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# THE RULE OF LAW BEYOND THE LAW OF RULES

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The Hon. Michael Kirby AC CMG

# AUSTRALIAN BAR REVIEW

## THE RULE OF LAW BEYOND THE LAW OF RULES\*

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### ABSTRACT

The 'rule of law' is an objective repeatedly proclaimed by lawyers. It was affirmed in the *Universal Declaration of Human Rights 1948*. But what does it mean? Does it imply no more than observance of the letter of the law? Is the principle neutral as to the rules that must be given effect if formally part of the law? Or does the 'rule of law' today imply something about the justice of the rules in question and, specifically, their compliance with universal human rights? In this article, the author deconstructs the 'rule of law' by reference to successive modern taxonomies. He concludes that impartial observance of law is essential to a functioning modern democracy. But a law of rules is not sufficient, as many Australian instances demonstrate. Apart from these instances, many practical impediments stand in the way of equal justice under law. Lawyers must be concerned with the justice of the law, not simply with its unthinking enforcement.

### AN UNSATISFYING CONCEPT

The rule of law is a common aspiration proclaimed by international organisations and national governments, as a pre-condition for acceptable modern governance.

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\* Based on part of an address to the 15<sup>th</sup> Malaysian Bar Association Conference, Kuala Lumpur, 29 July 2010.

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At the beginning of the new world order in 1945, with the adoption of the *Charter* of the United Nations<sup>1</sup>, it did not take long for this phrase to enter the discourse of the freshly-minted United Nations Organisation. Initially, it had been expected that the UN *Charter* would contain a Bill or charter of rights, envisaging ultimately justiciable rights that were to be enjoyed by people everywhere, in whose name the United Nations was founded. However, as in the case of the United States Constitution, this objective proved impossible of fulfilment<sup>2</sup>. The document containing the proposed statement of universal human rights was postponed for three years. It was adopted in December 1948 in the form of the *Universal Declaration of Human Rights* (UDHR)<sup>3</sup>. The preamble to that document contained an explicit reference to the concept of the rule of law<sup>4</sup>:

“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 ...”

But what did this objective envisage? Was it no more than the existence of identifiable law-making bodies and settled procedures in those bodies (and in the other organs of government) by which valid laws would be made, recognised, expressed and enforced? This would be a formal definition of the notion of the ‘rule of law’. But was this all that the UDHR was referring to”? Was it what the major western countries, including Australia, meant when they repeatedly insisted that the governments of

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<sup>1</sup> Charter of the United Nations, 26 June 1945, entered into force 24 October 1945. See F.F. Martin et al (eds.) *International Human Rights Law and Practice* (Kluwer, The Hague, 1997), 1.

<sup>2</sup> “Bill of Rights” in Kermit L. Hall (ed.) *The Oxford Companion of the Supreme Court of the United States*, OUP, Oxford, 1992, 70-72. The Bill of Rights was approved in April 1789 by the First Congress of the United States. It came into force in 1791.

<sup>3</sup> UDHR adopted and proclaimed by the General Assembly of the United Nations, by resolution 217A(III), 10 December 1948.

<sup>4</sup> *Ibid*, Preamble to the UDHR, no3. Also particularly relevant is art 3 (“a right to life, liberty and security of person”) and art 10 (right to “a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and ... of any criminal charge against him”).

newly independent developing countries should institute and defend the rule of law?

These questions became specifically relevant for me after 1985 when I was elected a commissioner of the International Commission of Jurists (ICJ) founded in 1952, and based in Geneva. Defence of the rule of law was one of the chief objectives of the ICJ. It was a reason that attracted to its membership judges, practising lawyers and legal academics in many parts of the world. For lawyers, the rule of law became a popular rallying cry<sup>5</sup>. Absence of a government of laws meant, in effect, chaos, anarchy or a government of power, money or unbridled discretions<sup>6</sup>. Law kept such power in check. Law was a safeguard for limited government in which lawyers played a vital role in defining and upholding the limits<sup>7</sup>. It was therefore a desirable attribute of a modern civilised state. But was this enough? Was this all that the 'rule of law' meant?

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. 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, although the rule of law was essential to a good society and a worthy objective for the legal profession to support, it was not sufficient. As the International Bar Association (IBA) has pointed out:<sup>8</sup>

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<sup>5</sup> For a recent example, see Olaide Gbadamosi and Ol Adewoye, "The rule of law as a catalyst for sustainable democracy in Nigeria" (2010) 36 *Commonwealth Law Bulletin* 343.

