*, but in the constitutional history of Great Britain, the *Parliamentary Debates*, and the works of publicists who consciously or unconsciously provide ammunition for political artillery.

In recent years, the phrase has been used mainly in connection with international affairs. Complaint is made that the rule of law does not apply in relations between States; that past governments have failed to use the League of Nations to enforce the rule of law; that the present war is being fought in order to re-establish the rule of law. Assertions of this kind can be found in every debate on foreign affairs since 1936. Here, clearly, the phrase has much the same meaning as "law and order." It implies that international relations should be regulated, not by naked

* The statutory and administrative material in this Article is discussed as of October, 1940, but changes are so rapid that material current at the end of the first year of the war may now be superseded.

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force, but by international law with such force as the comity of nations has given it. Yet, the rule of law has always meant more than order. International law should be re-established, not because it is law, but because it is good law. The Germans have re-established law and order throughout western Europe, but no British politician outside the internment camps has yet praised Hitler for establishing the rule of law. On the contrary, it is asserted that the law is the rule of the despot and the order the tyranny of the tyrant. In truth, it is the immediate aim of British strategy to create disorder in the occupied territories in order that the oppressed peoples may re-establish the rule of law. The rule of law means, therefore, not merely public order, but public order based on something like the principles of British liberalism.

Such is the contemporary attitude; but the phrase has not been invented since Munich, nor even since the March on Rome. It was popularized by Dicey,¹ who assumed that it was the product of the peculiar genius of the British peoples and could not be used, for instance, of the France of the Third Republic. As such, it has been used to protest against the alleged infringements of civil liberty implied in such legislation as the Incitement to Disaffection Act, 1934, and the Public Order Act, 1936. Moreover, it has been employed to criticize certain characteristics of modern social legislation.² However, it is in essence far older than any modern political controversy. Aristotle, with his usual prescience, argued the case between Hitler and the "effete" democracies much as it is being argued today. It is better that men should be ruled by law than that they should be ruled by men, because "he who bids the law rule, may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."³

There are similar passages in the writings of the "revolutionary" section of the schoolmen, William of Occam, for instance, whose members may be said to be the intellectual forbears of Locke and Rousseau,

1. DICEY, *LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885), especially Lecture V; DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (8th ed. 1915). The ninth edition (1939) by E. C. S. Wade, repeats the text of the eighth edition, less the Introduction and some of the Appendices, and contains a long Introduction by the editor indicating some slight changes in Dicey's opinions and the major criticisms which have since been made. See also ROBSON, *JUSTICE AND ADMINISTRATIVE LAW* (1928); JENNINGS, *THE LAW AND THE CONSTITUTION* (2d ed. 1938), especially Appendix II.

2. See especially HEWART, *THE NEW DESPOTISM* (1929), where Dicey is quoted almost verbatim in chapter II; and *THE REPORT OF THE COMMITTEE ON MINISTERS' POWERS* (Cmd. 4060, 1932), where Dicey's summary is quoted at p. 72, though the whole spirit of the Report suggests that the quotation is irrelevant.

3. ARISTOTLE, *POLITICS* (Oxford ed. 1916) 140.

though their law was natural law and not the positive law which Aristotle, apparently, had in mind.⁴ England went back to Aristotle because, though the theorists dressed their ideas in the apparel of natural law and the social contract and practical politicians even put them into statutory preambles,⁵ the essential problem was to curb the power of the despotic king, who introduced the "element of the beast." In any case, it was easy for a common lawyer to confuse natural law and that almost perfect common law which appeared to do exactly what the parliamentary politician required—the natural and the "artificial" reason which was the product of long study and experience.⁶ When Coke quoted Bracton—"quod Rex non debet esse sub homine, sed sub Deo et lege"⁷—he meant that the king should be under the common law. Indeed, the common law might have become a "higher law" to curb even the power of Parliament; but Parliament fought the battle of the common law, and there could be no reasonable doubt after 1689 that though the king was bound by the common law, the common law was controlled by Parliament. This view, which had already been put by Fortescue,⁸ was in substance (though with his usual confusion in the realm of ideas) adopted by Coke. What Dunning⁹ calls "the reign of law," as postulated by Fortescue, consists in two notions: that Parliament was supreme over the king, and that the judges were independent of royal control.

The Stuart disputes showed, however, that it implied more than this when they raised the general question of arbitrary government. The case for the king's independence from parliamentary control was put, for instance, by Finch, C. J., in *The Case of Shipmoney*,¹⁰ and by Sir Robert Filmer in the treatise which Locke saved from oblivion.¹¹ Nevertheless, it was not enough to assert that the king was bound by the law enacted by Parliament, for Parliament was the King in Parliament. If the common law gave him vast powers, then his consent was necessary for their abridgment—a consent which would be forthcoming only in such revolutionary conditions as were faced by the Long Parliament. Politically, therefore, it was essential to show not merely that Parliament could bind the king, but also that the existing law, the common

4. See RITCHIE, *NATURAL RIGHTS* (3d ed. 1916) 31.

5. Bill of Rights, 1688, 1 WILL. & M., sess. 2, c. 2.

6. Prohibitions del Roy, 12 Co. 63, 65 (1608).

7. *Ibid.*

8. 1 FORTESCUE, *DE NATURA LEGIS NATURAE*, c. XVI; FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (1874) c. IX.

9. DUNNING, *A HISTORY OF POLITICAL THEORIES: FROM LUTHER TO MONTESQUIEU* (1905) 205.

10. 3 St. Tr. 826 (1637); see *THE TRYAL OF JOHN HAMPDEN, ESQ. . . IN THE GREAT CASE OF SHIP-MONEY BETWEEN HIS MAJESTY K. CHARLES I AND THAT GENTLEMAN* (1719) 204.

11. FILMER, *PATRIARCHA, OR THE NATURAL POWER OF KINGS* (1685).

law as modified (or declared) by such statutes as Magna Carta, did not in fact give him wide discretionary powers. Hakewill in his famous speech¹² showed that the king was forbidden by common law and statute law to raise the rates of tonnage and poundage. Whether the king was bound by Magna Carta, the statute *de Tallagio non concedendo*, and the Petition of Right was not in issue in *The Case of Shipmoney*, because the Crown lawyers did not assert that he was not so bound (though Finch, C. J., said that he was not). The question in issue was whether the king's emergency powers (which Hampden's counsel admitted) gave him the right to decide whether or not there was an emergency. Again, even if it was admitted that the king could not make new laws out of Parliament, it was still uncertain whether he could dispense a subject from obedience to a general law, or even suspend a law which did not impose a limitation on himself. Nor, again, was it enough to say that the judges must set the limits of the king's powers according to law. The law is what the judges decide (subject to Parliament), and if they were the king's creatures the common law might give him too much power.

