The Just Rule of Law

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"Anyone who is riotous, destructive and unruly is our enemy."

"Crush all destructive elements."

Government slogans prominently displayed in Burma's major cities[1]

"The true measure of the justice of a system is the amount of protection it guarantees to the weakest. Where there is no justice there can be no secure peace."

Aung San Suu Kyi[2]

It is a truism that the rule of law is necessary in order to secure human rights. Indeed, those two phrases "rule of law" and "human rights" are so frequently linked together that (in the malleable way of the English language) there is a danger that their true meanings may be obscured or fused in our haste to declare simply the preconditions for our subjective perception of a "Good Society". They are, however, useful and separate (albeit imprecise) concepts, and their relationship to each other is perhaps best expressed in the Preamble to the Universal Declaration of Human Rights[3] which 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."

This idea of a "Good Society" is worth exploring. It too is imprecise. It is most often used to mean something akin to a "Democratic Society", that is, a society in which the government is representative of, and elected by, the people. In this context the former Governor General of Australia, Sir Ninian Stephen, recently adverted to the suggestion that

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[1] Described in Cummings J (*et al*), *Lonely Planet Travel Survival Kit on Myanmar (Burma)*, Lonely Planet Publications, Melbourne, 1993.

[2] Aung San Suu Kyi, "In Quest of Democracy" in *Freedom From Fear* (edited by Aris M), Penguin, 1995, p 177.

[3] UN General Assembly resolution 217A (III) of 10 December 1948.

"maintaining the rule of law is the true basis of democratic society, [for] without it democracy is a misleading and empty phrase". Sir Ninian judiciously went on to suggest that the contrast between democracy and totalitarianism lies "essentially in the reliance, by a people wedded to the democratic ideal, upon the law. *The rule of law is, if anything, more concerned with and committed to individual liberty than to democratic governance.*"[4] Which returns us inexorably to human rights.

Human rights can be easily eroded - and all states potentially have the power to oppress. But a democratic system that works well, in combination with a strong and independent judiciary and good laws, greatly limits such potential. Short of that, the responsibility inevitably rests with individuals and groups of individuals who are willing to stand up for human rights, even at the expense of personal comfort and security. Theoretically, the suggestion that human rights should be "protected" by the rule of law may lead one to surmise that human rights can exist in the absence of rule of law (for if one can imagine a scenario where human rights are not threatened they will have no need of protection). However, that parcel of human rights to which humanity aspires also embodies the concept of security. One is entitled not only to possess human rights but to feel secure in their possession, to know that they are protected. Hence the inter-dependent and inter-related natures of the rule of law and human rights.

Human Rights

The term "human rights" demands definition, and unfortunately the accepted definitions are as varied as they are vague. Professor John Rawls has suggested that "basic human rights express a minimum standard of well-ordered political institutions for all peoples who belong, as members in good standing, to a just society of peoples."[5] But this raises a number of questions. Are members in poor standing in a society (such as convicted criminals) not entitled to human rights? Clearly they may be legally incarcerated and hence deprived of their liberty - but what of their other rights? And are human rights really to do with "standards" and

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[4] Stephen N, *The Rule of Law*, 1999 Lawyers' Lecture to the St James Ethics Centre, November 1999, <http://www.rmit.edu.au/About/hotTYPEv3/991106.html> (17/7/00) (emphasis added). Sir Ninian was here quoting from Justice Barry of the Victorian Supreme Court.

[5] Rawls J, "The Laws of Peoples" in Shute S & Huxley S (eds), *On Human Rights: The Oxford Amnesty Lectures - 1993*, Basic Books, London 1993, p 68.

