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THE RULE OF LAW AND THE
LAW OF RULES: A SEMI-
SCEPTICAL PERSPECTIVE

MALAYSIAN BAR ASSOCIATION
15TH MALAYSIAN LAW CONFERENCE

KUALA LUMPUR CONVENTION CENTRE
KUALA LUMPUR, MALAYSIA
THURSDAY 29 JULY 2010 OPENING PLENARY

The Hon. Michael Kirby AC CMG

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RETURN TO MALAYSIA

This is the fifteenth law conference of the Malaysian Bar Association. I have visited Malaysia as many times. I begin by paying my respects to the King, the judges, lawyers and the people of Malaysia for the astonishing achievements that have been made in this country since my first visit, as a university student, in 1962.

As a school boy in the 1940s, I was aware of the British Empire, from the large maps that portrayed its global enterprise in red in the classroom¹. It was a colour that linked my country to the Malay Peninsular and Archipelago. At about the same time as my consciousness absorbed the special relationships of the English-speaking countries, two important changes were happening in the world, about which my teachers instructed me. The first was the Allied victory in the Second World War, including in the Pacific, ending in the mushroom cloud over

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¹ M.D. Kirby, Foreword, H.P. Lee, *Constitutional Conflicts in Contemporary Malaysia*, OUP, Kuala Lumpur, 1995, vii.

Hiroshima, Japan. Out of that conflagration arose the *Charter* of the United Nations and a commission, chaired by Eleanor Roosevelt, which drafted the *Universal Declaration of Human Rights* (UDHR). In 1949, all Australian school children were given a copy of that document with its proclamation of a new world order, based upon shared ideals. One of those ideals was stated in the Preamble²:

“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law ...”

The concepts of equal liberty for all, proclaimed in the UDHR, spelt a quick end to the British Empire and the creation of the Commonwealth of Nations. This became a new link to bind my country to this part of the world; but henceforth on the basis of ‘free association’ and full respect for the equal independence of all the member countries.

At university, in 1962, I led a delegation to Malaysia, then rejoicing in the first years of independence under the wise leadership of Tunku Abdul Rahman, the first Prime Minister. Many of the Malaysian friends whom I met on that visit, and later in Australia, went on to high service in the professions and government of this country. In the 1970s, together with my partner, I toured the length and breadth of the peninsular in a Kombi van. In those days, Kuala Lumpur was a very different place.

Later, as a judge, I returned many times. In the 1980s, I came to know well the first Lords President of the new Federal Court of Malaysia: successively Tun Mohamed Suffian (1974-82) and Tun Mohamed Salleh

² *Universal Declaration of Human Rights*, Preamble. See *Rule of Law – A Commentary on the IBA’s Council’s Resolution of September 2005* by Francis Neate, co-chair of the IBA’s Rule of Law Action Group (July 2009, 4).

Abas (1984-88). The latter participated with me in the influential acceptance, at a judicial conference in India, of the *Bangalore Principles on Domestic Application of International Human Rights Norms*³. Soon after returning to Malaysia from Bangalore, he was removed from office. That was an unhappy time for the rule of law in Malaysia. Its chief events were described in a book to which I was proud to offer a foreword, written in distinguished company with Tunku Abdul Rahman⁴. In my remarks, I observed, as prudently as I could, the importance of the rule of law and of independent judges and yet the near universality of challenges to the notion of such independence from national governments. I included in the list of challenges both my own government in Australia⁵ and the then government of Malaysia.

Later I was to know of the steps taken, in April 2008 under Prime Minister Abdullah Ahmad Badawi, to award *ex gratia* payments to the six judges of Malaysia who had been affected by the 1988 crisis⁶. And amendments of the procedures for appointing judges in this country, designed to remove, or reduce, criticism of excessively partisan political influence over judicial appointments⁷. These steps coincided with action by the Malaysian Bar Council, together with LAWASIA and the International Bar Association's (IBA) human rights committee, in creating a Panel of Eminent Persons to review the events of 1988. The Panel was chaired by the Hon. J.S. Verma, former Chief Justice of India. It affirmed the wrongness of the judicial removals. It confirmed the views that I had expressed as a friend of Malaysia in 1988.

³ The *Bangalore Principles* are set out in M.D. Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 *Australian Law Journal* 514 at 531-2.

⁴ Tun Mahamed Salleh Abas and K. Das, *May Day For Justice*, Magnus, 1989, Forewords by Tunku Abdul Rahman Putra Al-Haj at xi-xiii and by the author at xiv-xviii.

⁵ *Ibid*, xvii.

⁶ K. Arumugam Ruarum, *Malaysia – Human Rights Report 2008 – Civil and Political Rights* (2009), 148.

⁷ *Judicial Appointments Act 2008* (Mal).

My opinions, written so long ago, were expressed in my then capacity on the executive of the International Commission of Jurists (ICJ). That body (of which I later became the President) was one of the first international human rights organisations formed after the adoption of the UDHR. It took as its central plank the global defence of the rule of law. This was a natural enough objective, because the ICJ was a body made up of judges, practising lawyers and legal academics.

Spending much time in the councils of the ICJ, I had many occasions, over the years, to reflect upon this core agenda: the rule of law. And the more I did so, the more I became convinced that it was an important principle, and one worthy of the advocacy of lawyers and citizens. Yet though the rule of law was essential to a good society and a worthy legal profession, it was not sufficient. As the IBA has pointed out:⁸

“All countries, even those governed by the crudest dictatorship, need or have laws, although they disregard the individual or collective rights of all or parts of the population. Indeed, apartheid was enforced with meticulous attention to legal form and detail.”