These are examples only, but they show that the Revolution Settlement, out of which the rule of law grew, implied not merely the supremacy of the law, in the sense that the king's powers were determined by Parliament or by independent courts, but also the rigid limitation of the discretionary powers of the king. The essential ideas of the Revolution Settlement may be summarized as follows:

(1) *Independence and Supremacy of Parliament.* The positive provisions of the Bill of Rights¹³ to this end were of no great force, but the limitation of the revenues of the Crown,¹⁴ the establishment of the rule that additional funds could be obtained only by grant of Parliament,¹⁵ and the prohibition of a standing army in time of peace without consent of Parliament,¹⁶ compelled the king to call annual meetings of

12. HAKEWILL, *THE LIBERTIE OF THE SUBJECT; AGAINST THE PRETENDED POWER OF IMPOSITIONS* (1641).

13. "Election of members of parliament ought to be free. The freedom of speech and debates, or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." 1 WILL. & M., sess. 2, c. 2 (1688).

14. The Statute of Tenures, 1660, 12 CHAS. 2, c. 24, had abolished much of the hereditary revenue. Taxes intended to bring in £1,200,000 a year were granted to the king for life (though not to James II), but they were never enough, even under Charles II. The Dutch war compelled William III to approach Parliament every year, and during his reign the additional grants were "appropriated." Parliamentary control had become so effective under Anne that the House of Commons made standing orders which are still in force, subject to slight amendment.

15. "Levying money for or to the use of the crown by pretense of prerogative without grant of parliament for longer time, or in other manner than the same is or shall be granted, is illegal." 1 WILL. & M., sess. 2, c. 2 (1688).

16. "The raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against law." 1 WILL. & M., sess. 2, c. 2

Parliament and gave Parliament a power of bargaining. Parliamentary control of the law had already been established by the *Case of Proclamations*¹⁷ and the abolition of the prerogative courts; the Bill of Rights completed the process by declaring that exercise of the pretended suspending power and the pretended power of dispensing with laws was illegal.¹⁸

(2) *Independence of the Courts.* Although the independence of the judges was established by the Act of Settlement,¹⁹ the abolition by the Bill of Rights of all the prerogative courts except Chancery and the abolition of the civil and criminal jurisdiction of the Council were far more important, for in this way the rivals of the common law were extinguished. The Bill of Rights did little to strengthen the procedure of the courts, however, except (and a very important exception) that it made effective the writ of habeas corpus.

When the persons wielding the royal power ceased to be minions of the king and became minions of the House of Commons, the primary reason for the limitation of governmental powers disappeared.²⁰ The

(1688). A standing army was (normally) authorized from year to year by the Mutiny Act. Dicey exaggerates the importance of this annual Act. There were periods in the late seventeenth century when the army continued quite happily without a Mutiny Act. In fact, for the next hundred years, the country was as much at war as it was at peace.

17. 12 Co. 74 (1611).

18. "The pretended power of suspending of laws, or the execution of laws by regal authority, without consent of parliament is illegal.

"The pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal." 1 WILL. & M., sess. 2, c. 2 (1688).

19. "And whereas it is requisite and necessary that some further provision be made for securing our religion, laws, and liberties from and after the death of his majesty and the princess Ann of Denmark, and in default of issue of the body of the said princess and of his majesty respectively; be it enacted: . . .

"That after the said limitation shall take effect as aforesaid judges commissions be made *quandiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them." Act of Settlement, 1700, 12 & 13 WILL. III, c. 2.

20. The doctrine of separation of powers has never formed a very important part of the rule of law, though it stems from the Revolution Settlement. Dicey did not even include this doctrine in his exposition of the rule of law. It was, of course, never accurate as a statement of the British Constitution. During the early part of the eighteenth century, Montesquieu's analysis was reasonably accurate in its relation to the central government; but it could not be applied to local jurisdiction, where "executive" and "judicial" functions were inextricably mixed. However, this does not explain Dicey's omission, since he appears to have been almost completely ignorant of this aspect of government. Perhaps he said nothing on separation of powers because the development of Cabinet government made the principle no longer applicable even to the central Government and because the courts were obviously under the control of Parliament. Even at the beginning of the eighteenth century there was an obvious danger that royal influence would be brought to bear upon the House of Commons, not only by the king's

development of effective parliamentary control of ministers coincided, however, with the Industrial Revolution and the political dominance of the industrial middle class. The restrictions of the Whig mercantilist system were later obnoxious to the Whigs, and soon became almost equally obnoxious to all the Tories except the remnants of those "country gentlemen" whose names Disraeli rolled off in a succulent passage of his *Life of Lord George Bentinck*. The argument that governmental powers should be limited because they would be an instrument of royal despotism became an argument that they should be limited because they would interfere with the expansion of British trade. Accordingly, we find Dicey, who was a Whig politician as well as Vinerian Professor, asserting the doctrine that the rule of law forbade "arbitrary or even wide discretionary power." Historically, he was correct because the wide discretionary powers would have been the powers of the irremovable king; politically, in the context of the laissez-faire environment in which he learned his politics, he was equally correct. But the monarchy was now represented by the "retired widow," and laissez-faire was a lost cause. The working class, who had received an element of representation in 1867 and a larger element in 1884, suspected that freedom from legal restrictions meant freedom of employers to oppress workers. Many Conservatives had followed Lord Shaftesbury in his campaign for improved factory conditions because they believed that the repeal of the Corn Laws and Gladstone's budgets were designed to benefit Whig manufacturers at the expense of Tory landlords. Radicals like Dilke and Chamberlain were toying with protection as an imperialist weapon. Above all, a vast concourse of local Acts had widely extended the police powers of the municipalities and, in spite of the apathy of Liberal statesmen, these powers were gradually being generalized by such legislation as the Public Health Acts. The significance of this last development escaped

employment of members of that House as his "confidential servants," but also by manipulation of the elections. The Bill of Rights provided that elections ought to be free, but Parliament took no particular steps to ensure that they should be free. The presence of ministers in the House was an even greater danger, and the Act of Settlement therefore provided that, after the death of Anne of Denmark, no person holding a place of profit under the king should be capable of serving as a member of the House. This provision was repealed by a statute of 4 & 5 ANNE, c. 20, and a subsequent Act, a statute of 6 ANNE, c. 41, merely excluded certain officers, provided that holders of new offices should be disqualified, and enacted that if any member received office after election his seat should be vacated but he should be capable of being re-elected. There was thus nothing to prevent the development of Cabinet government, and not much to hinder the system of "management." This problem became acute later in the eighteenth century, and "the king's friends" were largely responsible for the American Revolution; but its importance began to diminish after 1782 and disappeared altogether after 1832. Consequently, the only aspect of the separation of powers which received emphasis as part of the rule of law was that of judicial independence—though even this aspect was not stressed by Dicey.

