THE RULE OF LAW AND ENFORCEMENT#

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Only a few years ago, discussion of the 'rule of law' in international forums such as this would have been influenced, if not dominated, by criticism of the concept as eurocentric, if not neo-colonialist. This has changed as part of the multi-faceted process often called 'globalisation'. There has been over the past decade or two what one author has described as a 'rule of law revival'.[1]

A number of nations, particularly in Asia, Eastern Europe, the former Soviet Union and Latin America, have gone through a process of transition from authoritarian state systems, accompanied by the emergence of a market economy. In both respects, that is, with respect to the system of governance and to the organisation of the economy, a process of institution building has been required both at a constitutional level and at the level of the administration of justice. The concept of the rule of law has emerged as a fundamental organising idea in this process.[2]

The new focus on the rule of law has been accompanied by a recognition of the importance of enhancing the ability of the key institutions of the legal system, including courts, police and prosecutors, to operate effectively and fairly. Institution building has become a significant focus of attention on both a bilateral and multilateral basis. There is now a widespread process of assistance and exchange of information and ideas between nations directed at improving systems of governance, including the administration of justice. Sometimes it is a requirement of multilateral arrangements, of which the most significant, perhaps, is the World Trade Organisation.

There are important projects in the United Nations Development Program, the World Bank and other development banks, and assistance projects directed to good governance, including the rule of law, funded and organised by a wide variety of governmental agencies on a bilateral basis – from the US Agency for International Development to the British Council. All of this is reinforced by a wide range of privately organised activity, including a large number of Non-Government Organisations ('NGOs'), think tanks, an endless stream of academic exchanges and a smaller, but no less fervent, flow of judges and jurists.

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1 Thomas Carothers, 'The Rule of Law Revival' (1998) 77 *Foreign Affairs* 95.

2 See, eg, in a now vast literature, Martin Krygier and Adam Czarnota (eds), *The Rule of Law After Communism* (1999).

In my own case, a month does not go by that the Supreme Court of New South Wales does not welcome a visiting delegation of judges from Asia, most often from the People's Republic of China, but also an annual delegation from Indonesia and Vietnam. Australian judges now regularly participate in judicial educational programmes, for example, at the National Judges College in Beijing, which I attended a year ago. I know that all the Australian judges involved have found their participation highly rewarding. The mechanisms of the rule of law are a primary focus of all these exchanges.

This broadly-based, necessarily anarchic process does not involve the simple migration of an identifiable set of ideas and institutions from one nation or culture to another. There is no single recipe for the 'rule of law'. These words are used in a number of different ways.[3]

Different nations and cultures have and, of course, will continue to have, distinctive practices in relevant respects, particularly in relation to the balance between the requirements of personal autonomy and the preservation of social cohesion. It is important to recognise that the idea of the rule of law encompasses a mixture of ethical and political principles.

Nevertheless, there is a core component without which a nation cannot claim to be operating in accordance with the rule of law. The most essential characteristic is that the law must operate to constrain the arbitrary exercise of power, both private and public. Persons and institutions who have power must exercise that power within, and subject to, a comprehensive framework of binding rules.

The rule of law is not inconsistent with the exercise of authority. It is, however, inconsistent with the exercise of authority in an arbitrary manner. Indeed, governmental authority is essential to a system of rule by law. The administration of justice is a core function of government, developed precisely in order to prevent violence or the exercise of any form of coercion by the strong, the powerful or the wealthy against others, less powerful or less well-off or less well-organised. The proper exercise of governmental authority is, I repeat, an essential aspect of the rule of law.

However, it is not enough to be concerned only with the systematic and consistent application of a body of general rules. That is only rule *by* law, not rule *of* law. The former is a prerequisite of the latter, but it is not a substitute for it, let alone its equivalent.

The two ideas are frequently confused. For example, art 5 of the Constitution of the People's Republic of China adopted in March 1999 employs the term *fazhi guojia*. This is sometimes translated as 'socialist rule of law state'. However, official translations use the terminology 'socialist country ruled by law'. There is a wide-ranging debate within China as to whether the recent reforms are directed

3 See, eg, Geoffrey De Q Walker, *The Rule of Law: Foundation of a Constitutional Democracy* (1988) ch 1.

to one or the other.[4] Similar issues have arisen in Indonesia in a debate as to whether or not the words *negara hokum* go beyond rule by law to encompass rule of law.[5] In both nations, experience with lawlessness and authoritarian rule indicates that rule *by* law is, itself, a substantial advance. The further development towards rule *of* law remains in these, as in many other cases, distinctly problematic.