I was asked to give this plenary address on the rule of law when Lord Bingham of Cornhill, until recently the Senior Law Lord of the United Kingdom, was unable to do so through illness. He is, as I shall show, a celebrated writer on the subject. Until recently, he was one of the leading judges of the Commonwealth of Nations. Were he here today, I suspect that his remarks might have been a little different, although not in essentials. Having, however inadequately, to step into his shoes, has obliged me to return to the hesitations that I felt in my years in the ICJ concerning the very notion of the rule of law. And to analyse some of

⁸ IBA Report, above n2, 6.

the weaknesses of the concept as a rallying cry for lawyers around the world, aiming to build better societies for their people.

If the Malaysian Bar Association expected a panegyric of praise for the rule of law, then I am afraid that you have asked the wrong speaker. My thesis is that, as a principle, the rule of law is essential. But it is only so as it safeguards and promotes the higher principle of justice. Justice for all. Harmony in society and its law through justice. Not simply justice for the majority, as expressed in democratic elections. Justice also for minorities. Justice, especially, for vulnerable and unpopular minorities. It is then that our discipline, the law is tested. As Lord Bingham himself has remarked, quoting Chief Justice Latham of Australia in war time⁹: in the give and take of democracy, popular majorities can generally look after themselves. Laws and legal process are “basically needed for minorities and especially unpopular minorities”¹⁰.

DECONSTRUCTING THE RULE OF LAW

There have been various evocations of the rule of law in different civilisations and over a very long period of time. Most of those who have made laws over the centuries, expected them to be obeyed. Compliance with law is therefore an idea that lies at the very heart of law’s purpose.

The code of Hammurabi, dated to about 1700BC. Ancient Assyrian documents reveal the great antiquity of the legal aspiration¹¹. In all

⁹ *Adelaide Company of Jehovah’s Witnesses Inc. v The Commonwealth* (1943) 67 CLR 116 at 124.

¹⁰ Lord Bingham, “Dignity, Fairness and Good Government. The Role of the Human Rights Act” (2009) 34 *Alternative Law Journal* 74 at 77.

¹¹ R. McCorquodale in Mads Andenas and Duncan Fairgrieve (Eds), *Tom Bingham and the Transformation of the Law: A Liber Amoricum*, OUP, Oxford, 2009, 136 at 139 fn8.

probability, the notion existed at an even earlier time in ancient China¹². Much later, the common law and civil law traditions of law in Europe offered a variety of definitions of the rule of law. For Dicey, writing of English law in the nineteenth century, there were three basic principles: the absolute supremacy of law as opposed to arbitrary power; the requirement of equality before the law in the sense of equal subjection of all to the law; and the right of the courts to define and enforce what the law was¹³. The civil law tradition, on the other hand, tended to focus on the concept of a state that was itself based on law: constrained by a constitution protecting the citizens¹⁴.

However, it has been the very vagueness of what is involved in the ‘rule of law’ that has probably made the concept popular. It was liable to mean all things to all people: each different nation and legal culture reading into the idea of the rule of law what it wanted and expected to find.

Lord Bingham was rather dissatisfied with this approach. He feared that it might lead lawyers to dismiss the central ideas of the rule of law as “meaningless verbiage, the jurisprudential equivalent of motherhood and apple pie ...”¹⁵. It was this fear that led Lord Bingham to attempt his famous deconstruction of what the rule of law means today. He identified what he declared to be eight sub-requirements, which together amounted to the unified notion of the rule of law that every modern civilized country is bound to uphold. As I outline the propounded sub-set

¹² Yongpin Liu, *Origin of Chinese Law* (1988) cited *loc cit*, 139. For a modern review, see Ann-Marie Slaughter, “Shielding the Rule of Law” in Andenas and Fairgrieve, above n11, 767-768.

¹³ A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1885 (1959 reprint), pt.II. See McCorquodale, above n11, 139.

¹⁴ Hans Kelsen, *Pure Theory of Law* (2nd ed, 1967); J. Chevalier, *L’État de Droit* (3rd ed, 1999). See also McCorquodale, above n11, 139.

¹⁵ Lord Bingham, “The Rule of Law” (2007) 66 *Cambridge Law Journal* 67 at 81.

of these elements, we should reflect on the extent to which, together and separately, they are a feature of the law and its institutions in countries such as Malaysia and Australia¹⁶:

- (1) The law must be accessible and, so far as possible, intelligible, clear and predictable;
- (2) Questions of legal rights and liabilities must ordinarily be resolved by application of the law and not by the exercise of discretion;
- (3) The law must apply equally to all, except to the extent that objective differences justify differentiation;
- (4) The law must afford adequate protection of fundamental human rights;
- (5) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve;
- (6) Ministers and public officials at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers;
- (7) Judicial and other adjudicative procedures must be fair and independent; and
- (8) There must be compliance by the state with its international legal obligations.

This detailed sub-set of rules has been declared by respected commentators a “powerful and persuasive” description of the rule of law today¹⁷. However, most have acknowledged that it is limited to the

¹⁶ *Ibid*, 69-84. See also Anthony Clarke and John Sorabji, “The Rule of Law and our Changing Constitution” in Andenas and Fairgrieve, above n11, 39 at 41; McCorquodale, *ibid*, 139; Slaughter, above n12, 767.