the notice of the academic lawyers, for most of the powers had not yet crept into the general law and nearly all of them were conferred upon minor and local bodies. Also, police powers had not yet reached the stage of political controversy. Generally they were capable of classification under criminal law. It was at first thought, for instance, that the worst evils of the manufacturing slums could be avoided by creating new statutory nuisances, and it was only late in the century before it was realized that the only method was to confer wide discretionary powers for the control of building, the provision of piped supplies of water, and the laying down of main sewers.

This "gas and water socialism" was at this stage merely the sport of local politics. It developed rapidly, however, into the vast social controls of the Public Health Acts, the Housing Acts and the Town Planning Acts. To the older social services of the poor law there were added medical services, education and social insurance. Finally came new controls over transport, electricity, cotton, coal and agriculture. All these have required a new technique of government and a new alignment of governmental powers. To assert today that the rule of law forbids wide discretionary powers is to assert that the rule of law no longer exists — particularly in time of war.

The key to the operation of the rule of law is to be found, however, in the word "arbitrary." The exercise of governmental powers must not be capricious or unrestricted. A discretionary power is not arbitrary if it is exercised honestly and for relevant reasons. A license to sell liquor may be granted to one man and refused to another if there are good reasons for the differentiation. A publican should not be refused a license because he has a wart on his nose, or because he voted for the Labour candidate at the last election, or because his grandfather was a Jew; on the other hand, refusal might be justified if he appears incapable of keeping order among his customers, or because he runs a betting business as a side-line, or because he has been associating with "shady" characters (even if he himself has been careful to commit no offense). It is not enough to give the power of granting a license to a person who, it is thought, is likely to exercise it honestly. The power must be subject to such restrictions as may be necessary. In other words, the law must not grant power to *X* to exercise as he pleases; the power must be hedged with limitations to make certain that he does not abuse it.

Above all, the exercise of the power must be subject to control. The checks and balances of the Constitution of the United States were designed expressly to prevent discretionary power from becoming arbitrary. On this, the more turbulent, side of the Atlantic we should regard those controls as too strict and the discretions (even today) as too narrow. There is, however, nothing in the experience of the modern dictatorships to modify the lesson which we draw from centuries of experience —

that uncontrolled power is certain to be abused. It is, too, the lesson of our history that the only effective control is that in the hands of a free people. Dicey's fundamental error lay not in the nature of the analysis, though that was faulty,²¹ but in the material which he analyzed. He omitted the most fundamental element in the British system of control — the control of the Government by the House of Commons and the control of the House of Commons by the people.²²

So long as these fundamental controls remain, very wide discretionary powers can be granted because the controls provide the real checks against abuse. To be fully effective there ought, however, to be additional controls within the governmental system itself. These controls must vary with changing circumstances. For instance, certain classes of persons must be excluded from public office if they are likely to abuse their trust. Civil servants are disqualified, either by law or by administrative practice, from sitting in the House of Commons. Persons holding contracts with local authorities were, until recently, disqualified from acting as members of those local authorities; but that disqualification has been removed because contracts are now usually made with limited companies, and there are other methods of preventing abuse. So long as there was danger to the Protestant religion, it was considered necessary to exclude Roman Catholics from any public office, but that disqualification has been removed because there is no longer a danger. Provisions of this kind are never regarded as part of the rule of law, yet they have precisely the same object as the rule of law — to prevent discretionary powers from being used in an arbitrary manner.

The controls which are regarded as part of the rule of law are those which are exercised by one governmental authority upon another. In the context of the seventeenth century, it was necessary that there be control by independent judicial tribunals over the acts of the king. The dangers lay in arbitrary seizure of property, against which the courts of common law and equity gave adequate protection once the prerogative of purveyance was abolished; in arbitrary taxation, which was taken under the control of Parliament and, within the statutory limits, controlled by the common law courts; and in arbitrary imprisonment, which was prevented by the abolition of the prerogative courts and the detailed regulation of the writ of habeas corpus. For those who were not country gentlemen, there were other dangers. The small landowner could be deprived of his property in exchange for an inadequate or illusory compensation by Enclosure Acts passed by the country gentlemen in Parli-

21. See note 1 *supra*.

22. For a fuller discussion see JENNINGS, *CABINET GOVERNMENT* (1936), especially c. XIV; JENNINGS, *PARLIAMENT* (1940), especially cc. II and XIV. These do not cover the whole field, but the relation between Parliament and public opinion is a vast subject which cannot be dealt with in an essay, but will be treated in a further volume to be published after the war, bombs and other exigencies permitting.

ment. The Game Laws were applied ruthlessly by the same country gentlemen sitting as justices of the peace. Rents were subsidized and wages increased (so that the employer could reduce them) by poor law grants made under the control of the same justices out of the poor rates assessed under the same control. The maintenance of highways was enforced (if at all) by the same justices. It is no criticism of the rule of law that it did not meet these difficulties, because it was never intended to meet them. The rule of law was maintained because the justices were controlled by the common law courts; and the fact that the poor man could appeal to them as easily as he could appeal to the Emperor of China was beside the point.

It is a more serious criticism of the rule of law that it provided no remedy in tort and a very poor remedy in contract against the Crown. However, in the course of the eighteenth century, the courts began to give remedies against the minister or other official who did or ordered the act. It thus became possible for Dicey to incorporate into the rule the principle that "with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." But, although the power to sue an official is a powerful remedy, it is not in itself an adequate control. It was adequate for the wealthy London magistrate who was unlawfully arrested; but it is not adequate for the individual who is injured by the negligence of a Post Office engineer, or of the driver of a War Office truck. The right to sue a servant is no substitute for a right to sue the employer, and the employer could not be sued because he was a king who could do no wrong.