The topic on which I have been asked to address you is: 'The Rule of Law and Enforcement'. Many of the problems of enforcement arise at the rule *by* law level. It is an obvious, even trite, observation to say that there can be no rule *by* law and, therefore, no rule *of* law, unless the laws are enforced in the sense of being reasonably, fairly and consistently applied to determine the actual outcome of disputes about rights and duties. Insofar as the enforcement of the law is distorted by corruption, these functions are not performed. Insofar as corruption is systemic or endemic, the nation cannot be regarded as one operating under the rule of law.

Without a substantial level of enforcement, the rule of law is simply devoid of meaningful content. What, then, is required to permit a nation to assert that it enjoys the rule *of* law, not just rule *by* law?

There is no universally-accepted content of the rule of law. In the jurisprudence of some, the concept encompasses forms of government, economic systems and human rights. The label becomes progressively less useful as its scope extends. A similar flexibility or indeterminacy arises in the equivalent idea in other languages, for example, *Rechtsstaat*, *État de droit*, *Stato di diritto*, *Estado di derecho*.

I wish to focus on the core content of a system that can accurately be characterised as manifesting the rule of law. This is a narrower use of the concept than that of some, but the core content of the rule of law has, I believe, widespread agreement.

There are two distinct perspectives to the delineation of the core content: the first is concerned with the relationship between citizen and citizen and the second is concerned with the relationship between citizen and state. They have been described, respectively, as the horizontal and vertical functions of the rule of law.[6]

The horizontal function serves significant social and economic objectives by ensuring that persons and groups can interact with each other with confidence. The vertical function is of social and economic significance also, but its primary

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4 See my address, 'Convergence and the Judicial Role: Recent Developments in China' [2003] 1 *Revue Internationale de Droit Comparé* 57; see also Albert H Y Chen, 'Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law' (2000) 17 *UCLA Pacific Basin Law Journal* 125, 128; Eric W Orts, 'The Rule of Law in China' (2001) 34 *Vanderbilt Journal of Transnational Law* 43, 45, 93–101; Randall Peerenboom, 'Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China' (2002) 23 *Michigan Journal of International Law* 471, 320–5, 474–5.

5 See Timothy Lindsey, 'Indonesia's *negara hokum:* Walking the Tightrope to the Rule of Law' in Arief Budiman, Barbara Hatley and Damien Kingsbury (eds), *Reformasi: Crisis and Change in Indonesia*, Monash Papers on South East Asia No 50, Monash Asia Institute (1999) 326.

6 See Martin Krygier, 'Rule of Law' in Neal J Smelser and Paul B Baltes (eds), *International Encylopedia of the Social and Behavioural Sciences* (2001) vol 20, 13 406.

purposes are constitutional and, therefore, it has political implications. The vertical function is concerned to ensure that those with power, especially governments, operate within and are subject to a comprehensive legal framework.

From the perspective of citizen and citizen, the minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence and thereby promote social cohesion and economic progress. All forms of social interaction, including economic interaction, are impeded by a system in which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. It is the predictability that establishes the necessary sense of security and the confidence to act.

The rule of law is not simply a system that contains rules that must be obeyed. The law is a system to be used by citizens for their own protection and their own advancement in their relations with the state and with other citizens.

The rule of law, including the component of rule *by* law, requires that a number of characteristics are present to a reasonably high degree in the practical operation of the legal system. None of the following propositions should be understood as absolutes. All are qualified by a criterion of reasonable practicality.

- Accessibility: laws must be public and ascertainable or knowable – perhaps with the assistance of a lawyer.
- Certainty: laws must be reasonably clear in their meaning.
- Coherence: laws should generally be consistent and not in conflict. There should be mechanisms to resolve the conflicts or tensions that inevitably arise.
- Achievability: laws should not require impractical, let alone impossible, conduct.
- Prospectivity: laws should generally be prospective in their operation, rather than retrospective.
- Generality: laws should be generally applicable and not specifically directed to individuals or small groups.
- Stability: laws should be relatively stable so that conduct with implications for longer periods of time can be engaged in with confidence.
- Enforcement: laws must be enforced in a rational and fair manner to enable the reasonable expectations of citizens to be realised.

It is important to emphasise that all of the other values of accessibility, certainty, prospectivity, stability, etc are of little moment if the practical significance of the laws is not high. There must be a narrow gap between, as it is sometimes put, the law on the books and the law in action. Unless this gap is a

narrow one, then the rules contained in law will not provide a clear signal about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others.

