

THE RULE OF LAW – A GENERAL INTRODUCTION

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Thomas Jefferson (who needs no introduction, but who was the third President of the USA and the principal author of its Declaration of Independence) wrote in 1795 that: *“It is to secure our rights that we resort to government at all”*. To him the greatest inalienable human right was liberty and he had written, some years earlier, that: *“The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure”*. These days, fortunately, the rule of law is a more appropriate and even more potent fertiliser for freedom (but blood is still occasionally spilt in its cause).

Later in life (in 1819) Jefferson wrote of the law in this context, but in a way that, while valid on its face, does not in the end do justice to modern notions of the rule of law (to which I shall come in a moment). He said: *“Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add ‘within the limits of the law’, because law is often but the tyrant’s will, and always so when it violates the right of an individual”*.

What has happened since then to enable us to have confidence in the limits of the law – in its ability to secure rights and freedoms for ourselves and others – confidence in the rule of law itself? A great deal, indeed...

RULE OF LAW

Democracy, human rights, the rule of law: three expressions that sit together like air, earth and water. They are elemental for all right-thinking people. They are inter-dependant. As Lord Woolf, a former English Chief Justice, has said: *“Human rights come with democracy, whether the government wants them or not”*. And they come supported by the rule of law.

In the words of the UN *Vienna Declaration* of 1993 human rights are universal, indivisible, inter-dependant and interrelated and therefore should be protected and promoted in a fair and equitable manner by something as fundamental and all-

pervasive as the rule of law (as has happened since at least the 18th Century, if not earlier).

In *Ex parte Milligan*, 71 U.S. 2 (1866) Justice Davis, writing for the Supreme Court just after the American civil war and in a very different environment from that experienced by Jefferson about 50 years before, said:

“No graver question was ever considered by this court, nor none which more nearly concerns the rights of the whole people... By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people”.

The dictatorship of individuals and of the masses are both equally to be avoided and it is only by the enforcement of the just rule of law that this may be achieved and democracy and human rights enjoyed in freedom.

Framed almost a century after *Milligan* and in the light of the experience of the horrors of the Second World War 60 years ago, the Preamble to the Universal Declaration of Human Rights (1948) states that:

“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.”

I shall say more about prosecutors and human rights tomorrow; for now, the focus is on the rule of law.

Sir Ninian Stephen in his 1999 Annual Lawyers’ Lecture for the St James Ethics Centre in Sydney said:

“Maintaining the rule of law is the true basis of democratic society. Without it democracy is a misleading and empty phrase.”

It is useful to note that, while it may mean different things to different people and in different places at different times, the rule of law does not mean:

- rule by law (that is, so long as there is a law on the subject, the rule of law is operating);
- the law of the ruler (the flaw in which was understood by Jefferson);
- “law and order” or related notions of authority;
- the law of rules; or even
- the rule of the lawyer.

A clue to its real meaning would be given by the addition of just one word to the phrase: “the *just* rule of law”. Justice requires the importation of principles that arise under other labels, such as peace, freedom, democracy and fairness. Such principles are echoed in the elements of the rule of law and are supported by it.

It has been said that the rule of law is, in effect, an institutional morality which requires certain ethical values to be observed by those who govern and those who administer public affairs. In that respect it sits alongside the notion of obedience to the

unenforceable (the domain of manners) propounded by Lord Moulton in 1920 – but it differs from that, in that it may be backed up by legal sanctions in certain circumstances.

It is a difficult notion to define comprehensively. It is both normative and descriptive. It is a universal ideal. It is a restraint on arbitrary power.

There are two principal features of the rule of law.

- * The people (including the government) should be ruled by the law and obey it.
- * The law should be such that the people will be able and willing to be ruled (or guided) by it.

Those features provide balance that would otherwise be absent. Democratic legislatures have plenary power – they can make laws about anything, subject to constitutional limitations, and provide for those laws to be enforced. But obedience to rules at the price of cruelty and repression is not the just rule of law. Sir Ninian Stephen in his lecture identified three factors that operate to resolve conflict between that plenary power and the rule of law in a country like Australia:

“First the general, if not constant and unanimous, recognition of and respect for the principles of the rule of law by our legislatures. Secondly, judicial interpretation ... Thirdly, it is aided by our constitution’s separation of powers doctrine and its distinction between legislative and judicial power.”

