

Chapter 3 Problem scenario: The rule of law

Fred is a journalist for one of the major London newspapers. He is currently dating Toby, who is a junior government minister in the Department of Health. One evening, when Fred is visiting Toby at his flat, Fred discovers highly confidential documents that outline legislative plans to abolish the National Health Service. Shocked that such plans have not been made public and knowing the outcry that they would cause, Fred intends to write an article for his newspaper revealing the government's plans.

The next morning, Fred calls the Department of Health, which denies that the National Health Service will be abolished. He is warned against spreading 'false rumours'. Three hours later, however, the police arrive at Fred's house and place him under immediate arrest for 'meddling in government business', later detaining him at the police station. When Fred angrily points out to the police officers that he has not committed any offence, he is told: 'You're being detained under the authority of the Secretary of State. She can do what she likes; she works for the government!'

In order that Fred's detention and silence can be lawfully guaranteed, the Secretary of State for Health introduces a short bill into Parliament—the Freedom from the Press (Government Privacy) Bill 2021, which provides that '[t]he publication or revelation of Government policies and decisions before formal announcement is unlawful'. The Act is passed within the week and as soon as it receives Royal Assent, Fred is formally charged and a date set for his trial.

Imagine being presented with this scenario and asked to critically discuss the actions taken by the government in the context of the rule of law.

We can see that this problem scenario raises a number of issues with regards to the rule of law and the manner in which it operates in the UK Constitution.

The first thing to consider is Dicey's conception of the principle and, in particular, his two observations that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law' and that 'no man is above the law'. AV Dicey, *Introduction to the Study of the Law of the Constitution* (by JWF Allison ed, first published 1885, OUP 2013) 97–111. Questions are raised in respect of both through the government's actions in initially seeking to silence Fred and by arresting him. At the time that Fred is arrested for allegedly 'meddling in government business', it is not—as he points out—an offence. The police's persistence in arresting him anyway, therefore, means that he is being made 'to suffer', despite no breach of the law, contrary to Dicey's conception. What is more, when Fred is told that he is being arrested 'under the authority of the Secretary of State' who 'can do what she likes [since] she works for the government', the government is essentially seeking to maintain that it is 'above the law'. *Entick v Carrington*¹ is a relevant case here, since, like the Secretary of State in that case unlawfully authorising entry and search of Entick's property, the Secretary of State is here ordering the arrest of Fred with no lawful authority.

One aspect of the problem scenario that raises a number of points is the Freedom from the Press (Government Privacy) Act 2021's provision, which states that '[t]he publication or revelation of Government policies and decisions before formal announcement is unlawful' and Fred's subsequent charge under this provision. This raises a number of issues from the perspective of both a formal and substantive conception of the rule of law. With regard to the formal conception of the rule of law, this provision raises problems from the point of view of retroactivity. The Act is passed by Parliament and *then* Fred is charged under its provision. The effect this has is that Fred is essentially charged with something that was not actually an offence when he carried out the actions in question. This goes against the formal conception of the rule of law and, in particular, features of the principle identified by Raz. With regard to the substantive conception, the provision and Fred's subsequent

¹ (1765) 95 ER 807.

charge for its offence raise a number of issues concerning potential breaches of fundamental rights. The whole episode arises, it seems, to prevent Fred from exercising ‘free speech’, though he later experiences violations of his right to liberty and his right to fair trial (through the unlawful arrest and detention), both of which are protected under the ECHR.

One final issue to discuss concerns the case of *Evans*.² In that case, the Supreme Court had to consider the government’s action in preventing disclosure of letters between Prince Charles and the government, ostensibly in line with the written word of Parliament’s legislation. In finding that the government had acted unlawfully, the courts upheld the rule of law and, in so doing, seemingly departed from the clear words of Parliament. The courts could, it seems, be faced with a similar dilemma here: that is, a question as to whether to uphold the written word of the Freedom from the Press (Government Privacy) Act 2021 in prohibiting ‘publication or revelation of Government policies and decisions before formal announcement’ and thereby justify government action that arguably contravenes a number of features of the rule of law.

² [2015] UKSC 21.