<sup>6</sup> *Ibid*, 349 citing *Onagoruwa v Inspector General of Police* (1991) 5 NWLR 193, 650 per Niki Tobi J.

<sup>7</sup> The concept necessarily assigns a central role to the judiciary which must be at once independent, impartial and professional. *Ibid*, 353.

<sup>8</sup> International Bar Association, *Rule of Law – A Commentary on the IBA Council's Resolution of September 2005* by Francis Neale (co-chair of the IBA's Rule of Law Action Group), July 2009, 6.

“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.”

The purpose of this paper is to deconstruct the concept of ‘the rule of law’. It is to analyse some of the weaknesses of the idea as an objective for lawyers around the world, aiming to build better societies for their people. I will state my thesis at the outset. As a principle, the rule of law is essential. However, it is only so as it safeguards and promotes the higher principle of justice. Justice for all. Harmony in society and its laws 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 when minorities demand the protection of the law that our discipline, the law, is tested. As Lord Bingham of Cornhill has remarked, quoting Chief Justice Latham of Australia in war time<sup>9</sup>: 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”<sup>10</sup>.

So how do we untangle commitments to formal and institutional objectives (such as ‘the rule of law’, the ‘independence of the judiciary’, and the ‘separation of constitutional powers’) on the one hand, and, on the other, the more value-laden notions of respect for universal human rights in all of their variety? Do those notions themselves introduce the attainment of the rule of law? Do they go further today and include a right to development? A right to relief from endemic poverty? A right to

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

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

express one's sexual feelings with other adults in private without interference by the state?

To answer these questions, it is necessary to dig deeper and to discover more precisely what is meant by the objective of the rule of law. That is the object of this paper.

## **DECONSTRUCTING THE RULE OF LAW**

There have been many explanations of the rule of law in successive civilisations, over a very long period of time. Most of those who have made laws over the centuries, expected their rules to be obeyed. So compliance with the letter of the law is an idea that lies at the very heart of the purpose of law in every society, whether democratic or oppressive.

The Code of Hammurabi, dated from about 1700BC. It and other ancient Assyrian documents reveal the great antiquity of the legal aspiration<sup>11</sup>. In all probability, the notion of obedience to formally expressed laws existed at an even earlier time in ancient China<sup>12</sup>.

Much later, the common law and the civil law traditions of law in Europe offered a variety of definitions for the 'rule of law'. For A.V. Dicey, writing on English law in the nineteenth century, there were three basic principles: the absolute supremacy of law, as opposed to arbitrary power; the notion 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

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<sup>11</sup> 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. See also Aristotle, *Politics III*, 16 (Trans. L. Jowett, ed. Davis), 1971.

<sup>12</sup> 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.

enforce what the law is<sup>13</sup>. The civil law tradition, on the other hand, tended to focus its attention on the basic concept of a state that was itself founded on law: constrained by a constitution and protecting the citizens<sup>14</sup>.

In a sense, it has been the very vagueness of what is involved in the 'rule of law' that has probably made the concept popular, particularly with lawyers. It was liable to mean all things to all people: each nation and differing legal cultures reading into the idea of the rule of law what it wanted, and expected, to find.

Lord Bingham, who has written a great deal on this subject, was rather dissatisfied with the foregoing 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 ..."<sup>15</sup>. It was this fear that led Lord Bingham to embark on an analysis of what the 'rule of law' means today. He identified what he declared to be eight sub-rules, which together amounted to a unified notion of the 'rule of law' that every modern civilized country is bound to uphold. The elements that he listed were<sup>16</sup>:

- (1) The law must be accessible and, so far as possible, intelligible, clear and predictable;
- (2) Questions of legal rights and liability should ordinarily be resolved by application of the law and not by the exercise of discretion;

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<sup>13</sup> 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.

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

<sup>15</sup> Lord Bingham, "The Rule of Law" (2007) 66 *Cambridge Law Journal* 67 at 81.

<sup>16</sup> *Ibid*, 69-84. For other taxonomies, see for example F.A. Hayek, *The Road to Serfdom* (Uni Chicago Press, Chicago, 1984). 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 above n11, *ibid*, 139; Slaughter, above n12, 767.

