

2000

## The rule of law

Jim Corkery

*Bond University*, [Jim\\_Corkery@bond.edu.au](mailto:Jim_Corkery@bond.edu.au)

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

---

### Recommended Citation

Corkery, Jim (2000) "The rule of law," *The National Legal Eagle*: Vol. 6: Iss. 2, Article 2.

Available at: <http://epublications.bond.edu.au/nle/vol6/iss2/2>

This Journal Article is brought to you by the Faculty of Law at [ePublications@bond](mailto:ePublications@bond). It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of [ePublications@bond](mailto:ePublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

# The Rule of Law

By Jim Corkery, Professor, Bond University

THE TERM “KING HIT” is well known in rugby league and ice hockey circles. It is, of course, not a practice in rugby union. Today, being “king hit” means to be hit heavily when you are not expecting the blow. You do not often rise quickly after being “king hit”.

The origin of the term concerns “the rule of law”. Brilliant English Chief Justice, Sir Edward Coke felt the force of his King’s fist in 1608 when he gave King James I the unwelcome news that “The king is not subject to men, but is subject to God and the law”. James I thought he should not be subject to man made law. It was a revolutionary thought. Enraged, he felled Coke to the floor. Thus “king hit”.

James I claimed that his prerogative right was divine and that he, as monarch, was above the law, at least above the law made by other mortals. The Stuart kings, building on the great strength of the mighty Tudor monarchs - Henry VII and VIII and Elizabeth I - were asserting divine right, to be above laws made by the parliament or the courts. Most dictators and all tyrants do this. They do not wish to be accountable nor have their actions slowed by consideration of due process and observance of rights. And tyranny spells the end of your freedoms. It leads to the flouting of the proper processes that ensure that your basic freedoms and rights are respected.

There is a story recounted in the book *Starting Law* about the importance of the rule of law and how it should trim arbitrary and brutal conduct. A helicopter pilot in the Australian Forces was stationed near a small town. There the Australians were in an uneasy alliance with the occupying forces from another country which controlled the area. One of the local native men entered the Australian barracks and stole this young pilot’s track suit. The pilot reported the loss. The local man was arrested the next day. Radio to his ear, he had been cheerfully showed off his newly-acquired track suit down the town’s main street. Early next morning, the Australian pilots were called to parade. They were addressed righteously and at length by one of the occupying force’s military officers on the subject of honesty. The handcuffed local thief was marched before this assembly. Then, suddenly, the occupying force’s officer drew his pistol, put it to the thief’s head and executed the man on the spot. The young Australian pilot was shattered. He could not accept that his stolen tracksuit had led to this death. There had been no trial. No forum had considered the crime, punishment or the prisoner’s rights. The punishment was hopelessly disproportionate to the crime, even assuming the man had committed the theft. The pilot was horrified by the arbitrary taking of power by the officer and his ending of the life of another, almost on a whim. The pilot resolved that the only force that could deter such persons as the officer and curb such brutal and arbitrary acts was a well-developed, independent and effective legal system. A system where there was respect for the rule of law. So the young pilot studied law.

## What is the “rule of law”?

The “rule of law” has a specific meaning, although some use the term as a slogan meaning conditions under which men have dignity and freedom and governments are not tyrannical. We hear the term frequently, these days. It has become a political ideal or mantra.

Legal philosopher, Joseph Raz asserts that the rule of law is one of those virtues that a good legal system should possess. It is not the same thing as democracy or freedom or equality, or human rights. It has a separate meaning.

At its narrowest it means that governments (and rulers) should be ruled by the law and should be subject to the law. The governor or ruler is not also the supreme judge. He or she is subject to the law, like everyone else, and must follow and respect its procedures.

Take James I again. As James VI of Scotland was processing down from Scotland into England where he was to be crowned James I, king of England, there was a great caravan of subjects and nobles following him. Following them in turn was a motley group of hangers on and a few thieves. A few suspected thieves were gathered up and brought before the king. James I ordered their executions on the spot. The crowd, at least those who were not thieves, was happy. But Attorney General Edward Coke was not. The King had not followed any proper process in committing these men to death. There had been no trials. No objective taking and weighing of evidence. The crowd had demanded retribution. The rule of law might be under threat in this king’s reign, said Coke, prophetically. What the ruler would do for these executed men, he could do for others who stood in his way or troubled him. No one wants to live under someone’s unchecked whims. That almost invariably leads to tyranny.