In fact, however, the right of action for tort is by no means the most effective control which can be devised. It is a remedy appropriate to the *Polizeistaat*; other controls must be added to it in the social service State. The remedies of the common law for this purpose, the writs of mandamus, prohibition and certiorari, were costly, dilatory and inadequate. The extent of their application was for long uncertain. Even now they do not cover every case, though generally speaking they prevent *détournement de pouvoir* by using a lawful power for an unlawful purpose, abuse of power by infringements of "natural justice," and *excès de pouvoir* by unlawful extension of powers. That control of this character must inevitably be exercised exclusively by judges skilled in the interpretation of contracts and accustomed to sentence criminals is, however, by no means obvious. It is here that Dicey's emphasis on the *ordinary courts* is important. That emphasis was laid because he was misled by de Toqueville and Hearn²³ into a complete misconception of

23. See 7 DE TOCQUEVILLE, *OEUVRES COMPLÈTES* (1866) 67, 68; HEARN, *THE GOVERNMENT OF ENGLAND* (2d ed. 1886) 109.

the French system. Though in fact numerous administrative tribunals have been established, the Whig conception of the rule of law has hindered the development of a completely effective system of internal controls. The need for such a system goes beyond the purposes covered by the prerogative writs; the primary need in such departments of the law as social insurance, social administration and social control is some cheap, rapid and effective method of securing appeal from administrative decisions which may become arbitrary if they are uncontrolled. It is a complete misconception of the rule of law to suppose that the power for this purpose can be exercised only by the Supreme Court of Justice. The appropriate body varies according to the nature of the service and the type of function to be exercised. Provided the control is adequate, the rule of law is fully preserved. Accordingly, the Whig idea of the rule of law has in fact hindered the establishment and maintenance of the essential idea of the rule of law: that there must be control efficient enough to cover most cases of possible abuse of power.

To try to assess the extent to which the rule of law is being maintained in wartime by using the Whig tests would, therefore, be misleading. The questions to be asked are (1) whether the powers granted are so wide that they are intrinsically capable of abuse, (2) whether there are internal checks to make certain that the limitations imposed by Parliament are fully effective, and (3) above all, whether adequate parliamentary control remains.

THE EMERGENCY LEGISLATION

In the twelve months between August 24, 1939, when the two Houses of Parliament were summoned to enact the Emergency Powers (Defense) Act, 1939, and August 22, 1940, when the fifth session of the thirty-seventh Parliament of the United Kingdom was adjourned for the summer recess, 105 public Acts of Parliament were passed. The number may seem small to those accustomed to the output of American legislatures; but, considering that there has been no private members' legislation in the current session, the number is over the average.²⁴ This fact is significant in itself, for it shows that, in spite of the vast powers vested in the Government, Parliament has been exercising at least one of its essential functions. It is nevertheless true that enormous powers have been delegated to administrative authorities, powers of a kind which would never have been granted in time of peace. *The Lists of Emergency Acts and Statutory Rules and Orders* for the first year of war contain

24. The numbers of Public Acts of Parliament in recent years are: 1931-32: 55; 1932-33: 53; 1933-34: 59; 1934-35: 47; 1935-36: 54; 1936-37: 70; 1937-38: 73; 1938-39: 121. The figure in the text covers the session 1938-39 from August 24 and the session of 1939-40 to August 22. The *LISTS OF EMERGENCY ACTS AND STATUTORY RULES AND ORDERS* (1940) enumerate 91 Acts.

1946 Statutory Rules and Orders. Not all of these have been issued under emergency legislation, because some have been issued under such permanent Acts as the British Nationality and Status of Aliens Acts, the Army Act, the Naval Discipline Act and the Air Force Act; but the number of orders indicates the extent to which powers have been delegated.

It would of course be quite impossible in the space of a single Article to survey this mass of legislation and delegated legislation. The widest powers are those contained in the Emergency Powers (Defense) Acts, 1939 and 1940. Under them have been issued the several classes of Defense Regulations;²⁵ and under the Defense Regulations have been issued many of the other Orders. Nor do the lists give a complete survey of the progeny of those Acts; for the Emergency Powers (Defense) Act, 1939, provides that:

“Defense Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and by-laws for any of the purposes for which such Regulations are authorized by this Act to be made.”

In other words, the maxim *delegatus non potest delegare* has gone by the board, and only those rules which are of general application are published as Statutory Rules and Orders. The numerous by-laws issued by Regional Commissioners, for instance, are nowhere published in any collected or coherent series.

The Emergency Powers (Defense) Act, 1939, gave power to His Majesty by Order in Council to make such Defense Regulations “as appear to him to be necessary or expedient for securing the public safety, the defense of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged,²⁶ and for maintaining supplies and services essential to the life of the community.” This power appears to be wide enough for any purpose whatsoever. It is an express enactment of the power held by the majority in *The Case of Shipmoney* to be inherent in the royal prerogative and subsequently declared by Act of Parliament to be contrary to law.

25. The Defense Regulations are issued from time to time in consolidated form. The edition used in the text is the 5th, dated July 24, 1940. That edition contains 27 Defense Regulations, with their numerous amendments. Of these, only the Defense (General) Regulations, 1939, originally issued as S. R. & O., 1939, No. 927, but amended out of recognition by subsequent Orders in Council, are quoted in the text. In addition, the Defense (War Zone Courts) Regulations, 1940, (S. R. & O., 1940, No. 1444) are quoted, but these were issued after the publication of the fifth consolidated edition.

26. This peculiar phrase is due partly to the fact that the Act was passed before His Majesty was at war, and partly to the fact that nobody knows with whom he may be at war before “the war” ends. Strangely enough, nobody has ever decided whether the war between His Majesty and the King of Italy is legally the same war as that between His Majesty and the German Reich.