¹⁷ See e.g. McCorquodale, above n11, 140.

national scene. When the same criteria are applied to the international legal system, it is generally accepted that that system falls far short of a rule of law regime. Many actions have been taken by governments over the decades, since the adoption of the *Charter* of the United Nations and the UDHR, that appear to have been contrary to international law. Professor Robert McCorquodale has instanced as prime examples the decision of the United Kingdom government in 1956 to undertake an armed intervention in Egypt in order to re-take control the Suez Canal. However, one does not have to go back to 1956 to find such instances. The actions of the so-called “Coalition of the Willing” in invading Iraq would appear to have been a more modern instance of the rule of power in place of the rule of law, and one involving a number of countries, including Australia.

Further and later attempts have been made to flesh out the contemporary prerequisites of the rule of law so as to provide further guidance to local lawyers and bar associations by which they may hold their national governments to account. In a resolution of the International Bar Association in 2009, the sub-rules that were declared to be implicit in the very concept of the rule of law, were said to involve twelve, not eight, essential ideas¹⁸:

- (1) The existence of an independent, impartial judiciary;
- (2) The presumption of innocence in the case of criminal accusations;
- (3) The prerequisite of fair and public trials, conducted without undue delay;
- (4) The observance of a rational and proportionate approach to punishment of those who are convicted of crimes;
- (5) The existence of a strong and independent legal profession;

¹⁸ IBA – above n2.

- (6) The strict protection of professional secrecy and of confidential communications between a lawyer and client so as to build confidence in the administration of justice;
- (7) The maintenance of equality of all before the law;
- (8) The absence of arbitrary arrests and secret trials;
- (9) The absence of indefinite detention without trial;
- (10) The exclusion of cruel and degrading treatment or punishment;
- (11) The absence of intimidation and corruption both in the electoral process and in judicial and other adjudicative decision-making; and
- (12) The conduct of governance in society through open and transparent institutions and procedures, with freedom of information, opinion and expression as prerequisites for the operation of all of the foregoing characteristics.

If one digs still more deeply into the notion of the rule of law and asks why that notion, and the prerequisites elaborated successively by Dicey, Bingham and the IBA are essential to civilized modern governance, Professor Anne-Marie Slaughter¹⁹ in the United States suggests that Lord Bingham was right in prescribing the rule of law as “a fundamental bargain between ‘the individual and the state’, the ‘governed and the governor’, in which both [parties to the compact] accept constraints for the sake of the common interest and the common good”²⁰.

These theoretical analyses are all well and good. But what does the rule of law come down to in practice? What have I learned over a long life in the law? The World Cup, the latest cricket scores and the current movies and songs are more likely to be on the lips of citizens at work

¹⁹ Slaughter, above n12, 761.

²⁰ *Ibid*, 771, citing a speech by Lord Bingham made in the United Kingdom House of Lords on 16 November 2006.

and at play. The importance of the rule of law does not tend to come up very often in such popular discourse amongst our fellow citizens. But that does not mean that it is unimportant. Why do I think that this notion, which has to do with institutions and procedures of law, is essential to a well-governed society. For the answer to that question, one must descend further into the engine room.

WHY THE RULE OF LAW IS ESSENTIAL

Having enumerated the basic and familiar characteristics of the rule of law, it can be recognised as something extremely irritating to other interests in society: politicians who claim simply to want to get things done; business people who seek to cut corners; powerful individuals who are irritated by what they see as outdated obstacles to their bright ideas for the rest of us; and religious preachers who are disturbed about what they see as disparities between the law of the state and the rule of God (as interpreted, of course, by themselves).

Lawyers and judges advocate the rule of law and all of the paraphernalia of accessibility, clarity, equality, protection of rights and so forth because doing so brings order into many of the most important decisions that arise in every society. It is a principle that provides a public place and largely transparent processes to resolve our most significant disputes. It affords a mechanism for establishing, and clarifying, the rules by which our people must live together in relative peace. It recognises that the only alternatives are the power of money, influence and guns. Those forms of power are generally viewed as defective when compared to the invocation and application of written rules that pre-exist events or that can be derived by logical reasoning from earlier expositions of the common law.

The experience of humanity has been that, in the absence of law, and of effective enforcement of the law, corrupting influences tend to rush, like quicksilver, to fill the gaps.

Thus, Germany, under the Nazis, remained a *Rechtstaat* – a state based on law. The only problem was that there existed “black holes”. There were spaces where the law did not run. There were areas of life where judicial orders were silent or completely ineffective. Often this was because of the very large discretions granted to civil and military officials affecting the lives of ordinary citizens. Sometimes it was because of the invocation of notions of the superior status of the Führer’s decrees and the excuse of a pressing ‘national emergency’. Hitler invoked both of these “black holes” in his murderous elimination of rivals during the Night of the Long Knives on 20 June 1934.

It is to remove such disturbing and unsettling dangers, that disrupt the orderly management of the state, civic and business activity within the state and ordinary human lives, that societies have constructed the concept of the rule of law. However irritating it may sometimes be to have independent officials (who happen to be lawyers and are usually called judges) second-guessing what politicians in the parliament or the executive have done in pursuit of their notions of what is best for society, it is necessary to uphold such checks and balances. Over the long haul, this has been found to be in the best interests of the good government of the people. It has also been found to be in the long term interests of business which depends upon predictability in ordering its affairs by reference to laws and rules and in depending ultimately on courts to insist impartially upon conformity with the law and to uphold contractual

promises that comply with law. In the integrated regional and global economy of today, it would be intolerable for business if it could not predict its legal obligations and entitlements by reference to law. Where global business cannot trust local courts to uphold impartially bargains entered with local businesses, it will demand external arbitration. It will resort to alternative dispute mechanisms in the search for reliable, predictable and lawful outcomes.