### Summarising What the “Rule of law” Means

*In summary, the phrase means:*

- *the law is not flexible according to the whims of a ruler;*
- *the law applies to all, the powerful and the wealthy as to the poor and disadvantaged;*
- *judges ought to be independent of government and of mob influence;*
- *retroactive criminal laws, secret laws and all forms of arbitrariness are repugnant.*

In 1977, the famous Oxford University legal philosopher, Joseph Raz listed, in more detail, the components of the term:

- All laws should be prospective, publicised and clear.
- Laws should be relatively stable.

- The making of laws should be guided by open, stable, clear and general rules,
- The independence of the judiciary must be guaranteed.
- The principles of natural justice must be observed.
- The courts should be easily accessible.
- The discretion of the crime prevention agencies should not be allowed to pervert the law.

Even in medieval times, there was a notion of the rule of law. For example, towns required criminal laws to be read out aloud in the square, so that the people knew the laws and could follow them. Ordinary citizens then could also bring their claims to independent courts and often get redress for their complaints.



## The rule of law develops

On 10 June 1215, in Britain at a field near London called Runnymede, some essential elements of the rule of law gained expression. The highest nobles in England were called Barons. They were weary of the King raiding their properties and taking money and provisions to mount wars in Europe. The clergy were angry, too. They owned a good deal of land in England at that time. They wanted certain “rights” to be recognised by the King. The pulled on their armour and raided London, capturing the town. That’s how they got to Runnymede.

The Barons opposed absolute power in the king. They drew up a list of liberties. This list was called the Articles of the Barons. King John turned up. He was greeted with the proposal that the King was also subject to the law. The law existed on some level above the King, he was told. The rights listed in this document, called the Magna Carta, make good reading today. It talks, for example, about your rights at trial – there must be credible witnesses. You cannot be exiled or stripped of your rights except by the lawful judgment of your equals or by “the law of the land”. Individuals could not be picked on. The law should be the same for everyone. Official abuses, whim and inconsistencies in treatment, then, were the Magna Carta’s targets. Abuses of power. You could be fined only in proportion to your

offence. There were to be no special favours and no exceptional fines for some, at the whim of the officials.

It was this government by whim of the sovereign that attacked the Barons. Justin Fleming says in *Barbarism to Verdict* at 43: “For if the document lacked convincing, eternal, legal authority, the event in the meadow was a powerful symbol of the rising of a society against the whim and spasm of the ruling conscience... It signifies the authority of the people and the limits of kings”. In a nutshell, then, the people came to see themselves as the source of the law.

## Rule of law today

So, this term means that the law rules over all persons and institutions, great or small, monarchs and prime ministers and presidents and public officials, as well as ordinary citizens. A system that respects the rule of law runs according to legal principles that have general application. “Freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by the legislative power elected in it; and not to be subject to the inconstant, unknown, arbitrary will of another man”, said John Locke.<sup>1</sup> Adherence to the rule of law means that the executive arm of government – which includes the Ministers, the administrative tribunals, the civil service – must adhere to legal principles set down by statutes or the courts. Citizens can be assured that, when unforeseen situations and crises arise, the rule of law applies. Arbitrary arrest and punishment cannot occur. You are not punishable unless you have committed a breach of the statutory or common law. Known principles apply, and not foolish or unreasonable whims.

William Pitt, the great English politician, said; “Where law ends, there tyranny begins”. The rule of law is a bastion against tyranny. Law and the legal system can, of course, be usurped and misused by tyrants and manipulators. For that reason a legal profession steeped in traditions of honour, integrity and independence from politics is vital, too. It must be a noble profession. And if that nobility or integrity is attacked from within or outside, the attacks must be resisted.

The study of law makes you sensitive to “the approach of tyranny”, as Edmund Burke (in his speech on “Conciliation with America”) put it:

“This study [of law] renders men acute, inquisitive, dexterous, prompt in attack, ready in defence, full of resources ... they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They auger misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze.”

The fostering of the rule of law has been vital in modern western society, as democracy (government by the people) triumphed over absolutism (government by a despot who exercises absolute authority). Economic activity has been better under a rule of law regime, for rules that are stable, not whimsical and predictable, foster business. Predictability of law and its fair application to all persons and institutions encourage economic growth, it is asserted.

## Rule of law and colonial Australia

In NSW in 1807 corruption abounded. The highly lucrative rum traffic was a particular interest of the corrupt New South Wales Corps. Any Governor espousing the rule of the law was a threat to their economic power. The then Governor

<sup>1</sup> John Locke, “An Essay concerning the true original Extent and End of Civil Government” (1690) s 22.