One of the factors driving the revival of interest in the rule of law is the recognition of the critical role that the law plays in economic progress. Studies undertaken for the World Bank indicate that amongst global investors, the predictability of judicial enforcement is the most robust predictor of economic growth.[7]

Judgments of courts are not self-executing. If necessary, orders must be backed up by sanctions, including fines or imprisonment for contempt of court. Orders to pay amounts of money must be made effective, for example, by the seizure and sale of property or the garnishee of wages by officers of the court or by law enforcement bodies. The efficacy of court orders requires robust institutions which have the requisite level of authority. Building such institutions takes time as well as commitment. To give only one, albeit proximate, example, on a recent calculation in the People's Republic of China, there is currently 2.5 billion renminbi of unenforced court rulings.[8] The creation of law enforcement capacity is a large task.

There are two other important aspects of the rule of law which I would identify as part of the core content of the concept. They are concerned with the vertical function of the rule of law: the relationship between citizens and authority.

1. Universality: everyone, whatever his or her position, is governed by the ordinary law and is personally liable for anything done contrary to law.

All authority, including all aspects of governmental authority, must find an ultimate source in the law. It is this principle which ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law. Accordingly, no-one charged with contravening the law can successfully defend the charge on the basis that the violation occurred by command of a superior. The basic proposition that government officials, and other powerful figures in society, are not exempt from the application of the law, is part of the core content of the rule of law. Unless they are so subject, the exercise of power becomes a pure exercise of will. This aspect of the rule of law is frequently considered in terms of constitutional law.

2. Boundedness: the law is not all-encompassing, so that there is a substantial sphere of freedom of action.

Citizens can only be punished – subjected to constraint or injury in person or property – for violation of the law and in accordance with the law. Other citizens, corporations, groups or any arm of government cannot impose any such effect, otherwise than in accordance with the law.

I do not intend to include, as some do, within the concept of the rule of law the preservation of political and civil liberties and the protection of human rights.

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7 See Frank B Cross, 'Law and Economic Growth' (2002) 80 *Texas Law Review* 1737, 1768–9.

8 See United Nations Development Programme China, *UN's Goals in China* (2001–02) <http://www.unchina.org/goals/html/obj10_law.shtml> at 23 May 2002.

These are matters that have their own separate discourses. Nevertheless, the idea that certain consequences cannot occur to citizens without the application of the law necessarily requires a residual area of freedom of a negative character. The discourse of liberty and of human rights approaches the same issues in a positive way. It is the former negative approach that I regard as a component of the rule of law.

A state cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influence, including inducements and pressures, are inconsistent with each of these objectives. Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires that similar cases lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome. Improper influence distorts all of these objectives. So, of course, do incompetence and inefficiency.

Legal institutions are interdependent. In the area of criminal justice the police force, the prosecution and the judiciary have a symbiotic relationship in which the performance and the functions of each depend to a substantial degree on the capacity and integrity of each of the others. The same kind of relationships exist in other areas of the law, involving the broad range of regulatory authorities and adjudicating bodies, including tribunals. If the powers given to any participant in this process are abused by being exercised improperly, for example, to serve the interests of those who wield the power, the whole system is distorted – indeed, perverted.

The resolution of private disputes by adjudicating bodies is a basic function of government. The numerous relationships into which persons and groups enter inevitably give rise to disputes. The rule of law requires that those disputes be resolved on the basis of impartial determination, so as not to depend on the mere election of the more powerful or wealthier party and the degree of desperation of the other. Improper manipulation through corruption prevents the law from having a real and practical influence on the resolution of disputes.

Distortion can be caused by any of the participants in the legal process. Corruption can occur amongst judges, police or prosecutors. The integrity of each of these institutions is significant. I will focus on the general requirements of the judiciary, which constitutes the ultimate mechanism for enforcement of the law.

Long experience over many generations and in many different societies has established certain requirements of institutional design of the judiciary for a rule of law system. Those requirements are the same, whether the rule of law is approached from the perspective of citizen and citizen or from that of citizen and state. The most significant of those requirements are usually referred to in terms of the need for judicial independence.

Of particular significance is the range of issues that arise in the inevitable interface between the judiciary and the executive arm of government. The

judiciary is an arm of government and cannot be entirely insulated from other arms of government.

I do not wish to suggest that there is any single institutional arrangement that constitutes a perfect system. Human institutions do not admit of perfection. Nevertheless, the degree of insulation, either formal or practical, of legal system decision-making processes, is of crucial significance to whether a nation can be described as operating under the rule of law.

The starting point for the impartial administration of justice is some form of institutional autonomy. An effective judiciary requires a distinct *esprit de corps* and its own legitimising traditions. This is often reflected in distinctive form of dress. The judiciary must be, and be seen to be, institutionalised as a distinct group performing distinct functions.