At about the time that I received my first copy of the UDHR in 1949, I became aware of a very great danger, appearing in the form of law in Australia, facing a close family member of mine. He was Jack Simpson, who had recently married my paternal grandmother in her second marriage. He was affected by the provisions of the *Communist Party Dissolution Act* 1950 (Cth). That was a law that was enacted by the Australian Federal Parliament. At the time, Jack Simpson was the national treasurer of the Australian Communist Party. A finer man of principle, I never met. Unworldly, somewhat naive and sometimes misguided, that is true. But a good man for whom communism had become his new religion.

Yet at the age of ten years, and in a very vivid way, I learned how the rule of law works in a modern democracy. The Communist Party and other interests challenged the Act before the High Court of Australia. That was the court that, half a century later, I myself was to join. The government had an undoubted electoral mandate to ban the party. An Australian brigade was fighting communists in Korea. Communists in Australia were then often regarded as terrorists. Early opinion polls showed that initially 80 percent of the population supported the Australian government's legislation. Yet, in this heated atmosphere, the

High Court of Australia measured the statute against the requirements of the Australian Constitution. By five justices to one (with Chief Justice Latham dissenting), the Court held that the law was invalid. Communists could be prosecuted under valid laws for what they actually *did* against fellow members of society. But they could not lose their civil liberties for what they *believed*, however foolish those beliefs might seem to their fellow citizens²¹. This was a counter-majoritarian lesson for a young boy growing up in a tolerant democracy. It was a clear insistence of the protections of the rule of law. Subsequently, in September 1951, a referendum of the electors of Australia rejected the government's proposal to amend the Constitution to override the Court's decision. The Communist Party was not banned. It continued to stumble along with a small band of dedicated members until, one by one, they became disillusioned. Eventually, at the end of the century, the party was disbanded by vote of its own members.

In the many years that have elapsed since those important events, I have kept them before me as an illustration of the wisdom and foresight of great judges in the past in protecting my country from the grant of over-wide discretions to officials; from the removal of true equality amongst citizens; from the imposition of differential treatment based upon political and other beliefs; from a departure from fundamental human rights to free expression and free association; from an excessive deployment of public power to agencies of the state; and from the attempt to remove crucial decisions affecting the lives of citizens from the independent and impartial courts. We must hope that our judges will always have the wisdom and foresight to respond to such challenges

²¹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

when they arise. This constituted an illustration of the rule of law at work in my country. It was one that I honoured and celebrated.

In the years since 1951, I have witnessed many instances in Australia (and taken part in some myself) where the rule of law has been upheld again to safeguard basic constitutional rights. This has been so even though, in Australia, such rights are rarely spelt out in the constitution as those of Malaysia are. In Australia, they must usually be derived from the common law or from individual statutes or be inferred from the structure and purpose of the 1901 Constitution. Instances have included court decisions:

- * To permit protection of the environment in Australia against irreversible damage²²;
- * To uphold the right of indigent accused persons to have effective access to competent legal representation when facing a serious criminal trial²³;
- * To undo a demonstrated wrong to a convicted prisoner notwithstanding a repeated rejection of his complaint by the appellate courts below²⁴;
- * To uphold the rights of short term prisoners to vote as citizens in Australia's federal elections and to reject the notion that parliament could deprive any category of citizens it pleased of the right to vote²⁵; and

²² *Tasmania v The Commonwealth (Tasmanian Dam Case)* (1983) 158 CLR 1.

²³ *McKinney v The Queen* (1991) 171 CLR 468.

²⁴ *Mallard v The Queen* (2005) 224 CLR 125.

²⁵ *Roach v Electoral Commissioner* (2007) 233 CLR 162. See also *Rowe v Electoral Commission*, High Court of Australia, unreported, 6 August 2010 (orders made requiring the Electoral Commissioner to enrol as electors in a federal election many (mostly young) qualified voters who had not enrolled within the day of the issue of the writs for the election. This rapid closure of the roll was enacted in an amending Act passed in 2008.

- * To uphold the rights of Islamic places of worship to enjoy the same taxation advantages as Christian places of worship under the law²⁶.

It is when the law protects the poor, the powerless, the vulnerable and the unpopular that it knows its finest hour²⁷. It is when the system of government provides for, accepts and implements such decisions that the society may be accepted as a rule of law society. It is so when judges feel constrained to reach, and give effect to, decisions that might be unpopular and might upset powerful interests in society. It will be so even where the outcome in the particular case is upsetting to the judge because it seems unfair. Such instances must be tolerated (as Lord Bingham has explained²⁸) because they are inherent in any system where the judges are obliged to construe, and give effect to the law. Not simply to give effect to their own notions, intuitions and human feelings²⁹.

Naturally, powerful people, used to getting their own way, will sometimes find having to submit to the external opinions of unelected judges (responding, in turn, to troublesome lawyers) annoying and frustrating. But there are strong reasons of principle, economics and efficiency for maintaining and defending that system.