Bligh tried to contain the rum traffic. In 1808 there came the Rum Rebellion, overthrowing Bligh's government.<sup>2</sup>

"The officers of the NSW Corps] became an aristocracy. They were allowed to engage in trade and agriculture; gradually, they obtained control of the imports, particularly spirits; and the consequences were that, within twelve months of [Governor] Phillip's departure, rum became the recognised medium of exchange. So much so that even labour could only be purchased with spirits. Under this system, the officers reaped enormous harvests."

When the revolt flared, Governor Bligh tried to evade capture. To their glee, the rebels found him hiding under a feather bed.<sup>3</sup>

For two years, the rebels ran the colony. The rule of law, such as it was, had been put aside. Reforming and effective NSW Governor Lachlan Macquarie arrived in 1810. Prudently, he brought his own regiment, and reinstated good government.<sup>4</sup> With him came a qualified lawyer, the 27 year old, inappropriately-named Ellis Bent. Bent became Judge-Advocate, the colony's second professionally-qualified judge (after Richard Atkins). He clashed often with the Governor, but he was intent on establishing the elements of the rule of law in NSW. Bent objected to the military nature of the criminal court, the conflicting roles of the Judge-Advocate (he was both prosecutor and judge in criminal matters), and the interference in the administration of law by the Governors. Bent wanted to move NSW from an open gaol to a free society; from arbitrary power to government on constitutional principles. He recommended reforms – such as removal of the military character of administration, fostering of a legal profession (he suggested that two barristers and two solicitors would be induced, by land and cattle grants, to settle in the colony), and trial by jury. William Wentworth also championed trial by jury, which finally came in 1833.

## Case Studies: Malaysia

One case study of the rule of law under threat is provided by Malaysia in 1999. The Deputy Prime Minister, Anwar Ibrahim was arrested under corruption charges under an exceptional statute - the Internal Security Act. Not under the Criminal Code. Anwar was then beaten in custody by the nation's police chief. Anwar was not released, after this atrocious assault. He was charged, and then the charges were changed during the trial. His lawyers claim they were harassed. Australian Prime Minister Howard called this episode "a lurch towards authoritarianism". In short, there was a failure of the sort of due process that the framers of the Magna Carta were concerned about. There was a failure in the proper application of the rule of law. The judges had been placed under pressure to abandon neutrality and side with the powerful ruler.

In the previous decade, in 1988, the top judge in Malaysia, Lord President Tun Mohd Salleh Abas, was asked to step down from his post by the Prime Minister and the King, following the judge's public protestations over government criticisms of the judiciary. Then, five Supreme Court justices were suspended, two being dismissed later.

The International Commission of Jurists condemned this episode as an attack on judicial independence. It protested the dismissal of the highest judge in the land, the "unpersuasive" report of the Tribunal that recommended dismissal, "[t]he campaign of attacks on the judiciary and on the rule of law in Malaysia by the Prime Minister of Malaysia", and the inclusion in the Tribunal considering the "misbehaviour" of the Lord President of a person likely to become Lord President if the incumbent departed.

## The favourite case study – Nazi Germany

Nazi Germany provides the most dramatic recent example of the Total State. How did the rule of law fare there? What happened to the judiciary and to lawyers in that regime?

The Nazis took power in Germany in 1933 when Hitler became Chancellor. Judges and legal scholars immediately came under great pressure. The State was planning to act dramatically and without due process in dealing with perceived enemies of the state. There was an end in view – the increase in power of Germany. All things were to be seconded to that aim. Including the justice system. So Hitler said in 1942: "Justice is no aim in itself. ... Its task is simply to serve that purpose [to maintain man's social order]".

Justice had to be subsumed into the leadership. The leader could have no law other than himself. "The Fuhrer protects the law from its worst abuse if, in the moment of danger, he creates immediate justice on the authority of his leadership and thus of his supreme judgeship. 'At this hour I was responsible for the fate of the German nation, and was thus the supreme judge of the German nation'. The true leader always is a judge as well." These are the writings of a German legal academic, Carl Schmitt (1940), who wanted to justify the new order.

One event triggered the systematic abuse of the rule of law that the German nation under Hitler suffered, leading to the abominations of the mass executions of Jews and others.

On 30 June 1930, the first major breach of the rule of law in Germany came with what is called the Roehm Purge. Ernst Roehm had been a decisive organiser for the Nazis, a popular, rough and tough leader. He was in charge of the Nazi private army – called the "Brownshirts" or SA or Stormtroopers. The SA numbered 4 million men. It was a powerful organisation, much more numerous than the official army of Germany, the Reichwehr.