- (3) The law must apply equally to all, except to the extent that objective differences justify a relevant differentiation;
- (4) The law must afford adequate protection for 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 described by respected commentators as a “powerful and persuasive” description of the ‘rule of law’ in contemporary circumstances<sup>17</sup>. However, most have acknowledged that Lord Bingham’s definition is limited to the 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 *Charter* of the United Nations and the UDHR were accepted, that appear to have been contrary to the international rule of law. Professor Robert McCorquodale has instanced as prime examples the decision of

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<sup>17</sup> See e.g. McCorquodale, above n11, 140.



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 affecting 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 IBA in 2009, the sub-rules said to be implicit in the concept of the ‘rule of law’, were reduced to twelve essential ideas<sup>18</sup>:

- (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 of punishment of those who are convicted of crimes;
- (5) The existence of a strong and independent legal profession;
- (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;

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<sup>18</sup> IBA – above n2.

- (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 to 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, Lord Bingham and the IBA are essential to civilized modern governance, Professor Anne-Marie Slaughter<sup>19</sup> 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”<sup>20</sup>.

These theoretical analyses are all well and good. But law is a practical profession. Barristers, in particular, are (mostly) practical people. So what does the ‘rule of law’ come down to in practice? What have I learned in this respect over a long life in the law? The World Cup, the latest cricket scores and the current movies, books and songs are more likely to be on the lips of citizens at work and at play. The ‘rule of law’ does not tend to come up very often in popular discourse amongst fellow citizens. 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 still further into the engine room.

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<sup>19</sup> Slaughter, above n12, 761.

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

## **WHY THE RULE OF LAW IS ESSENTIAL**

One can enumerate some of the basic and familiar characteristics of law: with independent judges and a vigorous legal profession. These features can no doubt sometimes be extremely irritating to other interests in society: to politicians who simply assert their desires 'to get things done'; business people who want to cut corners; powerful individuals who get annoyed 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 occasionally 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 they know that these elements bring a measure of order into many of the most important decisions that arise in society. The rule of law is a principle that provides a public place and largely transparent processes to resolve the most heated and significant of disputes. It affords a mechanism for establishing and clarifying the rules by which the people live together in relative peace. It recognises that the only alternatives to the rule of law 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 which can be derived by logical reasoning from earlier expositions of the common law. This is so because experience of humanity has been that, in the absence of law, and effective enforcement of the law, corrupting influences tend to rush, like quicksilver, to fill the gaps.

Thus, Germany, under the Nazis, remained a *Rechtstaat*. It was 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 which the law granted to civil and military officials affecting the lives of ordinary citizens. Sometimes it was because of the invocation of notions of the superior force of the Führer’s decrees or the excuse of a pressing ‘national emergency’<sup>21</sup>. Hitler invoked both of these “black holes” in his murderous elimination of his rivals during the Night of the Long Knives on 20 June 1934.

It is to remove such disturbing and unsettling events that disrupt the orderly management of the state, civic and business activity within the state and ordinary human lives, that societies have constructed the expectations of the rule of law. However irritating it may sometimes be to have independent officials (who happen to be lawyers and are commonly 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 good government for the people. It has also been found to be in the long term interests of businesses, which depend upon predictability of outcomes in the ordering of their affairs by reference to laws and rules and depending 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 generally its legal obligations and entitlements by reference to the law. Where global businesses cannot

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<sup>21</sup> Cf. *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 645 [188].

trust local courts impartially to uphold bargains entered with local businesses, they will demand external arbitration. They will resort to alternative dispute mechanisms in a search for predictable, reliable and lawful outcomes.

At about the time that I received my first copy of the UDHR in my classroom in 1949, I became aware of a very great danger, appearing in the form of law, facing a close family member of mine. He was Jack Simpson, who had recently married my paternal grandmother in her second marriage. He was an object of the provisions of the *Communist Party Dissolution Act 1950* (Cth). That was a law which was enacted by the Australian Federal Parliament. At the time, Jack Simpson was the treasurer of the Australian Communist Party. He was a fine man of principle. Unworldly, somewhat naive and sometimes misguided, that is true. But a good man for whom communism had become his religion.

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: the court that, half a century later, I myself was to join. The government had an undoubted electoral mandate to ban the communists. Furthermore, an Australian brigade was fighting communists in Korea. Communists were then often regarded as terrorists. Opinion polls showed that, initially, 80 percent of the population supported the Australian government's legislation<sup>22</sup>. Yet, despite this heated atmosphere, the High Court of Australia measured the statute against the requirements of the

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<sup>22</sup> G. Winterton, "Dissolving the Communists: The *Communist Party Case* and its Significance" in T. Kelly (ed.) *Seeing Red*, Evatt Foundation, 1992, 132 at 164 ("It demonstrated that our freedom depends on the rule of law.")