In fact, however, the power is not so wide as it may appear. Language equally wide was held in cases under the Defense of the Realm Acts, 1914 to 1916, to be subject to limitation; and the Act therefore provides that "without prejudice to the generality of the powers conferred" by the above provision, the Defense Regulations may contain provisions of certain specific kinds. In spite of the disclaimer of any limitation on the generality of the power, these specific powers do in fact show that there are limitations. What they are, nobody will know until the Act has been subjected to considerable judicial interpretation. It appears certain, however, that the following limitations are implied if they are not expressly stated:

(1) Defense Regulations may make provision for the apprehension, trial and punishment of persons offending against the Regulations; but the Act would almost certainly be interpreted to mean trial and punishment in the ordinary criminal courts. Trial by court martial of persons not subject to military law, to the Naval Discipline Act or to the Air Force Act, is expressly excluded, and, by implication, trial by any form of "administrative" criminal court is equally excluded.

(2) The taking of possession or control of any property or undertaking is authorized; but the power of acquisition of property does not apply to land. In other words, the Defense Regulations may authorize the requisitioning of chattels or the taking possession of land, but not the compulsory transfer of ownership in land.

(3) The imposition of any form of compulsory naval, military or air force service is expressly forbidden.

(4) The imposition of any form of industrial conscription is expressly forbidden.

(5) The Treasury may by order provide for imposing and recovering, in connection with any scheme of control contained in or authorized by Defense Regulations, such charges as may be specified in the order. But any such order must be laid before the House of Commons and will cease to have effect after twenty-eight days unless it is approved by resolution of that House. There are certain other powers for charging fees and making charges for services rendered; but, by implication, powers of taxation are not conferred.

(6) There is nothing in the Act to compel the payment of compensation where chattels are requisitioned, where possession of land is taken, or where injury to private individuals is committed under powers authorized by the Act. But the Compensation (Defense) Act, 1939, passed on September 1, 1939, establishes independent tribunals to assess compensation, and grants such compensation, for the taking possession of land, the doing of work on land, the requisition or acquisition of vessels, vehicles and aircraft, the taking of space or accommodation in ships and aircraft, and the requisition or acquisition of goods other than vessels, vehicles and aircraft.

The Act further enacts that Defense Regulations may provide for amending any enactment, for suspending the operation of any such enactment, and for applying any enactment with or without modification. In other words, the suspending power declared illegal by the Bill of Rights is restored. The Act, as originally enacted, was in force for one year only, but it has been extended for another year by the Emergency Powers (Defense) Act, 1940. It may be continued for a further year (and presumably from year to year) by Order in Council made after addresses from both Houses of Parliament, and it may be terminated at any time by Order in Council.

The Emergency Powers (Defense) Act, 1940, was enacted on May 22, 1940, after the resignation of the Chamberlain Government and the invasion of Holland and Belgium. Without specifically repealing any part of the 1939 Act, it provided that Defense Regulations may make provision "for requiring persons to place themselves, their services, and their property at the disposal of His Majesty." It also extended the suspending power to cover Acts passed before May 22, 1940.

Finally, the Emergency Powers (Defense) (No. 2) Act, 1940, was enacted on August 1, 1940, when there was imminent danger of invasion. If invasion occurred, ordinary civil and judicial administration would obviously break down in the invaded areas and in those areas where military operations were in progress. Such a breakdown might also result from massed bombing raids of the kind which the Germans were known to contemplate and which they in fact used, as ancillary to invasion, in Poland, Holland and Belgium; and it was not then certain that the British defenses were adequate. The need for local defense machinery had been foreseen. Regional Commissioners had been appointed in February, 1939, and their payment was authorized by the Regional Commissioners Act, 1939, passed on September 1, 1939. The powers of delegation in the Emergency Powers (Defense) Act, 1939, were wide enough to permit the conferment of full administrative powers upon the Regional Commissioners or, in fact, upon military authorities.²⁷

27. Full instructions for the event of invasion or the breakdown of communications owing to mass bombing have been issued to Regional Commissioners. Many of the Defense (General) Regulations provide for express delegation by ministerial order, so that it would not be necessary for Orders in Council to be made. In particular, the Regional Commissioners have wide powers under Regulation 16A over any "defense area" specified by the minister of Home Security. Defense (General) Regulations, 1939, 16A; S. R. & O., 1940, No. 842. After the surrender of the Vichy Government, the coastal areas on the east and south were declared to be defense areas (S. R. & O., 1940, Nos. 1004, 1081 and 1126), but they have been superseded by the Defense Areas (No. 4) Order, 1940 (S. R. & O., 1940, No. 1503), which places every part of Great Britain in a defense area. The essential purposes of the orders are, however, limited; namely, to provide for orderly evacuation where the military authorities require it, for the civilian population to "stay put" where the military authorities do not require evacuation, and

As will be seen from the limitation first mentioned above on the Emergency Powers (Defense) Act, 1939, further legislation was required to implement judicial administration. The Administration of Justice (Emergency Provisions) Act, 1939, passed on September 1, 1939, gave wide powers to the Lord Chancellor to modify and regulate the sittings of the ordinary courts, but did not empower him to supersede them. Further powers were conferred by the Defense (Administration of Justice) Regulations, 1940,²⁸ issued under the Emergency Powers (Defense) Acts, 1939 and 1940, on June 19, 1940. But in the event of invasion, it could not be hoped that these powers would be adequate or that the ordinary courts could always continue sitting. Accordingly, it was necessary either to allow the military authorities to fall back on the common law powers usually designated as "martial law," or to provide special powers. The principles governing "martial law" are by no means clear. There has been no invasion of England since Bonnie Prince Charlie's swan song in 1745, and in fact no "declaration of martial law" at any time since the Revolution. There are precedents from India, Jamaica, South Africa and Ireland, but it cannot be said that they produce definite conclusions. Although it may be necessary for the military authorities, as a last resort, to fall back upon the maxim *inter arma silent leges*, it is better to provide positive laws for those conditions which can reasonably be foreseen.

Accordingly, the Emergency Powers (Defense) (No. 2) Act, 1940, does two things:

(a) It enacts that Defense Regulations may provide that, "where by reason of recent or immediately apprehended enemy action the military situation is such as to require that criminal justice should be administered more speedily than would be practicable by the ordinary courts," persons may be tried by such special courts, not being courts martial, as may be so provided.