Roehm was at heart a revolutionary. He thought Hitler and the other leaders were too soft. He wanted the Nazis to push on further with socialist reforms and thoroughly remove the power of the privileged and old powerful classes in Germany. He criticised the Nazi regime's attacks on the unions and its attacks on freedom of opinion. He said of Hitler: "Adolf is rotten. He's betraying all of us. He only goes around with reactionaries..." Roehm wanted his army to absorb the smaller Reichwehr. Hitler decided to remove Roehm, who had outgrown his usefulness in the pursuit of power.

Roehm and dozens of others, not just army chiefs, were

<sup>2</sup> The Royal Australian Historical Society's Journal vol II, p 195.

<sup>3</sup> Bligh has been characterised as a brutal and ruthless Governor. But history is looking more kindly on him. HV Evatt (1894-1965, Labor politician and High Court judge) in *Rum Rebellion* (1938) painted Bligh as principled and courageous. Bligh had tried to repair a corrupt system in NSW and was the heroic victim of the unscrupulous wealthy trading monopolists and the New South Wales Corps.

<sup>4</sup> In 1821, when he sailed home to Britain, Macquarie said: "I found NSW a jail and left it a colony. I found a population of idle prisoners, paupers and paid officials and left a large free community thriving in the produce of flocks and the labour of convicts."

charged with being opponents of Hitler. They were variously charged with having “pervert dispositions”. They were accused of being in a “plot” and of being in “opposition”.

One victim, SA Gruppenfuhrer Ernt was about to go on his honeymoon when he was arrested. He thought it was all a honeymoon prank and joked with the arresting officers until he was put up against a wall and shot, his last words being an astonished “Heil Hitler”. He had seen, on his way to execution, newspaper headlines on the posters saying that he had already been executed - again he thought it was part of an elaborate ruse to celebrate his marriage.

A music critic, Dr Willi Schmid, was shot, although he had never been engaged in any activity but music. He had been confused with SA Gruppenfuhrer Wilhelm Schmidt.

The killings took place anywhere – on the streets, in their offices, in their homes, in the forests, wherever they were found.

Hitler approved these arbitrary executions. His authority only was enough. This was the Nazis’ first major affront to the rule of law. These killings were arbitrary and ignored due process. The victims had been sentenced, in private, of offences, the true nature of which was never articulated or deliberated on by an independent judiciary.

Joachim C Fest in *Hitler* (1974) at 465: The Roehm purge “represented a break with [Hitler’s] tactical imperative of strict legality”. He had now abandoned any semblance of justice and due process. There were no trials; there was no presentation of evidence or advocacy; there were not even any judgments; no inquiries into guilt or innocence. The Nazis’ end was power and all things bent to that. The means were not important, as long as the end was served.

The popular General Roehm waited his fate in his cell. Hitler dithered. He harboured some sentiment for this old and loyal warhorse of the Nazi Party. But other leading Nazis demanded decisive action from the Fuhrer. The decision came. Roehm was handed a pistol in his cell and told he had 10 minutes in which to do the decent thing. The officers left the cell, but no sound came from inside for the 10 minutes. They wanted to retrieve the loaded gun, so they went in firing. Roehm was waiting for them with his shirt melodramatically stripped off his chest.

The Nazi Cabinet met some days later. The Cabinet Minutes had but one sentence on the matter: “The measures taken on 30 June and 1 and 2 July to suppress treasonous assaults are legal as acts of self-defence by the State”. Hitler was halting and clumsy when explaining himself to the Reichstag (Parliament) 10 days later.

These arrests and killings were decisive breaches of the rule of law. The public of Germany were shocked. They knew that predictable and justice-based orderliness had gone. Hitler was now to be supreme judge, and his ways would often be whimsical. Strong people were intimidated. There would be little protection any more from arbitrariness.

Judges now knew they had to toe the line. They joined the obligatory Nazi organisations. They were careful to adopt Nazi terminology. They passed harsher sentences than they had before. New “political” appointees to judgeships grasped the new elitist and racist theories and ideology and applied them with ruthless enthusiasm. The People’s Court was established in 1934. It was to deal with crimes against the state. Judges like Roland Freisler (1893-1945) abandoned all pretence of judicial impartiality and attacked accused persons from the Bench with amazing vitriol. Defence Counsel in

some cases abandoned their clients, knowing that strong defence of them would lead to retribution.