Australian Constitution. By five justices to one (with Chief Justice Latham dissenting), the Court held that the law was invalid.

Communists could thus be prosecuted in Australia under valid laws for what they actually *did* harmful to fellow members of society. But they could not lose their civil liberties for what they *believed*, however foolish those beliefs might seem to be to their fellow citizens<sup>23</sup>. This was a counter-majoritarian lesson for a young boy growing up in a tolerant democracy. It was a clear insistence on 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 High Court's decision. The Communist Party was not banned. It continued to stumble along with a small cadre of dedicated members until, one by one, they became disillusioned. Eventually, at the end of the century, the party was disbanded not by law but by vote of its own members.

In the many years that have elapsed since those events, I have kept their lessons before me<sup>24</sup> as an illustration of the wisdom and foresight of great judges in the past in protecting the people from the provisions of over-wide discretions given 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 the norms of fundamental human rights to free expression and free association; from an excessive deployment of public power; and from the attempt to remove crucial decisions affecting the lives of citizens from the independent and impartial courts. We must hope that Australian judges

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<sup>23</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

<sup>24</sup> See e.g. *Thomas v Mbray* (2007) 233 CLR 307 at 292-3 [241]-[242]; extract at 504-5 [589] per Callinan J.

will always have the wisdom and foresight to respond to such challenges when they arise. If this constituted an illustration of the rule of law in Australia, it was one that I honour and celebrate.

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 in important cases to safeguard basic constitutional, statutory and common law rights. This has been so even though, in Australia such rights are rarely spelt out in express terms in the constitution itself. Usually, they must be derived from the common law or individual statutes or inferred from the structure and purpose of the Constitution. Instances have included:

- \* To permit protection of the vulnerable environment against irreversible damage<sup>25</sup>;
- \* To uphold the right of indigent accused persons to have effective access to competent legal representation when facing a serious criminal trial<sup>26</sup>;
- \* To undo a demonstrated wrong to a convicted prisoner notwithstanding a repeated rejection of his complaint by the appellate courts below<sup>27</sup>;
- \* 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 vote<sup>28</sup>; and

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<sup>25</sup> *Tasmania v The Commonwealth (Tasmanian Dam Case)* (1983) 158 CLR 1.

<sup>26</sup> *McKinney v The Queen* (1991) 171 CLR 468.

<sup>27</sup> *Mallard v The Queen* (2005) 224 CLR 125.

<sup>28</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162. See also *Rowe v Electoral Commissioner*, orders made in July 2010 concerning the enrolment of new electors for a federal election after the issue of the writs. Reasons reserved.

- \* To uphold the rights of Islamic places of worship to enjoy precisely the same taxation advantages as Christian places of worship under the law<sup>29</sup>.

It is when the law protects the poor, the powerless, the vulnerable and the unpopular that it knows its finest hour<sup>30</sup>. It is when the system of government provides for, accepts and implements such decisions that we can say that the society concerned is 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 accepted (as Lord Bingham has explained<sup>31</sup>) 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 feelings<sup>32</sup>.

Naturally, powerful people, used to getting their own way, will sometimes find having to submit to the opinions and orders of unelected judges (responding in their turn to the submissions of independent 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

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<sup>29</sup> *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525 (NSWCA).

<sup>30</sup> *Falbo v United States* 320 US 549 at 561 (1944) per Murphy J. Applied *ABC v O'Neill* (2006) 227 CLR 57 at 114.

<sup>31</sup> Lord Bingham, above n10 at 78.

<sup>32</sup> *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 is a good example.



own notions and values<sup>33</sup>. In mature democracies, they rarely succeed. This is why there is special wisdom in maintaining a thick wall between appointed judges and the corrupting pressures and influences of political or other power or pressure. In my 34 years as a judge, never once was I conscious of an attempt of any power external to the parties and the courts to influence the outcome of a decision I made. Those who submit their disputes to legal determination do so upon 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 put in doubt.

### **WHY THE LAW OF RULES IS INSUFFICIENT**

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

A common criticism of legal systems, and of the people who regularly participate in them, is that they are overly concerned with institutions, systems and procedures and insufficiently attentive to the substance of what they ultimately propound as their mission: 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 engaging with civil society, not just with powerful individuals and companies.