(b) It enacts that Defense Regulations may provide for the apprehension and punishment of offenders against the Regulations and for their trial by such courts, not being courts martial, and in accordance with such procedure as may be provided for by the Regulations, and for the proceedings of such courts being subject to such review as may be provided, so, however, that provision shall be made for such proceedings being reviewed by not less than three persons who hold or have held high judicial office, in all cases in which sentence of death is passed, and in such other circumstances as may be provided by the Regulations.

for the general destruction of all supplies where enemy occupation appears likely. For a summary of the legal position, see JENNINGS, *LOCAL AUTHORITIES IN WARTIME* (1940) § 28.

28. S. R. & O., 1940, No. 1028. There are corresponding provisions, both in legislation and in Defence Regulations, for Scotland and Northern Ireland.

If the limitations of the Emergency Powers (Defense) Act, 1939, are examined in the light of subsequent legislation, these conclusions may be drawn:

(1) Trial by court martial is still excluded in the case of civilians, though the classes of persons subject to military law, and therefore triable by court martial, may be widely extended. On the other hand, ordinary criminal justice, and the extraordinary criminal justice provided by Defense Regulations, may be superseded by the creation of special courts under the second Act of 1940. In the case of ordinary criminal justice there is an important restriction set out in (a) above, which means that wherever the special courts are established, the ordinary courts may determine, in proceedings in habeas corpus, prohibition, certiorari or otherwise, whether the necessary conditions exist. In the case of criminal offences under the Defense Regulations there is no such restriction, though death sentences must be subject to review by three persons who hold or have held high judicial office.

(2) It is by no means certain whether the obligation of the Emergency Powers (Defense) Act, 1940, that a person place his "property" at the disposal of His Majesty, adds anything to the Act of 1939. As the placing of property at the disposal of the Crown does not mean transferring ownership to the Crown, this provision of the 1940 Act is otiose, and was in fact prescribed by political conditions expressed in the slogan "equality of sacrifice": the worker places his labour, and the property owner places his property at the Crown's disposal; but the property was already in fact at the disposal of the Crown under the Act of 1939.

(3) Compulsory naval, military, and air force service is in fact provided for by the Armed Forces (National Service) Act, 1939. Compulsory service is subject to many restrictions, but all of them could be swept away under the Emergency Powers (Defense) Act, 1940, which authorizes Defense Regulations to require any person to place his services at the disposal of the Crown, and authorizes the suspension of any provision of the Armed Forces (National Service) Act. For instance, aliens or Dominion citizens could be compelled to serve; women could be compelled to join the present voluntary women's services; service in the Home Guard could be made compulsory; the civil defense services could be placed under military law and service made compulsory; the provisions protecting conscientious objectors could be swept away. Since any class of persons could be made subject to military law, the provisions of the 1940 (No. 2) Act preventing trial by court martial are wholly illusory.

(4) Industrial conscription subject to limitations was authorized by the Control of Employment Act, 1939, passed on September 21, 1939.

That Act has not been used and is obsolete, because ample and unlimited power is contained in the Emergency Powers (Defense) Act, 1940.

(5) It is probable that the provision of the Emergency Powers (Defense) Act, 1940, placing the property of any person at the disposal of the Crown would not be interpreted to authorize a power of taxation. This restriction may therefore be assumed to stand.

(6) Property taken under the Emergency Powers Acts is still compensated under the Compensation (Defense) Act, 1939. This latter Act, however, is one of the Acts which can be amended or suspended under the Emergency Powers (Defense) Act, 1940.

EMERGENCY POWERS AND THE RULE OF LAW

The question posed above as to whether or not the powers granted by the emergency legislation are so wide that they are intrinsically capable of abuse, must clearly be answered in the affirmative. Though apparently it is still not possible for taxation to be imposed without consent of Parliament, nor for the ownership of land to be acquired without express statutory authority, and though no civilian may be tried by court martial, there is little else which might not be done by executive order if it were considered necessary or expedient for the defense of the realm or the maintenance of public order. Among the many things which can be done are the following:

(1) New offences may be created and persons charged with them tried in courts under direct ministerial control, though a death sentence will be subject to review by three persons who hold or have held high judicial office.

(2) The administration of criminal justice may be transferred to special criminal courts, under direct ministerial control, if the provisions of the Emergency Powers (Defense) (No. 2) Act, 1940, are satisfied. These courts may use Star Chamber or any other procedure that may be prescribed.

(3) Whole classes of civilians may be compulsorily embodied in the armed forces of the Crown and made subject to military law.

(4) Power may be taken to imprison persons without trial, habeas corpus or other remedy.

(5) Industrial conscription may be authorized.

(6) Property may be taken compulsorily (though the ownership of land cannot be obtained), and the obligation to pay compensation may be suspended by ministerial order.

The answer to the second question posed above — whether there are internal checks to make certain that limitations imposed by Parliament are fully effective — is implicitly answered by the reply to the first question. The powers are so wide that there can be no effective judicial

control. It is true that the validity of any order can be challenged in the civil courts—a factor which has always been assumed to be an important element of the rule of law. But the broadness of the powers indicates that the occasions for the operation of judicial remedies will be rare. It is true that an order under Regulation 55 of the Defense (General) Regulations has been declared invalid,²⁹ but the simple solution of such a difficulty is to amend the Regulation, as has in fact been done³⁰—an operation for which only an Order in Council is necessary. The only situation in which there is effective judicial control is that in which it is proposed to transfer the administration of criminal justice to special courts—a limitation which is largely illusory because almost any criminal offence under the general law can be converted into an offence under the Defense Regulations, and jurisdiction can then be transferred to special courts without the necessity of satisfying the conditions as to enemy action, etc. At the same time, it appears probable that nothing in the Emergency Powers Act authorizes the abolition of the civil courts, the modification of their jurisdiction to issue habeas corpus, mandamus, prohibition or certiorari, or the exercise of their powers to give remedies at common law to any person unlawfully injured by an act of an official. Nor does the Administration of Justice (Emergency Provisions) Act, 1939, authorize any such action. On the Diceyan analysis of the rule of law, this would be an important point; but the courts can intervene only where some unlawful act is done or some legal duty is not performed. If official powers are so wide that all actions are legal there is no remedy. For instance, habeas corpus may be an excellent remedy in theory, but it is of no avail to a person interned in Brixton Jail if the Governor merely returns that the person is detained by order of the Minister of Home Security under Regulation 18B of the Defense (General) Regulations.