"institutions"? Some would demur. Thomas Fleiner, the respected German commentator on constitutional law, is a little more specific: "the most elementary human right is the right of each individual to stay in the surroundings in which she finds herself, to find out things for herself, to be with other people, to marry and raise children: *human rights are the rights of human beings to live according to their nature and with other human beings.*"[6] In this vein, it could be concluded that the most useful way to define human rights is to list them. Fleiner's approach starts to do this - but international organisations such as the United Nations have attempted the task much more extensively and rigorously. The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social & Cultural Rights (ICESCR) and the International Covenant on Civil & Political Rights (ICCPR) combine to provide what is essentially both an internationally-accepted list *and* a definition of "human rights". These instruments demarcate the claims that every person has on his or her society (or against his or her state), claims that apply to everyone regardless of race, religion, gender, economic status, ideology or occupation. Included among these are: religious freedom; freedom of assembly; freedom from cruel and unusual punishments; the right to work; freedom from discrimination; the right to establish trade unions; the right to retain legally-obtained property; the right to due process; and the right to determine one's own government and to have a voice in electing one's leaders.

These rights are, however, not absolute, for all freedoms must be exercised with due caution. The UDHR also provides that:

> in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[7]

Human rights may, therefore, be abrogated or limited in certain circumstances - subject to the rule of law.

The Rule of Law

If we then attempt to define "rule of law", we find that there are similar uncertainties. Whilst it appears to be a universal ideal,

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[6] Fleiner T, *What are Human Rights?* (translated from the German by Nicholas Anson) Federation Press, Sydney, 1999, p 8 (emphasis in original).
[7] Note 3, Article 29.2.

there does not seem to be any internationally-accepted definition. It is a concept that is both normative and descriptive. Clearly it involves a restraint on arbitrary power, but it does not necessarily divest power from the powerful. It does not mean, for example, "rule *by* law" (that is, so long as there is a law on the subject the rule of law is operating), nor does it mean "the law of the ruler(s)", or even "law and order". At the risk of introducing early what might seem to be an overly Anglocentric viewpoint, the following definition from J.H. Baker's *Introduction to English Legal History* is worth considering: "[t]he principle known as the 'rule of law' treats all exercise of authority as subject to the control of the regular courts of law and furnishes the subject with a legal remedy when any official, however mighty, exceeds the power which the law gives him".[8] This would seem to be a common view. But such a statement leads inexorably to a conclusion that no nation in the world has, or could have, rule of law, because social and economic inequalities inevitably intrude, thereby facilitating access to the law for those who are rich and/or powerful and hindering it for those who are poor and powerless. The argument in such a case seems to hinge on the principle of rule of law being a desirable but unattainable goal, rather than an achievable objective. Nation-states could consequently be notionally placed on a continuum, with "Rule of Law" at one desirable extreme and "Might is Right" at the other.

But it is essential to bear in mind that the law is neither all-encompassing nor all-pervasive. The degree to which our lives are modified and controlled by law may significantly affect our consideration of extant social and judicial systems. This was recognised by the distinguished British jurist Lord Moulton as far back as 1919 in a now-famous speech that he made to the Authors' Club in London. Lord Moulton suggested that there were three great domains of Human Action. The first was the domain of Positive Law, "where our actions are prescribed by laws binding upon us which must be obeyed." At the other extreme was the domain of Free Choice, "which includes all those actions as to which we claim and enjoy complete freedom." And between these two extremes there was a third, large and important domain in which neither Positive Law nor Absolute Freedom prevailed - "it grades from a consciousness of a Duty nearly as strong as Positive Law, to a feeling that the matter is all but a question of personal choice... - it is the

[8] Baker J.H., *An Introduction to English Legal History*, 3rd ed, Butterworths, Sydney, 1990 p 165.

domain of Obedience to the Unenforceable. The obedience is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself." [9]

It has been observed[10] that the rule of law could be regarded as 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 this notion of Obedience to the Unenforceable (that is, Moulton's central Domain of Manners), the significant difference being that it may be backed up by legal sanctions in certain circumstances.