In a recent essay, Stephen Golub has argued that the concept of justice represents a broader and more effective organising principle for the

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<sup>33</sup> See e.g. Jeff Shesol, *Supreme Power – Franklin Roosevelt v The Supreme Court*, Norton and Co. NY, 2010.

international efforts of lawyers 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 whom the ordinary citizen encounters but rarely<sup>34</sup>.

Some of these 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 influential international agencies, such as the World Bank and the Organisation for Economic Co-operation and Development (OECD) and wealthy Western sponsors<sup>35</sup>. However, these bodies tend to sustain top-down instruction by Western countries, addressed to developing countries. Often they fail to ask about the lessons that developed nations can themselves learn 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 systems<sup>36</sup>.

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 and even-handedness of the law that is being upheld and enforced. 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.

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<sup>34</sup> 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.

<sup>35</sup> James A. Goldson, “The Rule of Law at Home and Abroad” (2009) 1 *Hague Journal of the Rule of Law*

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<sup>36</sup> *Ibid* at 42.

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 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.

We have had many instances in Australia of legal decisions that were entirely faithful to the law in the formal sense but which produced outcomes that were seriously unjust and unfair, as we can now see:

- \* The body of laws and cases that upheld the immigration policy of White Australia, administered by a dictation test, is a good illustration<sup>37</sup>;
- \* 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 which was the primary evidentiary foundation for his conviction<sup>38</sup>;
- \* The previous, long-standing common law rule, upheld by the courts, which denied indigenous Australians recognition of their traditional interests in land<sup>39</sup>;
- \* The rejection of claims to recognition as a conscientious objector against military service, except in a case of total opposition to every conceivable war<sup>40</sup>;

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<sup>37</sup> *Chia Gee v Martin* (1905) 3 CLR 649; *Potter v Minahan* (1907) 7 CLR 277; *O’Keefe v Calwell* (1948) 77 CLR 261.

<sup>38</sup> *Stuart v The Queen* (1959) 101 CLR 1.

<sup>39</sup> *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.

<sup>40</sup> *Ex Parte White: Regina v District Court (Sydney)* (1966) 116 CLR 644.

- \* The interpretation of modern migration law in a way that would permit the indefinite executive detention of a stateless person<sup>41</sup>;
- \* The confirmation of anti-terrorism laws that would invest judges with restrictive powers based on very wide discretionary and policy judgments, unusual to the judiciary<sup>42</sup>; and
- \* The conferral of jurisdiction on State Supreme Courts to keep in prison a person who had completed serving his sentence upon a judicial prediction of 'dangerousness', always notoriously disputable<sup>43</sup>.

Some of these cases might breach the rule of law assumptions and sub-rules, at least as they have been elaborated by Lord Bingham and the IBA. 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 sufficient guarantee of a just and fair society or even of just and fair outcomes in 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 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 in our legal systems. The power to prosecute or not to prosecute for criminal offences is one such instance. For example, in Malaysia, in decisions to prosecute for sedition offences, and in

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<sup>41</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>42</sup> *Thomas v Mowbray* (2007) 233 CLR 307.

<sup>43</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 622 [123]; *Baker v The Queen* (2004) 223 CLR 513. See I. Freckleton and P. Keyzer "Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations" (2010) 17 *Psychiatry, Psychology and Law* 345.

Australia, general criminal prosecutorial discretions are generally left untouched by the courts although sometimes the decision to prosecute may effectively determine the outcome of the case<sup>44</sup>;

- \* In cases involving the exercise of defence or war 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 information<sup>45</sup>;
- \* In some instances, governments wishing to achieve particular objectives may do so by turning a blind eye to the letter of the law or by indulging in selective enforcement of the law, difficult to reconcile with its strict terms<sup>46</sup>;
- \* Even where the law is enforced equally, the unequal powers of government compared with those of the ordinary citizen may produce a far from level playing field. A good example arises 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 real review or availability. Occasionally, this is done, according to law, so as to secure higher objectives, such as in the special privileges and immunities accorded to parliamentarians and judicial officers<sup>47</sup>. On other occasions, the

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<sup>44</sup> 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. See also in Australia: *Dupas v The Queen* (2010) 84 ALJR 488 at 491 [15] ff.

<sup>45</sup> *Farey v Burnett* (1916) 21 CLR 433 at 453-6 per Isaacs J; cf *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.