Over the years, powerful politicians in most countries have tried to shape and re-shape the composition of the judiciary in accordance with their own notions and values³⁰. However, in mature democracies, they rarely

²⁶ *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 (NSWCA).

²⁷ *Falbo v United States* 320 US 549 at 561 (1944) per Murphy J. Applied *ABC v O'Neill* (2006) 227 CLR 57 at 114.

²⁸ Lord Bingham, above n10 at 78.

²⁹ *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 is a good example.

³⁰ Jeff Shesol, *Supreme Power – Franklin Roosevelt v The Supreme Court*, Norton and Co. NY, 2010.

succeed. This is why there is a special wisdom in maintaining a thick wall between appointed judges and the corrupting pressures and influences of external power or pressure. In my 35 years as a judge, I was never conscious of an attempt of any power external to the parties and the courts to influence the outcome of a decision I had to make as a judge. Those who submit their disputes to legal determination do so on the assumption of impartial and independent decisions. It is destructive of the peaceful acceptance of such decisions in society if that assumption is ever displaced or rendered in doubt.

WHY THE LAW OF RULES IS NOT SUFFICIENT

Having established that the rule of law, as we have come to understand it, is essential for an effective and just governmental system. I now want to offer a number of sceptical thoughts.

A common criticism of legal systems, and of the people who participate in them, is that they are overly concerned with institutions, systems and procedures. And insufficiently attentive to the substance of what they are ultimately about: the attainment of just or fair outcomes; the achievement of improved relations between parties; the pursuit of desirable social objectives beyond the parties; and the protection of minority interests, as ascertained by consulting civil society, not just powerful individuals and institutions.

In a recent essay, Stephen Golub has argued that the concept of justice represents a broader and more effective organising principle for international efforts to alleviate the really serious grievances and problems on the planet, rather than the rule of law which tends to be concentrated on courts, other legal institutions, judges, laws and

lawyers: persons and bodies that the ordinary citizen encounters but rarely³¹.

Some of his propositions bear comparison with a connected set of views expressed by James Goldston, Executive Director of the Open Society Justice Initiative in New York. He points out that rule of law objectives have attracted much support from powerful agencies like the Organisation for Economic Co-operation and Development and wealthy Western sponsors³². However, they tend to sustain top-down instruction by Western countries, addressed to developing countries. Often such Western countries fail to ask what lessons they can themselves learn from developing countries about real problems affecting long-term governance, including instruction for the way in which developed countries should go about addressing the defects in their own legal systems³³.

The basic defect involved in focusing exclusively, or mainly, on the rule of law as an organising principle for the idealism of the legal profession is, to put it bluntly, that it all depends upon the justice, wisdom, applicability and even-handedness of the law that is being applied. Only when that factor is taken into account can the question be decided whether the ultimate outcome is good or bad for the human beings affected and for the society about them.

It is important to make this point because it is all too easy, in rule of law discourse, to overlook the fact that sometimes, including in modern

³¹ S. Golub, "Making Justice The Organising Principle of the Rule of Law Field" (2009) 1 *Hague Journal of the Rule of Law* 61 at 66.

³² James A. Goldson, "The Rule of Law at Home and Abroad" (2009) 1 *Hague Journal of the Rule of Law*

38.

³³ *Ibid* at 42.

democracies, the law in the books (whether statute or judge-made law) may be unjust, out-of-date, inefficient, lacking in balance, inattentive to later knowledge or contrary to universal human rights.

In Australia, we have had many instances of judicial decisions which were entirely faithful to the law, as interpreted, but which produced outcomes that were seriously unjust and unfair, as we can now see:

- * The body of laws that upheld the immigration principle of White Australia, administered by a dictation test, is a good illustration³⁴;
- * The confirmation, in former times, of the death sentence in cases where the reviewing court confessed itself to be concerned about the reliability of a confession by an Aboriginal accused that was the very foundation for his conviction³⁵;
- * The previous, long-standing common law rule, upheld by the courts, that denied indigenous Australians any recognition of their traditional interests in land³⁶;
- * The rejection of claims to status as a conscientious objector against military service, except in a case of total opposition to every conceivable war³⁷;
- * The interpretation of modern migration law in a way that would permit the indefinite executive detention of a stateless person³⁸;
- * The confirmation of anti-terrorism laws that would invest judges with restrictive powers based on very wide discretionary and policy judgments unusual to the judiciary³⁹; and

³⁴ *Chia Gee v Martin* (1905) 3 CLR 649; *Potter v Minahan* (1907) 7 CLR 277; *O'Keefe v Calwell* (1948) 77 CLR 261.

³⁵ *Stuart v The Queen* (1959) 101 CLR 1.

³⁶ *Cooper v Stuart* (1889) LR 14 App Cas 286 at 291 (PC). See also *Attorney-General v Brown* (1847) 1 Legge 312 at 316-318 and *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439. These decisions were reversed by *Mabo v Queensland [No.2]* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 186 CLR 1.

³⁷ *Ex Parte White: Reg v District Court (Sydney)* (1966) 116 CLR 644.

³⁸ *Al-Kateb v Godwin* (2004) 219 CLR 562.

- * The conferral of jurisdiction on State Supreme Courts to keep in prison a person who had completed serving his judicial sentence upon a later judicial prediction of dangerousness, always notoriously disputable⁴⁰.