The common view of rule of law (that governments and those who wield power should be bound by the same laws that bind ordinary individuals) is further complicated by the fact that not all laws are meant to be universally applied. Sometimes justice requires that the less-powerful have greater protection. There are, for example, the more recent inventions of administrative law[11] and consumer legislation[12] which aim specifically to make governments and bureaucrats more accountable to the people or to regulate large corporations and companies in order to protect consumers. Conversely there have been instances (for example in Nazi Germany) where laws have been enacted in such a way as to target, often obliquely, minority groups[13] - sometimes to their extreme detriment. Indeed, jurists in both Hitler's Third Reich and Mussolini's Italy revelled in the mass of legislation that governed every aspect of citizens' lives and suggested that those states were, as a result, "exemplary law-states".[14] Rule of law was thereby turned into (to use Professor Walker's words) "a ghastly parody". We might therefore draw up another continuum - upon which nation-states could notionally be 'ranked' according to the benignity or malignity of their laws.

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[9] Moulton F, "Law and Manners", (1999) 73 *Australian Law Journal* 256-259, reprinted from *Atlantic Monthly*, July 1924.

[10] Jowell JJ, "The Rule of Law Today" in Jowell & Oliver (eds) *The Changing Constitution*, Clarendon Press, Oxford, 1989, p 19.

[11] For example: in Australia: the *Administrative Appeals Tribunal* Act (1975) (Cth), the *Administrative Decisions (Judicial Review)* Act (1977) (Cth), the *Ombudsman* Act (1976) (Cth), and the *Freedom of Information Act* (1982) (Cth).

[12] For Example: in Australia: the *Trade Practices* Act (1974) (Cth), the *Fair Trading* Act (1987) (NSW) & equivalents in other Australian states.

[13] For example: the *Reich Citizenship Law* (1933), the *Law for the Protection of German Blood and German Honour* (1935), and the *Law for the Restoration of the Professional Civil Service* (1933).

[14] Walker, G de Q, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne University Press, Melb, 1988, p 5.

The "Just" Rule of Law

So it can be seen that, in reality, while the existence of the rule of law (in its most fundamental definition) may facilitate the protection of human rights, it does not of itself guarantee it. The significant qualifying principle becomes clear with the addition of one word: "the *just* rule of law". It is not enough merely that a government should govern in accordance with rules; if human rights are to be safeguarded the rules themselves must be just. Justice requires the importation of principles that arise under other labels, such as peace, freedom and fairness, which are echoed in and supported by the rule of law, thereby creating a necessary balance.

Some commentators have argued[15] that a wide view of the rule of law (which encompasses notions of justice) confuses its meaning with "the rule of good law" - that it is a virtue in itself that might be incorporated into a legal system, but is nevertheless distinct from other virtuous concepts such as democracy, freedom and human rights. Such semantic discourse would, however, seem to be more indicative of the flexibility of language than any major conceptual or ideological clash.

The definition quoted earlier from Baker's *An Introduction to English Legal History* suggests an Anglocentric origin of the concept of the rule of law, and indeed it was developed in part by British judges in a legal milieu where there was no comprehensive bill of rights. The efficacy of the rule of law in such circumstances depended upon the quality and independence of the judiciary, particularly if in conflict with an obdurate sovereign or government. The well-known seventeenth and eighteenth century cases of *Semayne v Gresham*[16] and *Entick v Carrington*[17] are early instances of the just rule of law protecting individual privacy and property rights in England. But the concept also has roots in Roman-Dutch law, which recognised the principles of freedom of person, equality before the law, and that the sovereign should be bound by the same laws that bind the people.[18]

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[15] For example Raz J, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review*, p 195.
[16] (1604) Smith's Leading Cases Vol 1, p 85 & 77 English Reports, p 195.
[17] (1766) 19 State Trials 1030.
[18] Hahlo HR & Maisels IA, "The Rule of Law in South Africa" (1966) 52 *Virginia Law Review* 1, cited in Dugard J, *Human Rights and the South African Legal Order*, Princeton University Press, 1978, p 38.