<sup>46</sup> For example, the policy of non-prosecution of nude bathing on some Australian beaches and non-prosecution for needle possession in facilities established to combat the spread of HIV.

<sup>47</sup> See e.g. *Fingleton v The Queen* (2005) 227 CLR 166 at 233 [162].

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.

Instances such as the foregoing demonstrate the practical limits that arise in subjecting many decisions to effective legal 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 decisions<sup>48</sup>. That ruling has sometimes had the result of placing those adversely affected by an exercise of public power in many cases beyond effective judicial review because they could never demonstrate the real reasons for the allegedly oppressive use of power by officials.

Quite apart from these instances, every lawyer knows of the many practical impediments that stand in the way of securing real access to the rule of law. Just to list some of these impediments will demonstrate that, in some cases at least, the rule of law is more of a theoretical construct than a practical reality:

- \* People who are intelligent and well educated will enjoy enormous advantages because of their knowledge of law and of their rights and their willingness to pursue remedies that lie in the books. Recent studies have suggested that disease may often be linked to intelligence<sup>49</sup>. However that may be, real access to legal rights (in the absence of legal aid or *pro bono* assistance) will often depend on a person's background and experience;

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<sup>48</sup> *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 reversing *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 477 (NSWCA).

<sup>49</sup> "Mens sana in corpora sano" (Disease and Intelligence) in *The Economist*, 3 July 2010 (vol 396, no8689), 71.

- \* The type of people who assert, advocate and decide cases are generally amongst the elite of society. Inescapably, most lawyers and virtually all judges, are part of that elite. A good proportion have been well educated and supported by parents of better-than-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 invocations of the law;
- \* The impecuniosity of potential litigants will frequently mean 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 upon 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. Legal costs are ever rising;
- \* Alternative dispute resolution is spreading and is sometimes now a 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 courts<sup>50</sup>. Yet the old requirements of individual litigation may sometimes place

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<sup>50</sup> *Campbell's Cash & Carry Pty Ltd v Fostif* (2006) 229 CLR 386.

particular claims beyond the pockets of citizens of modest means, although they may be the very persons in need of legal assistance<sup>51</sup>;

- \* Occasionally poor litigants, even in criminal trials, must accept inexperienced lawyers and courts of criminal appeal are generally reluctant to re-visit the decisions and judgments of such lawyers, however imprudent they may in retrospect appear to have been<sup>52</sup>.
- \* 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 repair;
- \* Civil society organisations in many jurisdictions frequently 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 parties<sup>53</sup>;
- \* 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 small-time firm or sole legal practitioner and the local equivalent of Atticus Finch have been replaced by the mega multi-national law office, often operating out of palaces of marble and glass for which somebody (inferentially the client) pays; and

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<sup>51</sup> See *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322atT 431 [317] ff.

<sup>52</sup> *Nudd v The Queen* (2006) 80 ALJR 614 at 636 [105].

<sup>53</sup> See e.g. *Wurridjal v The Commonwealth* (2008) 237 CLR 309 at 312-314. Cf. *Levy v Victoria* 91997) 189 CLR 579 at 604, 650-1; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 135-6; Patrick Keyzer, *Open Constitutional Courts* (Federation Press, Sydney), 2010, 98-122.



- \* 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 one instance. The influence of the internet on the First Amendment values of the American Constitution is another example of the extra-territorial operation of national law. In this way, the rule of national law today is often replaced by decision-making by anonymous officials, sometimes exhibiting a very large democratic deficit.

## **THE SEARCH FOR GREATER FREEDOM**

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

The growth of business law, and the demand of independent judges to decide business 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 more sensitive issues of political power and contested human rights<sup>54</sup>.

Still, the practical limitations listed above 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 consistent reform, modernisation and simplification.

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<sup>54</sup> Slaughter, above n12.

Not long after I received my first copy of the UDHR from my teacher early 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 criminal laws against homosexual men<sup>55</sup>. I found that 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<sup>56</sup>.

Recently, in India, a unanimous decision of the Delhi High Court struck down s377 of the *Indian Penal Code*. That court held that the provision, in its general operation to adults in private, was incompatible with the notions of equality and privacy expressed or implied in the Indian Constitution. Chief Justice A.P. Shah declared<sup>57</sup>:

“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 States<sup>58</sup> and South Africa<sup>59</sup>.