Some of these cases might breach the 'rule of law' assumptions and sub-rules, at least as they have been elaborated by Lord Bingham. But the instances show that fearless maintenance of the law and faithful observance of its rules and procedures by uncorrupted courts are not, of themselves, a guarantee of a just and fair society or even of just and fair outcomes to particular controversies.

Moreover, lawyers know that there are many forms of law that may be upheld, and even arguably comply with the external requirements of the rule of law, and yet be a repository for very large and effectively unreviewable decision-making by governments or other powerful interests:

- * The existence of very wide discretions in the letter of the law is not unknown to our legal systems. The power to prosecute or not to prosecute for criminal offences is one such instance. Both in Malaysia, in decisions to prosecute for sedition offences, and in Australia⁴¹, prosecutorial discretions are generally left untouched by the courts although sometimes the decision to prosecute may effectively determine the outcome of the case⁴²;

³⁹ *Thomas v Mowbray* (2007) 233 CLR 307.

⁴⁰ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Baker v The Queen* (2004) 223 CLR 513.

⁴¹ See e.g. *Elliott v The Queen* (1996) 185 CLR 250; *Dyers v The Queen* (2002) 210 CLR 285 at 316 [85].

⁴² Cf. Stephen Gray and Naomita Royan, "The Blogger Prince and the Cultured Mongolian – Sedition Prosecutions in the Modern Malaysian State" (2009) 14 *Media and Arts Law Review* 455 at 463. But see also at 465 in reference to *Re Param Cumaraswamy* [1986] 1 MLJ 10.

- * In cases involving the exercise of defence (military) powers and in prosecution under anti-terrorism laws, courts will ordinarily defer to official decisions. They may sometimes be encouraged to do so by legal restrictions placed on their access to relevant evidence and information⁴³;
- * In some instances, governments wishing to achieve particular objectives may do so by turning a blind eye to the letter of the law and indulging in selective enforcement of the law, difficult to reconcile with its strict terms⁴⁴;
- * Even where the law is enforced equally, the unequal powers of government and of the ordinary citizen may produce a far from level playing field. A good example is where the Taxation Office pursues an ordinary taxpayer through the courts at a cost that few individual citizens could ever afford; and
- * The powers of particular office holders will sometimes effectively put them outside merits review. Occasionally this is done, according to law, so as to attain higher objectives, as in the special privileges and immunities accorded to parliamentarians and judicial officers⁴⁵. On other occasions, the law may protect particular categories (such as parents, teachers or guardians) out of deference to their traditional roles in society and because the deployment of such power is normally exercised for the benefit of the persons concerned.

⁴³ *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police (WA)* (2008) 234 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501.

⁴⁴ For example, the policy of non-prosecution of nude bathing on some Australian beaches and non-prosecution for needle possession in policies introduced to combat the spread of HIV.

⁴⁵ *Ryan d'Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 16 [31]; cf. at 98 [314].

Instances such as the foregoing demonstrate the practical limits that arise in subjecting many decisions to effective judicial scrutiny. Unless an obligation is imposed expressly by statute, the common law of Australia has been held not to oblige public officials to give reasons for their decisions⁴⁶. That ruling has had the result of placing those adversely affected by the exercise of public power in many cases beyond effective judicial review because they could never demonstrate the real reasons for the oppressive use of power by officials.

Quite apart from these instances, there are many practical impediments that stand in the way of securing real access to the rule of law in all societies. Just to list some of these impediments will help to demonstrate that, in some instances at least, the rule of law is more of a theoretical construct than a practical reality. Although the following instances are drawn from Australian case law, there would be many equivalents, some additional and some different cases in Malaysia, known to this audience:

- * A person who is intelligent and educated will enjoy enormous advantages because of his or her knowledge of law and of their rights and willingness to pursue remedies that otherwise lie hidden in the books. Recent studies have suggested that disease may often be linked to intelligence. However this may be, real access to legal rights (in default of legal aid or *pro bono* assistance) will often depend on a person's background and experience;
- * The type of people who assert, advocate and decide cases are generally amongst the elite of society. A good proportion of them have been well educated and supported by parents of better-than-

⁴⁶ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 reversing *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 477 (NSWCA).

average means. Sometimes people of this background, without any actual ill will, may not empathise with those on the fringes of society, at least sufficiently to perceive their complaints and to sympathise with their invocation or interpretation of the law;

- * The economic means of potential litigants will frequently result in the fact that they cannot afford to secure even basic advice, still less to pursue their legal rights effectively in the courts. Judges may endeavour to accord equal justice to self-representing litigants. But in the press of business, such litigants may not know, find or express their rights. Too much will often depend on the chance factors of their securing public legal aid or *pro bono* assistance;
- * Public legal aid in many countries, including Australia, has not kept pace with the ever-growing needs of civil litigation. The common law system is inherently cost intensive and legal costs are ever rising;
- * Alternative dispute resolution is spreading and sometimes is now a compulsory prerequisite to litigation. Whilst this is often beneficial, it does occasionally deprive parties of a judge with the *will* to ensure a just and lawful outcome to a conflict. It may sometimes effectively substitute market forces for the rule of law;
- * Attempts to improvise with class actions and litigation funding have not always proved acceptable to the courts⁴⁷. Yet the old requirements of individual litigation may sometimes place some claims beyond the pockets of citizens of modest means.
- * Occasionally poor litigants, even in criminal trials, must accept inexperienced lawyers and courts of criminal appeal are generally

⁴⁷ *Campbell's Cash & Carry Pty Ltd v Fostif* (2006) 229 CLR 386.

reluctant to re-visit the decisions and judgments of such lawyers, however imprudent they may appear to have been in retrospect⁴⁸.