If these were the only questions to be asked, the conclusion that the rule of law has been suspended would be inevitable. There remains, however, the fundamental question whether adequate parliamentary control remains. The classical theory ignores—or almost ignores—this aspect of the rule of law because, clearly, parliamentary control of delegated powers is a political control and not a quality of the law itself. It may fairly be called part of the rule of law, however, if the effect of this control is to prevent the development of arbitrary government. The fact that legislation confers enormously wide discretionary powers is not conclusive if the effect of parliamentary control is that those powers actually are not exercised arbitrarily and cannot in fact be so exercised. The body of law which “rules” does not consist only of the legislation but also of the delegated legislation. The legislation may authorize arbi-

29. *E. H. Jones, Ltd. v. Farrell & Muirsmith*, 3 All. E. R. 608 (1940).

30. S. R. & O., 1940, No. 1432.

trary "children," but parliamentary control may prevent those "children" from being arbitrary. In other words, we must look not only at the Emergency Powers (Defense) Acts, but also at the Defense Regulations, and even at the orders issued under the Defense Regulations, and perhaps also at the by-laws and orders issued under the orders issued under the Defense Regulations.

To make an adequate survey in a short space would be impossible. There stands before the writer at the moment a volume of 286 pages containing the fifth edition of the Defense Regulations, and two piles of Statutory Rules and Orders containing enough material to fill six large volumes. These last are the "grandchildren" of the Emergency Powers (Defense) Acts and the "children" of other emergency legislation. The "great-grandchildren" could not be collected in this way. Even to go through the "children" and the "grandchildren" would be impossible, and the reader must be satisfied with the assurance that the possibilities of abuse under this mass of law is extremely remote even from a legal angle — and without consideration of the fact that there is ultimate parliamentary control.

Let us instead look at the cases of possible abuse already mentioned in order to discover how far the abuses do in fact exist. Many new offences, it is true, have been created. It is significant that the most serious of them were created, not by Defense Regulations, but by the Treachery Act, 1940. The reason was, not that the Government had not ample powers under the Emergency Powers (Defense) Acts, but that it was thought proper that such serious additions to the law should be made not by the King in Council but by Parliament itself. Serious offences are prescribed in the Defense Regulations, no doubt, but they bear all the characteristics of offences made by Act of Parliament. That is, they are perfectly general, making no distinction between persons on grounds which are irrelevant. Race, religion or economic condition are not treated as grounds for distinction. There are special offences for aliens, but in a war in which the Fifth Column plays the dominant part, alienage, enemy origin and hostile association are relevant distinctions.

It is true also that there are serious limitations of the rights of free speech, public meeting and association: but those rights are always subject to limitation, and nobody has been able to express precisely the point at which the limitations should stop. In warfare they must inevitably be more limited because of the danger of giving information to the enemy. It can hardly be said that sabotage, as fixed by Regulation 2B, should not be treated as an offence. It is questionable, however, whether "fomenting opposition," as defined by Regulations 2C and 2D, and publishing statements "likely to cause alarm or despondency," under Regulation 39BA, do not cross the line which separates the desirable from the undesirable. But it should be noticed that Regulations 2C

and 39BA are both subject to considerable limitations designed to prevent abuse. That the rigid limitations of Regulation 39BA have not always prevented abuse must be admitted; but the abuse lay in the exercise of their discretionary power of punishment by the *ordinary courts*, and it was left to the Home Secretary, administering the royal prerogative, to revise the sentences in the direction of less severity. Far from being a case where the courts imposed restrictions on abuse by administrative authorities, it was, on the contrary, a case where the administrative authorities, acting under parliamentary criticism, removed abuses committed by the courts in an excess of zeal. All these new offences are punishable, not by special courts under ministerial control, but by the ordinary criminal courts; and the wide powers of the Emergency Powers (Defense) (No. 2) Act, 1940, have, as appears below, been used very restrictively.

So far, the only product of the wide powers conferred by the latest Emergency Powers Act is the Defense (War Zone Courts) Regulations, 1940.³¹ These do not distinguish between the punishment of ordinary criminal offences and the punishment of the new offences under the Defense (General) Regulations. They are therefore applicable only within those "war zone" regions in which, under the Act, ordinary criminal cases may be transferred to special courts. Within those war zones, the powers of courts of summary jurisdiction are not affected, except that a military officer or a senior police officer may bring a case before a war zone court. In addition, these war zone courts possess the jurisdiction of the superior criminal courts. These tribunals are of very high quality. In each case the president must be a judge of the Supreme Court or a person qualified to be a commissioner of assize — in other words, he must have the qualifications of the highest criminal judges. His status is prescribed as that of a puisne judge of the High Court, and so he has all the independence prescribed by the Act of Settlement and otherwise. He will make the decisions, but he must consult two "advisory members" selected by him from a panel of justices of the peace (*i.e.*, members of the lowest criminal tribunals) set up by the Secretary of State. Review of decisions is provided wherever sentence of death or of imprisonment for seven years or more is imposed. The reviewing judges, who must hold or have held high judicial office, exercise the powers of the Court of Criminal Appeal.

There is no jury in the war zone court, but it is impossible to imagine trial by jury while enemy tanks are in the neighborhood. Moreover, English lawyers no longer place the faith in the jury which is still apparent in the United States. The tradition which is enshrined in the Constitution of the United States was due to the peculiar political

31. And the corresponding order for Scotland. See The Defense (War Zone Courts) (Scotland) Regulations, 1940, S. R. & O., 1940, No. 1445/S.64; and see also The War Zone Courts (Procedure) (Scotland) Rules, 1940, S. R. & O., 1940, No. 1446/S.65.

conditions of England in the seventeenth and eighteenth centuries. A middle-class jury was a protection against oppressive use of the courts by despotic monarchs and subservient ministers. Even at the beginning of the nineteenth century, when Tory reactionaries, frightened by the French Revolution and the consequences of the Industrial Revolution, tried to suppress popular movements by repressive legislation, the jury was useful. Today, a middle class jury is the last tribunal that any member of a minority movement would choose. In truth, the war zone courts are better tribunals than the courts which they replace.

The Emergency Powers Acts have not been used to impose military conscription, which is being carried out strictly according to the rules laid down by Parliament in the Armed Forces (National Service) Act, 1939.