Indeed, elsewhere in Europe such principles were also being incorporated into national laws. In Sweden in 1350 the National Law Code of Magnus Erikson included the injunction that:

> [The king should swear] to be loyal and faithful to all his countrymen, so that he shall not deprive anyone, poor or rich, in any way, of his life or limb, without a lawful inquiry, as laid down in the law and the justice of the country, or deprive him of his property, except according to law and lawful trial.[19]

In Poland in 1551, A.F. Modrzewski noted in his *De Republica Emendanda* that:

> It is right, therefore, that kings as well as every public official should be ruled by Law, so that they may thereby preserve themselves from the influence of the passions, and make it a criterion wherewith to govern themselves and their peoples alike.[20]

In Islamic countries *Shariah* law was enshrined as a universal guide to even the most intimate aspects of everyday life. It also regulated relations and disputes between individuals irrespective of status or belief. *Shariah* applied equally to all Muslims, including the ruler – and, despite occasional explorations by the caliphs into notions reminiscent of the early European "divine right of Kings", Islamic scholars defined caliphal rule as "nomocratic"[21], based only on the law they protected and enforced.[22]

The concept of the rule of law, therefore, has wide historical and geographical relevance. Moreover, it is clearly not restricted to particular cultures or belief systems, a fact recognised by the International Commission of Jurists when it injected a notably internationalist tenor into its deliberations at its conference in New Delhi in 1959:

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[19] UNESCO, *Birthright of Man*, UNIPUB Inc, 1969, p 110.
[20] Note 19, p122.
[21] A nomocracy can be defined as a system of government based on a legal code. An example of this is the German concept of *Rechtsstaat* or "State-under-law" where the organisational entity of a state is considered to be limited by laws and fundamental principles, rather than as a purely political organisation that can dispense with law in the interest of policy.
[22] For more detailed accounts of *Shariah* law see: Hussain J, *Islamic Law and Society – an Introduction*, Federation Press, Sydney, 1999 and Weeramantry CG, *Islamic Jurisprudence: An International Perspective*, St Martin's Press, New York, 1988.

> The Rule of Law... may therefore be characterised as "The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."[23]

Nevertheless, the applicability of such concepts in an international context has been greatly vexed. An oft-expressed view is that notions of democracy, freedom, and rule of law are inherently ethnocentric - or more specifically Eurocentric - and hence inappropriate (for example) in an Asian context because they are "western" and therefore incompatible with "eastern" values. The People's Republic of China has been most vocal in this respect, but other Asian leaders have followed suit, notably Dr Mahathir Mohamad of Malaysia and Mr Lee Kuan Yew of Singapore.[24]

It should be noted, however, that such principles were recognised in many parts of Asia even earlier than in Europe. Kuan-tzu, writing on "Legislation" in third century BC China exhorted his countrymen: "Never alter a law to suit the whims of a ruler; law is superior to the ruler."[25] In the same century Hsün-tzu suggested that:

> If the laws are made after discussion ... all affairs will be free from mistakes. Those affairs for which law exists will be regulated by law; those affairs for which law does not exist will be dealt with by analogy.[26]

Moreover, western notions of jurisprudence were also transferred to Asia via trade routes and particularly during the various periods of colonisation. Sometimes these were imposed, and sometimes willingly adopted. Tsukasa Okamura (1866-1922) noted, for example, in his *A Short Treatise on Law* in Japan that:

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[23] Note 14, pp 6-7, quoting the International Commission of Jurists Report, p 313.

[24] See, for example, Powers J, *Human Rights and Cultural Values: the Political Philosophies of the Dalai Lama and the PRC*, a paper delivered at the Seventh East-West Philosophers' Conference, University of Hawaii, January 1995; "Do Asian Values trump the West?", reproduced from the *Economist* in *The Australian*, 2 June 1994; and Adonis A, "Determined trend towards Asian Values", *Financial Times*, 24 February 1995, viii.

[25] Note 19, p 122.

[26] Note 19, p 96.