- * The sheer number of appeals that are now brought, including against criminal convictions and sentences, undoubtedly produce the risk of overlooking errors which a final court, with its many special burdens, cannot be expected to cure⁴⁹;
- * Civil society organisations in many jurisdictions often find it difficult to gain acceptance as *amici curiae* or as interveners because our system of individual litigation has not yet fully adapted to the role of courts in declaring the general law beyond the interests of particular parties⁵⁰;
- * The advent of highly complex, scientific evidence has presented serious challenges to non-institutional litigants. Effectively, much litigation has begun to follow the pattern of the organisation of the legal profession itself. The days of the small-time firm or sole legal practitioner and the local equivalents of Atticus Finch has been replaced by the mega multi-national law office and large practices, often operating out of modern palaces of marble and glass for which somebody (usually the client) pays; and
- * Beyond the nation state are now international organisations and technologies that are not readily susceptible to domestic law and regulation. The large role that the World Trade Organisation plays in intellectual property law, as it operates on pharmaceutical patents is but one instance. The influence on the internet of the First Amendment values of the American Constitution is another

⁴⁸ *Nudd v The Queen* (2006) 80 ALJR 614 at 636 [105].

⁴⁹ *Mallard v The Queen* (1998) 119 CLR 646 (24 October 1997 SLR) is an illustration. See *Mallard v The Queen* (2005) 224 CLR 125 at 142 [45].

⁵⁰ See e.g. *Wurridjal v The Commonwealth* (2008) 237 CLR 309 at 312-314. Cf. *Levy v Victoria* (1997) 189 CLR 579 at 604, 650-1; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 135-6.

example of the extra-territorial operation of national law. In this way, the rule of national law today is sometimes replaced by decision-making by anonymous officers, sometimes exhibiting a very large democratic deficit⁵¹.

CONCLUSIONS

Individually or collectively, the practical inhibitions and impediments listed by me do not represent a reason to abandon the adherence of the judiciary and legal profession across the world to upholding the banner of the rule of law.

The growth of business law, and the demand of truly independent judges to decide commercial cases impartially, is likely to spill over in its consequences for the role of independent judges in deciding public law matters that can sometimes present sensitive issues of political power and contested perspectives on human rights⁵².

Still, the practical limitations are reasons enough to recognise that the rule of law is, in the end, only productive of good governance for the people, if the law that is enforced is just, conformable with universal human rights and susceptible to regular reform, modernisation and simplification.

Not long after I received my first copy of the UDHR from my teacher in 1949 and learned of the decision of the High Court of Australia in the *Communist Party Case* in 1951, I discovered an aspect of the law in Australia that, astonishingly, made me a kind of outlaw. I refer to the

⁵¹ Alfred A. Aman, *The Democracy Defecit*, NY Uni Press, NY, 2004, 162 referring to the WTO.

⁵² Slaughter, above n12.

criminal laws against homosexuals. I was subject to serious criminal penalties for an attribute of myself (like race, skin colour or gender) that I did not choose and could not change. This is still a feature of the otherwise generally beneficial heritage of British law. It still exists in 41 of the 54 countries of the Commonwealth of Nations. It exists in Malaysia although it has been abolished in Australia⁵³.

Recently, in India, a unanimous decision of the Delhi High Court partially invalidated s377 of the *Indian Penal Code*. That court held that the provision, in its general operation to adults in private, was incompatible with the constitutional notions of equality and privacy expressed in the Indian Constitution. Chief Justice A.P. Shah declared⁵⁴:

“If there is one constitutional tenet that can be said to be an underlying theme of the Indian constitution, it is that of inclusiveness [which is a] value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognising a role in society for everyone. Those perceived by the majority as ‘deviants’ or ‘different’ are not on that score excluded or ostracised.”

Similar decisions have been pronounced by judges in other common law countries as diverse as the United States⁵⁵ and South Africa⁵⁶. Important decisions on connected themes have also been rendered by many courts, including recently by the new Supreme Court of the United Kingdom⁵⁷. In other jurisdictions, including my own, reform in this

⁵³ The last Australian jurisdiction to repeal the law was the State of Tasmania, following the decision of *Croome v Tasmania* (1998) 198 CLR 119.

⁵⁴ *Naz Foundation v Union of India* [2009] 4 LRC 838 at 895 [129].

⁵⁵ *Lawrence v Texas* 529 US 558 (2003). See *Naz*, above n48 at 867 [57].

⁵⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648 (CCSA). Cf. *Naz*, above n48, at 866 [56].

⁵⁷ *H.J. (Iran) (FC) v Secretary of State for the Home Department* [2010] UKSC 31, on appeal from (2009) EWCA Civ 172. Applying *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216

context has been achieved by democratic legislative amendments⁵⁸. Yet, in some parts of the world, reforms on this issue have been very slow in coming. One must respect the fact that different societies are at different stages on the journey. Just as, earlier, different societies had different views expressed in law with respect to people of different races, religions and other personal attributes. I grew up in a society that seriously disrespected Asian people and repeatedly proclaimed a culture of racial superiority.

At that time, there was no doubt about what the law on these subjects said in Australia. Just as there was no doubt on the laws that enforced apartheid in South Africa, anti-miscegenation in the United States and earlier religious disqualifications from voting or holding public office in Britain⁵⁹.