There is no doubt that the Defense Regulations impose the power to imprison without trial in certain cases. Generally speaking, aliens are not interned under the Defense Regulations, but under the prerogative. Under Regulation 18B, however, the Secretary of State has power to intern any person whom he has reasonable cause to believe to be "of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defense of the realm or in the preparation or instigation of such acts." The Secretary also has power to intern if he has reasonable cause to believe that a person has been a member of or active in an organization subject to foreign influence or control, or an organization which has associations with persons concerned in the government of, or sympathies with the system of government of, any Power with which His Majesty is at war. In other words, the Secretary of State has power to imprison fascists and fascist sympathizers. If this is a breach of the rule of law, the rule of law is nonsense in these days of Fifth Columns. Even so, the Regulation provides for appeal to an advisory committee. It is true that nobody is bound by the decision of the committee, but the fact is that anybody whose appeal is successful is almost certain to be released. A Regional Commissioner has the same power of detention under Regulation 18BB, but only pending a decision by the Secretary of State. Police officers have power to detain suspected persons for twenty-four hours under Regulation 18D, but this is not different from the usual power of detention pending inquiries. The restrictions on these powers (which have not been fully set out above) show how strongly it is desired that the exercise of the wide discretion conferred shall not be an arbitrary one.

General industrial conscription has not been imposed. It is true that full-time members of the police forces and civil defense services may not resign without leave, under rules made in accordance with Regulation 29B. There is, also, a general control of employment under Regulation 58A, which has been exercised only in relation to special classes of employees. Here the criticism is not that the power has been exer-

cised but that it has been insufficiently exercised. The statement that workers and employers are now in the front line has become hackneyed. In their happier days the French showed that a compulsory system, under democratic control, is the only democratic system.

Finally, it can be stated with assurance that property is being taken compulsorily. But here again the criticism is that the powers have not been exercised widely enough, and for the same reason. No attempt has been made to take away the right to compensation provided by the Compensation (Defense) Act, 1939.

It may reasonably be asked why the wide powers of the Emergency Powers Acts have been exercised so narrowly and with such obvious precautions against arbitrary decisions. Alternatively, it may be asked why such wide powers were conferred if it was intended that they be so narrowly exercised. The answer to the second question is that there are German-controlled ports and aerodromes from the Arctic Sea to the Pyrenees and that, though the English Channel remains English in more meanings than one, its southern shores are lined with gun-emplacements. In other words, the powers are wide because no one can foresee the conditions under which it may be necessary to apply them. In the last resort the rule must be *inter arma silent leges*: but the law should rule as long as possible; and, because the law must be extremely flexible, its powers must be wide. On the other hand, present conditions do not require that wide powers be exercised to their fullest extent. Moreover, they have to be exercised under parliamentary control. So we arrive at the answer to the last of the three questions propounded above.³² None of the emergency legislation has affected the power and the authority of Parliament. It is in Parliament that the ultimate control must rest. The law rules because Parliament rules.

It is hardly possible for British and American lawyers to understand each other on this subject. No British lawyer fully comprehends why the Congress of the United States should be so reluctant to grant powers to the President or to administrative boards. He has always at the back of his mind the notion that what Congress has granted it continues to control. Similarly, no American lawyer ever really comprehends that the wider the powers granted by Parliament the wider its power of control. Nor is it merely a control after the fact. It is true that no question can be raised in Parliament until there is evidence of abuse, but so firmly fixed is the idea that there may be a question, that every official acts with the possibility in mind. Subconsciously he reminds himself that if he acts wrongly he will get his minister—or some minister—into trouble.

It is also true that the power of a Government with a majority at its back is as great as that of any dictator. To speak of "Cabinet dicta-

32. See p. 374 *supra*.

torship" is, however, to ignore the qualification; it is not the Cabinet alone but the Cabinet with a majority. Though that majority never fails—it did not even fail Mr. Chamberlain after Trondheim—it has to be "managed"; and the "management" consists in meeting all criticisms that cannot be convincingly answered. Consequently, wide powers may be granted, but they must be narrowly exercised so long as the House of Commons believes that narrow exercise is sufficient. It would be instructive, for instance, to detail the history of Regulation 18B,³³ to show how the initial Regulation had to be modified because of parliamentary criticism, and how it was once more widened when Norwegian and Dutch experience proved the necessity of a power to deal with a Fifth Column. In both cases there were not only public debates but also private consultations by the Government with members of Parliament.

The conclusion must be, therefore, that while the powers which the emergency legislation has vested in the Government are wide enough to infringe altogether the principles which might reasonably be regarded as those of the rule of law, these principles, reasonably interpreted, are in fact carried out in the actual exercise of those powers. In other words, the law which actually touches the individual citizen through the application of the "children" and the "grandchildren" of the Emergency Powers Acts is not arbitrary or despotic. The Emergency Powers Acts themselves would, in a legal sense, permit of arbitrary government; political conditions, through the control of Parliament, forbid abuses in the exercise of the Acts. The continuing flexibility of the British Constitution has made it adaptable to total war. The Government has powers almost as vast as those of any dictator, but parliamentary control prevents those abuses which are associated with dictatorship.

33. Regulation 18B was inserted by S. R. & O., 1939, No. 978, dated September 1, 1939. So far as detention was concerned, it provided only that "the Secretary of State, if satisfied, with respect to any particular person, that with a view to preventing him acting in any manner prejudicial to the public safety or the defence of the realm, it is necessary so to do, may make an order . . . directing that he be detained." On October 31, 1939, it was moved in the House of Commons (352 H. C. DEB. (5th ser. 1939) 1829) that the order which included this Regulation be rescinded. Emphasis was laid upon Regulation 18B. The Home Secretary stated that 35 persons had been detained under it, and he gave the assurance that the powers would not be abused. In the course of further debate, much of it against the Government, the Lord Privy Seal undertook that the drafting of this and other Regulations should be reconsidered after discussion with members of the House. The motion to rescind was thereupon withdrawn, and a new Regulation substituted on November 23, 1939 (S. R. & O., 1939, No. 1681). A minor amendment was made on May 9, 1940 (S. R. & O., 1940, No. 681). The important amendment dealing with fascist organizations was made on May 22, 1940 (S. R. & O., 1940, No. 770). Authority to impose a curfew on persons not detained was conferred on June 11, 1940 (S. R. & O., 1940, No. 942). German troops crossed the Dutch and Belgian frontiers on May 10, 1940. The Regulation is still much less wide than it was at the outbreak of war.