> When the administration allows itself to be led too far astray and becomes despotic and tyrannical, sacrificing the people's rights and liberty, then the laws should set it right and bring it back to the path of justice. Excellent and well-known examples of this are provided by the signing of the Magna Carta in England and the promulgation of the Declaration of the Rights of Man and of the Citizen at the time of the French Revolution. It is precisely the spirit of the laws that hovers over the Japanese people, controlling them and giving them a pattern to follow, and so saving them from confusion and depravity.[27]

Indeed, the very concept of a homogeneous entity called "Asia" is a European notion dating to colonial times, whereas, in reality, the cultures of Asia are markedly diverse. The counter-argument[28], therefore, asserts that any all-encompassing view of "Asian values" is both inadequate and ambiguous given the spectrum of races, languages, religions and cultures which exists in that vast region. There can be no single set of Asian values. Indeed, notions of democracy, freedom, and rule of law are characterised by their universality; they are far from alien to Asian cultures and traditions, and to suggest that they might be absent in Asia "*denigrates the contribution of Asian civilisations to the underpinning of these notions.*"[29] The rule of law may, for example, be thought of as being in "dynamic equilibrium", in line with the Taoist view of the world which conceptualises opposing extremes as *yin* and *yang*. To preserve something it is necessary to preserve an element of its opposite - hence it is not necessary for rule of law to be a pure concept, free of contradictory elements. On the contrary, according to Professor Walker, "unless we define it in such a way as to include some of its own opposite, it will never enjoy stability."[30]

Even if we consider the very specific circumstances which prevail in Burma, with its unique culture and Theravada Buddhist context, such notions do not really change. The concept of law in Burma is based on *dhamma* (righteousness or virtue), which theoretically does not permit the imposition of harsh and inflexible rules on defenceless people - and yet such

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[27] Note 19, p 122.

[28] As proposed, for example, by Lee HP, "Constitutional Values in Turbulent Asia" (1997) Vol 23 No 2 *Monash University Law Review*, 375-396; see also Powers, note 27.

[29] Lee, note 28, p 379.

[30] Walker, note 14, p 47.

seem to form the very basis of the interface between the Burmese government and its people. "There is nothing new in Third World governments seeking to justify and perpetuate authoritarian rule by denouncing liberal democratic principles as alien," noted Aung San Suu Kyi in 1995. "By implication they claim for themselves the official and sole right to decide what does and does not conform to indigenous cultural norms."[31] It is undoubtedly possible for Asian governments to subscribe to the rule of law without slavishly emulating the minutiae of western societies or their governing principles; governments must merely recognise and strive to protect - via the legal process - freedom, justice and human dignity.

The processes of the law bestow great power on governments, and yet - in a line of reasoning that is both elegant and precise, and perversely logical in its circularity - it is the just rule of law that can help to deprive governments of the power to do evil. Democratic legislatures possess plenary power - they can make laws about anything, subject to constitutional limitations, and they can provide for those laws to be enforced. (As Dicey[32] would have it, such a power would be termed "legislative supremacy", one step below "*absolute* legislative supremacy".) But obedience to rules at the price of cruelty and repression is not the just rule of law. The Australian situation is instructive in this respect. Sir Ninian Stephen in the above lecture identified three factors that operate to resolve conflict between plenary power and the rule of law in this country: "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." [33]

Consequently, the rule of law has an over-arching relevance to the role and functions of both the judiciary and the legislature, even if the effect of the concept on these branches of government may differ subtly.

Requirements:

Many commentators have drawn up formulae to define the existence (or otherwise) of the rule of law. Some regard such formulations as simple statements of certain legal values which

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[31] Note 2, p 167.
[32] Dicey AV, *Introduction to the Study of the Law of the Constitution*, 10th edition, London, 1960.
[33] Note 4.

are indispensable to a democratic legal order.[34] Others view them more seminally, but as variations on a theme. Some have only a single requirement - usually something along the lines of the stated prescription that governments and those who wield power should be bound by the same laws that bind ordinary individuals. Others have dual requirements, such as that, first, the people (including the government) should be ruled by the law and obey it, and secondly, that the law should be such that the people will be able and willing to be ruled (or guided) by it.[35] Sir Ninian Stephen in his recent address suggested four requirements:

- that the law should apply to the government;
- that the judiciary should be independent;
- that the courts should be accessible; and
- that the law should be "general in its application, equal in its operation and certain in its meaning". [36]

The list of such requirements, however, can be expanded to twelve by distillation from Professor Walker's list in his comprehensive work on the rule of law[37], based upon points which have historically been stressed by scholars, practitioners and judges. These requirements are worth repeating here. They are:

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

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[34] For example Dugard, note 18, p 38.
[35] This dual requirement was postulated by Dr Joseph Raz at the 1959 Delhi meeting of the International Commission of Jurists; see also Walker's comments, note 14, p 21.
[36] Note 4.
[37] Walker, note 14, p 24.

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.**[38] These principles militate against the making of retrospective laws or laws that discriminate against sections of society. They prevent the manipulation of the lawmaking process for improper purposes which 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 representative democracy it is essential that there be continuing consultation between the lawmakers and the community. The lawmaking bodies make laws for the community - so those laws should be what the community wants. In doing so, of course, it is necessary to steer clear of ethnocentrism – and it is sometimes difficult to reflect *informed* public opinion and *general* social values, rather than the opinions and values of noisy elements of the society that may not be representative. In Australia, for example, Talkback Radio is unfortunately a vastly persuasive medium, but is far from a sound basis on which to fashion laws. Unless such a 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 expeditiously enforcing the law.** This requirement is self-evident, but even in Australia the expeditious 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**

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[38] The concept of equality is complex and vexed. Some minority and feminist writers would argue that formal equality alone is insufficient. For example Margaret Thornton notes in her book *The Liberal Promise: Anti-Discrimination Legislation in Australia* (OUP, Melbourne, 1990) that: "[t]he dichotomy between formal and substantive equality not only graphically highlights the elusiveness of the meaning of equality *per se*, but it also goes to the heart of Western liberalism. It is in the interests of the liberal state to obfuscate the meaning of equality and eschew any expression of aims which might endanger its legitimacy in the eyes of its diverse constituents." (p 15). See also the chapter on "Formalism and the Rule of Law" in Bottomley S & Parker S, *Law in Context* (2nd edition), Federation Press, Sydney, 1997.

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 chaos.

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". Again, independence of the legal profession is 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.** Natural justice in Administrative Law requires that a person be given a fair and unbiased hearing before being deprived of a legal right or interest. This requires that 1) he or she be given an opportunity to be heard; 2) he or she has a legitimate expectation that a legal right or liberty will not be unfairly withdrawn without a hearing; and 3) that the findings of the court will be based on logically probative evidence. Beyond this, however, there is the more general principle that 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.** It is an oft-quoted maxim that "justice delayed is justice denied", but a second limb could be added: "justice bought at great cost may be justice 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 number four in it. In addition, it is a requirement that the community be kept informed of the state of the law, social changes and trends requiring amendments to the law (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 inevitably play a large part in the fulfilment of this requirement - so freedom of the press, of information, and of communications are vital.

Such are the stated requirements for the existence of the (just) rule of law. It is unlikely that any nation-state in the world fully conforms to all these criteria in their idealised form - and sometimes important requirements are most notable by their absence. Consequently nation-states are scattered along the length of the "Rule of Law"/"Might is Right" continuum discussed earlier. If all or most of the twelve features noted above are present, the nation-state's location on the continuum will be more towards the "Rule of Law" extremity, and the climate will be conducive to the protection of human rights. It has been suggested, however, that in accord with the view of the rule of law as being in "dynamic equilibrium" an element of its opposite may enhance its stability - Walker sees this as a balance between pure law and pure power.[39] So the requirements should not be regarded as absolute. Their presence will, however, facilitate the acceptance, observance and incorporation into domestic law of acknowledged international standards and their protection in everyday life, whilst providing for the internal mechanisms for that protection.