There are numerous decision-making processes capable of impinging on judicial independence. Judges who are selected or promoted on the basis of how they are likely to rule, rather than on the basis of their professional expertise, are unlikely to disappoint the authorities who select and promote them. Judges who may have their appointments terminated by a mechanism which does not contain real restraints, of a formal and informal character, on the process of termination, are unlikely to be prepared to offend persons or groups capable of exercising power in their community. Courts that are continually requesting additional resources from governments in order to perform their functions effectively are more likely to be subject to subtle pressures to achieve particular outcomes in matters of significance to those who control the resources. Judges who are inadequately remunerated, given the economic circumstances of their particular nation, are subject to temptations which may be difficult to resist and are not accorded the status required to ensure that the administration of the law in their society is a matter of significance. A judiciary which is accorded a low level of status and, accordingly, a low level of respect in its community, will be less likely to have the level of competence and impartiality required for the effective administration of justice.

There are many choices in the institutional design of the judiciary with respect to these matters. Insofar as the society wishes itself to be known as a society in which the rule of law operates, it is essential that the ultimate guardians of the rule of law have the level of integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a source of social guidance.

The widespread international recognition of the significance of an independent judiciary is reflected in art 10 of the *Universal Declaration of Human Rights*[9] and in art 14(1) of the *International Covenant on Civil and Political Rights*,[10] which proclaim that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

9 *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc A/810 (1948).

10 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

A useful compilation of the relevant principles of institutional design, expressed so as to apply to a significant range of different legal systems and constitutional structures, is a document known as the *Beijing Statement of Principles of the Independence of the Judiciary* ('Beijing Declaration'), signed by or on behalf of 32 Chief Justices of the Asia-Pacific region, including the President of the Supreme People's Court of China and the Chief Justices of Australia, Fiji, Hong Kong, India, Indonesia, Korea, Malaysia, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Vietnam, Japan and Thailand. This statement includes the following principles:

> 3. Independence of the judiciary requires that:
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> (a) the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.
>
> (b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

I interpolate to observe that what is to be regarded as justiciable will vary from one nation to another.

> 11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence
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> …
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> 17. Promotion of judges must be based on an objective assessment of factors such as competence, independence and experience.
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> 18. Judges must have security of tenure.
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> 19. It is recognised that, in some countries, tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.
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> 20. However it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.
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> 21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.
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> 22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge
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> …
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> 31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. Remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed
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> …

> 33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law
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> …
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> 35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court
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> …
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> 38. Executive powers which may affect judges in their office, their remuneration or conditions, or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.
>
> 39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.

There is no one model appropriate for all societies. However, there is a great deal of experience which supports the principles set out in the Beijing Declaration.

Chinese tradition contains a well-known role model for the administration of justice in the character of Bao Zheng, also known as Bao Gong. He was an outstanding government official of the Northern Sung dynasty, born at the turn of the millennium in 999. As many in this audience will know, Bao Gong is a popular character in Chinese opera, in which he is portrayed with a black face. As I understand it, in Chinese opera, a black face may indicate either a rough and bold character, or an impartial and selfless personality. It is the latter that applies to Bao Gong. He is known for opposing corruption and dispensing justice without fear or favour and with such impartiality that he punished the son-in-law of the Emperor, the uncle of a high-ranking imperial concubine and many government officials.

However, Bao Gong's functions were not only judicial; they were executive and even, on occasions, legislative. In the Chinese imperial tradition, the execution and enforcement of the law and dispute resolution were part of an undifferentiated governmental function. There was in that tradition nothing analogous to a separation of powers, nor even of separate institutions sharing power. Separation of power questions may require some modification of the legend of Bao Gong as a role model for contemporary application. Bao Gong, I should observe, was not a democrat. However, he does personify the essential judicial virtues. The Chinese judiciary does not have to look to the West for a role model of judicial independence, integrity and impartiality.

I conclude, however, with an example drawn from the Western tradition of the rule of law, the tradition with which I am most familiar. Many of you will have heard of Thomas More, the Lord Chancellor of England who defied Henry VIII and was beheaded because of his refusal to support the King in his insistence on divorcing and marrying again. In a play by Robert Bolt entitled *A Man for All Seasons*, Thomas More delivers a passionate defence of the rule of law to his future son-in-law, Roper. More asserts that he knew what was legal, but not

necessarily what was right, and would not interfere with the Devil himself, until he broke the law. The following exchange then occurred:

> ROPER: So now you give the Devil benefit of law!
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> MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?
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> ROPER: I'd cut down every law in England to do that!
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> MORE: Oh? And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down … d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

This imagery of the law as a protection from the forces of evil is an entirely appropriate one. Each society has its own devils, some real, some imagined. The forest of laws that are planted under the rule of law protects us from those devils.