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<sup>55</sup> *Crimes Act 1901* (NSW), ss79-81B ( “Unnatural offences”).

<sup>56</sup> M.D. Kirby, “Legal Discrimination Against Homosexuals – A Blind Spot of the Commonwealth of Nations” [2009] *European Human Rights Law Review* 21.

<sup>57</sup> *Naz Foundation v Union of India* [2009] 4 LRC 838 at 895 [129]. The decision is under appeal to the supreme Court of India.

<sup>58</sup> *Lawrence v Texas* 529 US 558 (2003). See *Naz*, above n48 at 867 [57].

Important decisions on connected themes have also been rendered by many courts, including recently by the new Supreme Court of the United Kingdom<sup>60</sup>. In other jurisdictions, including in Australia and Britain, reform in this context has been achieved by legislative amendments<sup>61</sup>. Yet, in some parts of the world, reforms on this issue have been very slow in coming, in not non-existent.

One must respect the fact that different societies are at different stages on the journey. Just as, earlier, different societies had different views on respect for people of different races, religions and other personal attributes. I grew up in an Australian society that disrespected Asian people and repeatedly proclaimed a notion of racial superiority. In those years, 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 religious disqualifications from voting or holding public office in earlier Britain<sup>62</sup>.

The rule of law had nothing 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 rules of the law, as such, tended to enforce inequality. They thereby gave prejudice

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<sup>59</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648 (CCSA). Cf. *Naz*, above n48, at 866 [56].

<sup>60</sup> *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 CLR 473. See also *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No.3); *Dudgeon v United Kingdom* (1982) 4 EHHR 149; *Morris v Ireland* (1991) 14 EHHR 186; *Naz Foundation* [2009] 4 LRC 838 at 865 [52].

<sup>61</sup> The last Australian State to abolish such provisions was Tasmania. It did so after the decision of the High Court of Australia in *Croome v Tasmania* (1996) 191 CLR 119, concerning a claim for relief under the *Human Rights (Sexual Conduct) Act 1994* (Cth), s4. See also *Sexual Offences Act 1967* (UK).

<sup>62</sup> 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 Imperial legislation of January 1830. See *Roman Catholic Relief Act 1830* (UK). Before that legislation, Roman Catholics were denied the suffrage and many civil rights in the United Kingdom and some of its colonies.

and unequal treatment a kind of legitimacy and respect. This was certainly the case with the White Australia laws in Australia well into the 1960s. Only gradually were they dismantled, together with laws against Aboriginal Australians.

The rule of law, in the sense of the *letter* of the law, is not, therefore, enough. Lawyers must be concerned with the *content* of the law and the *content* of the procedures and institutions that deliver law to society. Above all, lawyers must be ever vigilant to see new truths (often revealed by scientific research) which earlier generations did not perceive. This is why the rule of law means more than obedience to a law that exists in the books. We can never ignore our duty as lawyers, 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. Yet 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 professions that look after our physical bodies. Embedded in the human spirit is an undying curiosity about the human condition and a yearning for the universal values that are shared by all human beings. I have never seen this idea better expressed than by Justice Kennedy, in the Supreme Court of the United States, in *Lawrence v Texas*<sup>63</sup> when he said<sup>64</sup>:

“... [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

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<sup>63</sup> 539 US 558 (2003).

<sup>64</sup> 559 US 558 at 563 (2003). See *Naz* [2009] 4 LRC 838 at 889 [115].

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.”

Lawyers must be specially alert to this ever-present challenge to our sensibilities. And just as I agree that Western countries can derive wisdom and insights about law and justice from those of other cultures<sup>65</sup> (most especially on economic, social and cultural rights) so those of other countries can sometimes derive insights from the West, as Chief Justice A.P. Shah did in his recent decision in India<sup>66</sup>. Such a decision is not inconsistent with the special features of Asian culture and values.<sup>67</sup>

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 States<sup>68</sup>:

“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.”

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<sup>65</sup> Goldston, above at 45.

<sup>66</sup> *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 Law Journal* 3.

<sup>67</sup> Amartya Sen, “Human Rights and Asian Values”, 16<sup>th</sup> Morganthau Memorial Lecture on Ethics and Foreign Policy, Carnegie Council on Ethics and International Affairs (NY, 1997), 9, 28.

<sup>68</sup> In Adam Liptah, “United States Court, a Long Time Beacon, is now Guiding Fewer Nations”, *The New York Times*, 18 September 2008, A30.