My point here is that the rule of law had nothing really protective to say, as such, about the burdens imposed in these ways on minorities (or in the case of South Africa, on the majority racial group). On the contrary, the law, as such, helped to enforce inequality. It thereby gave prejudice and unequal treatment a kind of legitimacy and respect in the community. This was certainly the case with the White Australia laws in Australia, well into the 1960s. Only gradually were those laws dismantled, together with similar laws adverse to Aboriginal Australians.

CLR 473. See also *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No.3); *Dudgeon v United Kingdom* (1982) 4 EHHR 149; *Norris v Ireland* (1991) 14 EHHR 186; *Naz Foundation* [2009] 4 LRC 838 at 865 [52].

⁵⁸ Starting with the *Sexual Offences Act* 1967 (UK).

⁵⁹ Before the *Roman Catholic Relief Act* 1829 (UK); 10 Geo IV, ch7. This was made applicable to Roman Catholic subjects in the Australian colonies by legislation of January 1830. See e.g. *Roman Catholic Relief Act* 1830 (UK). Before that legislation, Roman Catholics were denied the suffrage and many other civil rights in the United Kingdom and its colonies.

Observance of the law, in the sense of the *letter* of the law, is not, therefore, enough. We, as lawyers, must be concerned with the *content* of the law and the *content* of the procedures and institutions that deliver law to society. Lawyers above all should be ever vigilant to see new truths (often revealed by scientific research) that earlier generations did not perceive. This is why, for lawyers, the rule of law means more than the fact that a law exists in the books. Lawyers can never ignore their duty as legal practitioners, and as citizens and human beings, to ask whether the law so appearing is contrary to universal human rights. If it is, it is a breach of the fourth of Lord Bingham's subordinate attributes of the 'rule of law' as that principle is understood today.

The duty that practitioners of law carry is a very heavy one. But it is the one that gives the profession of law its nobility of purpose. It makes law as important to society as the health care professionals who look after our physical bodies. Encoded in the human spirit is an unending curiosity about the human condition and a yearning for the dignity that lies at the very heart of each and every one of us. This idea was well expressed by Justice Anthony Kennedy, in the Supreme Court of the United States, in *Lawrence v Texas*⁶⁰ when he said⁶¹:

“... [T]hose who drew and ratified the [US Constitution] ... might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”

It is the lawyers who must be specially alert to the ever-present challenges to our sensibilities. And just as I agree that Western

⁶⁰ 539 US 558 (2003).

⁶¹ 559 US 558 at 563 (2003). See *Naz* [2009] 4 LRC 838 at 889 [115].

countries can derive wisdom and insights about law and justice from those of other cultures⁶² (most especially on economic, social and cultural rights) so the lawyers of other countries can sometimes derive insights from the West, as Chief Justice A.P. Shah did in his decision in *Naz Foundation*⁶³. The creation of the ASEAN Human Rights Commission, and the leading part that Malaysia may be expected to play in that body foreshadow an increasing influence of international human rights jurisprudence on domestic legal practice and court decisions in Malaysia and the region. This will be a beneficial and constructive influence. And it is not one that is inconsistent with the special features of Asian culture and traditional values.⁶⁴

Justice Sandra Day O'Connor captured this idea in a speech made by her shortly before her retirement from the Supreme Court of the United States⁶⁵:

“I suspect that, with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues. Doing so may not only enrich our own country’s decisions; it will create that all-important good impression. When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.”

I conclude, as I began, with an expression of respect for the King and people of Malaysia. And with an affirmation of affectionate regard for my many friends in the judiciary and legal profession of this country. I am

⁶² Goldston, above n32 at 43.

⁶³ *Naz* [2009] 4 LRC 838. Contrast the consideration of apostasy in decisions of the Malaysian courts: *Lina Joy v Majlis Agama Islam* [2004] 2 MLJ 119; [2005] 6 MLJ 193; [2007] 3 MLJ 557; [2009] 1 LRC 2. See also M.D. Kirby, “Fundamental Human Rights and Religious Apostasy: The Malaysian Case of Lina Joy” (2008) 17 *Griffith Law Review* 151; M.D. Kirby, “Law, Human Rights and Religion – Of Genocide, Sexuality and Apostasy” (2009) 9 *Macquarie LJ* 3.

⁶⁴ Amartya Sen, “Human Rights and Asian Values”, 16th Morgenthau Memorial Lecture on Ethics and Foreign Policy, Carnegie Council on Ethics and International Affairs (NY, 1997), 9, 28.

⁶⁵ In Adam Liptah, “United States Court, a Long Time Beacon, is now Guiding Fewer Nations”, *The New York Times*, 18 September 2008, A30.

grateful to be welcomed back again. And especially so because, by now, you are well aware that I am prone to offer thoughts that go beyond the self-congratulations that were once the comforting and invariable hallmark of these great occasions.

Law is not enough. It is ultimately the contents and justice of law that matters. Ours is the special responsibility to ensure that law is just and protective of human dignity. Law is not (or should not be) simply for the wealthy. Law is (or should be) for all. It is not just for the popular and the acclaimed. It is for the vulnerable and the disadvantaged. We must never forget this. And conferences like this one provide us with the occasion to re-dedicate ourselves. And to re-affirm the universality and integrity of our discipline publicly before each other, before our fellow citizens and before the watching world.