I shall say more on the separation of powers a little later.

REQUIREMENTS

From the broad features to which I have referred commentators have deduced 12 more particular requirements to be met before it can be said that the rule of law is fully in operation in any jurisdiction.

1 There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.

The need for such laws is self-evident, for no members of society may be free to enjoy their rights unless a degree of social order is maintained. This is the extent of the “law and order” component of the rule of law (but is not enough by itself).

2 The government must be bound (as far as possible) by the same laws that bind the individual.

As a corporate entity the government is required to take actions that affect its subjects and others. It is necessary that the same principles that bind individuals in their conduct towards others should also bind governments

when they take action that will affect others. Principled behaviour is universally recognised and governments should not be exempt from it.

- 3 The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. They must apply equally to all.**

These principles militate against the making of retrospective laws or laws that unreasonably or unfairly discriminate against sections of society. They prevent the manipulation of the lawmaking process for improper purposes, which process disadvantages subjects of the legislature.

- 4 The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.**

In a democracy it is essential that there be continuing consultation between the lawmakers and the community. The legislature makes laws for the community – so those laws should be what the community needs and wants. The difficulty, of course, is in reflecting *informed* public opinion and *general* social values, not the opinions and values of noisy elements of the society that may not be generally held.

Unless this requirement is fulfilled, the consent of the governed, on which the effective enforcement of the law is essentially dependent, will not be forthcoming.

- 5 There must be institutions and procedures that are capable of speedily enforcing the law.**

That is self-evident; but in most countries the speedy enforcement of the law suffers with the inadequacy of resources provided to the institutions involved.

- 6 There must be effective procedures and institutions to ensure that government action is also in accordance with the law.**

Mechanisms for the effective review of public administrative decisions are instrumental in enforcing this principle. Government must also be subject to the law and amenable to law enforcement.

- 7 There must be an independent judiciary, so that it may be relied upon to apply the law.**

If government – or anyone else – has a thumb on one side of the scales of justice, litigants will avoid the courts and the community will not respect or abide by their decisions. That way lies anarchy. Sir Ninian Stephen referred to judicial interpretation of the law as one of the three essential factors in resolving the inherent conflict between plenary governmental power and the rule of law – that interpretation must be by an independent judiciary.

8 A system of legal representation is required, preferably by an organised and independent legal profession.

Access to justice cannot be assured if citizens do not have the means to maintain their positions – whether by pressing their claims through the proper channels or by defending their positions against attack. Courts and legal processes are not, by and large, “user-friendly”, and expert assistance is essential. Again, independence is also essential to ensure that the rights of citizens are not improperly compromised.

9 The principles of “natural justice” (or procedural fairness) must be observed in all hearings.

Contests cannot be allowed to become “one-sided” by the denial of equal rights to all concerned.

10 The courts must be accessible, without long delays and high costs.

“Justice delayed is justice denied” – to all the parties, it must be remembered: in the criminal context to both the accused and the community. If the costs of access are too high, access will be denied.

11 Enforcement of the law must be impartial and honest.

This is self-evident.

12 There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

This proposition has echoes of point 4 in it. In addition, it is a requirement that the community be kept informed of the state of the law, factors indicating any need for change to it, or to the way in which it is enforced, and the need to proceed in a principled way at all times in the general public interest. The media play a large part in the fulfilment of this requirement – so freedom of the press, of information and of communication are vital.

If all (or most) of these features exist, at least in large part, the climate will exist for democracy and for the protection and enforcement of human rights under the rule of law – those rights that are enjoyed by humans simply because they are human beings and subject to the limits, as Jefferson said, of the equal rights of others. Those rights are to be found in the great international instruments accepted by the community of nations.

That climate will be one of acceptance, observance and incorporation into domestic law of those international standards and their enforcement in everyday life. Those 12 features also provide the internal mechanisms for that enforcement.