Conclusion:

There are only two personal qualities required of those in power to ensure that human rights are protected, and they are qualities which have been frequently bandied about in legal arenas more in the form of platitudes than judicial pronouncements. They are "common sense" and "good-will" - and they too are imprecise terms. It is in circumstances where these qualities are absent that the rule of law must provide a backstop. Consequently, the rule of law is perhaps best viewed as a political rather than a legal concept,[40] for it stands at the interfaces of the judicial, the social and the legislative domains. At its most efficacious it might be considered to be a bulwark against oppression and a safeguard against the erosion of human rights - and it must be the "*just* rule of law" which, *in extremis*, performs these most powerful of roles. So it could be regarded (in the words of Professor Walker) as "the essential prerequisite of our whole legal, constitutional and perhaps social order"[41]. And yet others consider the concept of the rule

[39] Walker, note 14, p 47.
[40] As discussed by Dugard, note 18, p 45.
[41] Walker, note 14, pp 41-2.

of law as merely procedural: "[it is] certainly an important part of the make-up of individual liberty, but ... not everything."[42] Opinions differ - and the proof could be said to be in the *realpolitik*.

The fact that two continua have been alluded to above which relate to the rule of law (styled for convenience by their extremities as the "Rule of Law"/"Might is Right" continuum, and the Benignant/Malignant Law continuum) is indicative of the wide nature of the concept. There is no one rigid and inflexible "rule of law"; it is a concept which moulds itself to suit the prevailing circumstances. Contradictory values certainly intrude, but these are illustrative of the "dynamic equilibrium" view of the concept. For example, the requirement for stability and certainty in the law is inevitably counterposed against the need for flexibility and adaptability, and the requirement for an independent judiciary may sit precariously with the dangers of too-powerful courts. "We do not want judges to be too independent," noted Walker, "lest the rule of law degenerate into judicial tyranny."[43] The rule of law doctrine is consequently a means whereby balance can be achieved - a balance between power and regulation.

The moral responsibility of an individual who wields power within a society to inject qualities of common sense and good-will into his or her deliberations remains absolute, and the rule of law, necessary though it is, can never be a complete substitute. Quintessentially, a Good Society is dependent upon the motives of those who wield power, whereas jurisprudential checks and balances such as the rule of law strive for a subtly different outcome – that of a Just Society.

The motivation to create a Good Society must inevitably encompass, as a necessary step along the way, the creation of a Just Society. It can therefore truly be said that without the existence of the aforementioned qualities which underpin and delineate the just rule of law there can be no Good Society.

The rule of law, in a general sense, articulates values such as procedural fairness and due process which affect the form of legal rules and govern their manner of application. But it goes beyond a mere utilitarian approach and also acknowledges underlying principles of human dignity and autonomy. It cannot guarantee justice – but it is an essential precondition for it.

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[42] Dugard, note 18, p 45.
[43] Walker, note 14, p 42.

This, however, presupposes that rule of law delineates what *ought* to be, regardless of the fact that advocates of legal realism and sociological jurisprudence argue that rules of law (as distinct from "rule of law") should be seen as constitutive of *existing* practices and therefore devoid of moral force. The rule of law clearly has a moral dimension, not least of which is the human rights component. Indeed, however we define it, a "Good Society" requires at the very least that measures be taken to ensure that human rights are safeguarded – and in this respect the situation in Burma is most instructive.

Aung San Suu Kyi wrote in the 1990s:

> That just laws which uphold human rights are the necessary foundation of peace and security would be denied only by closed minds which interpret peace as the silence of all opposition and security as the assurance of their own power.[44]

These words are particularly apt in conclusion when juxtaposed against the words of the Chinese scholar Hsün-tzu, made some 2,300 years earlier in his treatise *The Way of the Emperor*:

> Therefore law is not sufficient of itself, order does not perpetuate itself. When the right man comes, law succeeds, but not otherwise. When the saint rules, general laws will meet all cases; but when the ruler is not a saint, no amount of legislation can be properly applied. When there is mis-application of law, disorder is at hand.[45]

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[44] Note 2, p 177.
[45] Note 19, p 123.