The introduction of the prison camps and the sending of people there was accomplished without any recourse to established judicial procedure. The “rule of law” was ignored. The “laws” here were the whims of a ruler acting tyrannically; the Roehm group had no right of appeal or redress; the “laws” applied were secret and arbitrary dictates of the leader. They were not made by the legislative power elected to, make such rules; they were the result of the “inconstant, unknown, arbitrary will of another man”, to use John Locke’s words. In 1930s Germany, then, state genocide and terrorism were instituted, tolerated, and then flourished when opposition to the undermining of the rule of law became almost impossible.

The success of the terrorism of those few days of the Roehm Purge emboldened the dictator. The principles of the rule of law were not going to be a problem, he now knew. Breaches of the rule of law and the installation of morally intolerable laws would become normal. From the Roehm incident, a direct line can be traced to the monstrous extermination practices under the Nazis.

## Fiji?

Coming forward some 60 years, we see similar disrespect for the rule of law in the recent Fiji Coup of May 2000. Consider the following reports from *Time Magazine* and be prepared to discuss how the rule of law was flouted in these events.

### *Time Magazine 29 May 2000:*

Seven men armed with AK-47s stormed Fiji’s Parliament and detained Prime Minister Mahendra Chaudhry and his ethnic-Indian-dominated government. Their leader, George Speight, a former timber industry official, said the group had executed a civil coup on behalf of the indigenous people of Fiji and named government M.P. Timoci Silatolu as the new Prime Minister. As rioters looted and burned shops in downtown Suva, President Ratu Sir Kamasese Mara declared a state of emergency. Speight and his accomplices did not appear to have the support of the military. Sitiveni Rabuka, the former army strongman who seized power in a 1987 coup and lost it to Chaudhry in free elections a year ago, asked the group to reconsider their action.

The hostage crisis in Fiji’s Parliament entered its second week as coup leader George Speight rejected an offer from the powerful Great Council of Chiefs to pardon him and his co-conspirators, appoint a new government that would include some of Speight’s supporters, and give “special attention” to reviewing the constitution. On Saturday, hours after a skirmish between government soldiers and coup supporters in which two soldiers and a journalist were wounded, President Ratu Sir Kamasese Mara announced that he had dismissed the captive, democratically elected government, leaving him to “run the country in the coming months.” The U.N. and Fiji’s Pacific neighbors have condemned the coup and urged Fijians to restore the democratically elected government.

**Radio National’s Law Report** with Chris Richards in Program number 361, Tuesday 19 September 2000 dis-

cussed "Making Law Out of Chaos". Chris Richards and Sian Prior summarise the program:

"This week The Law Report looks at the difficult task of re-establishing legal systems in states which have been recently ravaged by war.

The challenge has always been to demonstrate that there are other ways of effecting change and pursuing justice than at the point of a gun.

Australian lawyers have been working to meet that challenge in nations like Cambodia, Vietnam, East Timor and Somalia.

Mark Plunkett from Griffith University's Centre Key Centre for Ethics, Law, Justice and Governance, and Lieutenant-Colonel Mike Kelly from the Australian Defence Forces, explain how you go about transforming the rule of war into the rule of law in nations which have been dominated by warlords and militia-men. Melbourne solicitor Gerard Bryant describes the 'woeful lack of resources' hampering those who are attempting to establish a judicial system in East Timor. Two old computers, no printer and hardly any pens or paper for the judges and lawyers in the Dili District Court, for example... But with the help of a mentoring system organised by Australian lawyers, and a forthcoming funding appeal by the International Commission of Jurists, international supporters of the rule of law are hoping to provide both peace AND justice in East Timor.

And Melbourne University lawyer Gillian Triggs talks about some peacekeeping and legal training projects in Vietnam and Mongolia which are being privately-funded, rather than government-sponsored. She points out that the

learning process works in both directions - in fact Western lawyers can learn a lot from their Asian counterparts about cooperation and mediation."

### Questions for Discussion:

- (1) *What are the "other ways of effecting change and pursuing justice than at the point of a gun"? (referred to in the Radio National Report item above)*
- (2) *Why do the writers of this extract write "peace AND justice" with that special emphasis on the word AND?*
- (3) *Discuss what Gillian Triggs means when she asserts that "Western lawyers can learn a lot from their Asian counterparts about cooperation and mediation."*
- (4) *If all the students in your school were cast away on a desert island together for 5 years, do you think you would live by a rule of law? What do you think would be the most important laws that you would have to "enact" and observe? How do you think you would deal with disputes? How do you think the physically strong or the intellectually clever would conduct themselves? Can you imagine circumstances when you might give absolute power to one of your number to govern your lives on the island?*