Professor Geoffrey Walker wrote in *The Rule of Law* (Melbourne University Press, 1988) that the rule of law

“is plainly the essential prerequisite of our whole legal, constitutional and perhaps social order ... The rule of law is not a complete formula for the good society, but there can be no good society without it.”

The International Bar Association [IBA], the world’s largest association of lawyers, passed a resolution in September 2005 that said, in part:

“An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are the fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable. The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect.”

The IBA has since made the rule of law a centrepiece of its conferences and lobbying efforts. At the conclusion of its Rule of Law Symposium held with the 2007 IBA Conference in Singapore, the Chair of the IBA Rule of Law Action Group, Francis Neate, posed three questions for participants:

- 1 How can I personally contribute to building the rule of law?
- 2 How can my bar association/law society/firm contribute?
- 3 How can the IBA contribute?

A report on the answers can be found at [www.ibanet.org/images/downloads/ibe-news/buildingrule of law.htm](http://www.ibanet.org/images/downloads/ibe-news/buildingrule%20of%20law.htm) .

The American Bar Association also has an initiative called The World Justice Project – a multinational, multidisciplinary initiative to strengthen the rule of law worldwide. Its first task is to develop a rule of law index to assess countries’ adherence to the rule of law and the first being studied are Nigeria, India, Chile and – interestingly – the USA.

HOW GOVERNMENT OPERATES

In Fiji and in my country, with governments and legal systems largely based upon the English tradition, we have – or in Fiji’s case, sometimes have – a modified Westminster system of government by representative democracy.

We profess to adhere to the just rule of law. An ancient Roman writer – I think it was Ovid – wrote that the law was created to prevent the powerful from doing whatever they want; and I think that is not a bad way of looking at it. (Something had gone seriously awry by the time Jefferson was writing in the USA – probably an excess of monarchy.) We should remember that nobody is above the law – nobody.

We apply the rule of law in a way that recognises the separation of powers – between the legislature (which makes the law, by and large), the executive (which manages the functions of the state) and the judiciary (which administers justice by adjudicating disputes and imposing penalties – and which occasionally also makes law). These are not optional arrangements, able to be altered at whim – these are the three separate foundational arms of government and their relationships are well defined (even if they need to be reinforced from time to time).

The doctrine of the separation of powers in its modern form was articulated by the French writer Montesquieu in 1748. [It was also Montesquieu who said: “*The public prosecutor watches for the safety of the citizen; he proceeds in his office while they enjoy their quiet and ease*”.] Seventeen years later in 1765 the English jurist Blackstone wrote of the reasons for the separation of the administration of justice from the other two branches:

“Were [the administration of justice or judicial power] joined with the legislative [power], the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law: which the legislators may depart from, yet judges are bound to observe.

Were it [ie. the administration of justice] joined with the executive, this union might soon be an overbalance for the legislative ... Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and a minister of state. [emphasis added]

Those final words are significant because the consequences may be more than just an overbalance for the legislature; yet uniting the provinces of a judge and a minister is precisely what some politicians and others in positions of power and some sections of the media sometimes try to do by exerting improper influence over the administration of justice.

It is salutary to take an example from the United Kingdom that occurred a few years ago. It had many resonances, at least in Australia and possibly in Fiji as well.

The High Court in London upheld applications made by six asylum seekers, challenging the implementation of a new government policy that was contrary to UK human rights law. The Home Secretary, whose legislation had been set aside, attacked the judges for (as he alleged) undermining attempts to stem the influx of asylum seekers. He is reported to have said that the judgment sent out the wrong message: “*There’s a climate of instability and insecurity, and that’s a very dangerous moment*”. He warned judges that they were in danger of damaging democracy. He said: “*If public policy can always be overridden by challenge through the courts, then democracy itself is under threat*”.

No, Mr Blunkett, no and no again. The courts and the judges were not threatening democracy. All that is required for legitimate public policy to be implemented is for it to be enacted in legislation that is legally valid and carried out by means that are lawful. Lawful challenges to irregular exercises of public power, adjudicated by an

independent judiciary, are an integral part of democracy. That is how the rule of law works.

The tabloid media took up the cry with its usual alacrity and lack of restraint. One headline said: “*So what have our judges got against Britain?*” and the story continued: “*Britain’s unaccountable and unelected judges are openly, and with increasing arrogance and perversity, usurping the role of Parliament*”. No, no and no again! We see similar things happen in Australia, especially in the context of sentencing for crime, and I would be surprised if you could not produce examples from here.

At the end of her term as President of the NSW Bar Association in 2001, Ruth McColl SC (now a Judge of Appeal in NSW) sounded a timely warning for us all. In her final column in the Bar’s monthly newsletter she wrote:

“Lawyers tend to take these core values [ie. the rule of law and democratic principles] for granted. We work with the rule of law every day. We should not lose sight of the fact that the rule of law is not as concrete and ever-present a phenomenon to some members of the community as it is to us. At times, the transient, but regrettably politically significant, influence of opinion polls can push the rule of law to one side and allow pragmatism to prevail over principle.”

The driving force may not be just opinion polls. These influences may be exerted openly or covertly by politicians, the media or rulers and policy makers of all kinds – even political usurpers.

It matters not that the motives of the urgers or policy makers may be honourable. Justice Brandeis of the US Supreme Court in 1928 warned in *Olmstead v United States* (277 US 438, 479):

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”

LESSONS FOR PROSECUTORS

We need to incorporate the principles of the just rule of law into our practices and procedures as prosecutors. The International Association of Prosecutors (IAP) has provided some assistance in developing the foundations for that through its minimum Standards – *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (1999).

Most prosecution agencies have extensive guidelines and policy documents assisting decision making in the course of prosecutions. What other practical steps might we take to achieve these standards in practice to give effect to the rule of law?

Francis Neate's report for the IBA (to which I have referred) sets out some practical steps that we can all take. I would add the following.

1 It seems to me that a starting point is to ensure that such official arrangements and documents as we have in our Offices reflect at least the minimum standards, duties and rights contained in the IAP Standards.

2 Staff need to be trained and encouraged to adopt and apply those standards of conduct.

3 The next, concurrent, step is to ensure that governments acknowledge and facilitate the enforcement of such standards.

4 The next step may be to assist other agencies who do not – or who presently cannot – embrace those standards to do so, or to find ways of making greater compliance with them possible.

In a speech at the dinner for the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007 the (now) President of the NSW Bar Association, Anna Katzmann SC, summarised the effect of the Standards, noting that they

“record that the use of prosecutorial discretion should be exercised independently and free from political interference. Prosecutors are required to carry out their duties without fear, favour or prejudice – impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect.”

Ms Katzmann observed: *“That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”*

It should be taken as read, of course, that a prosecutor's primary professional duty is to act legally and professionally in the role of prosecutor – to identify and analyse the admissible evidence, to advise competently, to identify and apply the relevant law and to adduce evidence and make submissions in a competent fashion.

The ways in which judgment and discretion are exercised are determined by reference to the prosecutor's duties and to the various instruments that identify and give effect to them.

The lessons we may learn from the rules and guidelines that have grown up around that role and with the need to apply the rule of law may be summarised as:

- independence – first and foremost: independence from the pressures of politicians, the media (in the early stages) and business interests – from all inappropriate external pressures;

- determination – recognition of what must be done and persistence in doing it;
- teamwork – in a large team of investigators and prosecutors, ensuring that the junior members are supported and encouraged by the senior members and imbued with the right values to do the job in a principled way;
- professionalism – attendance to the basics and achieving a high standard of professional performance; and
- satisfaction – ultimately the satisfaction of knowing that the job has been done well and, with it, the recognition and approval of the community that is being served.

It is vitally important, as I have said, that in our tasks we have the general support of the community and sometimes we have to explain to them what we are doing and why, so that they do not get a mistaken view of the process. Without the support of the community we serve, we are wasting our time and might as well pack up and go home. If we do not apply the rule of law, we will lose that support.

Shortly stated, a prosecutor is required to act

- fairly,
- effectively and
- efficiently;

but each of those words imports a multitude of considerations, the competing strengths of which may yet vary in accordance with the particular circumstances. Prosecuting is not a task to be performed by numbers or by computer programs.