

**COMMENTARY ON THE IBA COUNCIL'S RULE OF LAW RESOLUTION OF
SEPTEMBER 2005 (DRAFT TO BE CONSIDERED AND ADOPTED AT THE IBA
ANNUAL CONFERENCE IN BUENOS AIRES IN OCTOBER 2008)**

**КОММЕНТАРИЙ К РЕЗОЛЮЦИИ СОВЕТА МАЮ О ВЕРХОВЕНСТВЕ ПРАВА ОТ
СЕНТЯБРЯ 2005 г. (ПРОЕКТ, ПОДЛЕЖАЩИЙ РАССМОТРЕНИЮ И ПРИНЯТИЮ
НА ЕЖЕГОДНОЙ КОНФЕРЕНЦИИ МАЮ В БУЭНОС-АЙРЕСЕ В ОКТЯБРЕ
2008 г.)**

To: IBA Council

From: Francis Neate, Chair, Presidential Taskforce on the Rule of Law

Date: August 2008

Re: Commentary on the Rule of Law

The Rule of Law

At its meeting in Prague in September 2005, the Council passed an important Resolution in which it set out some of the essential characteristics of the Rule of Law and called upon all members of the IBA “to speak out in support of the Rule of Law within their respective communities”. Since then, we have held three Symposia on the Rule of Law -in Chicago, Moscow and Singapore — and a fourth will be held on the last day of our conference in Buenos Aires. Sessions on the Rule of Law have also been held at the last two Bar Leaders’ Conferences. One regular refrain in these discussions has been a desire for clarity about the meaning of the Rule of Law.

Accompanying this note is a Commentary on the Council’s Resolution of September 2005. I produced a first draft of this and made it available at the Bar Leaders’ Conference in Zagreb in May 2007. I also circulated it widely among the membership inviting comment. A subsequent draft was made available at the annual conference in Singapore and yet another at the Bar Leaders’ Conference in Amsterdam last May, at all times inviting comments.

Many comments have been received and many of these have been taken into account in the attached document. It has also been discussed and approved by the Policy Committee of the Bar Issues Commission and by the Presidential Rule of Law Taskforce. I am especially grateful to Justice Richard Goldstone, Hans Corell and Michael Kutschera, each of whom has been careful to understand the deliberately limited scope of the document and tailored many constructive comments accordingly. I am also grateful to Mark Ellis who advised me at the outset NOT to attempt a definition of the Rule of Law, a task which might keep the lawyers of the world engaged in intensive debate for many years. Accordingly, the attached document — described as a “Commentary” on the Council’s previous Resolution — attempts (as it explains) merely to describe the minimum essential characteristics of the Rule of Law and explain and develop the reasoning behind the Resolution. Many other comments on the previous drafts of the document were not incorporated because they aimed to widen the scope beyond this very limited aim.

It may well be that the Council would like to authorise an attempt to produce a more ambitious document, possibly as far as a definition of the Rule of Law. That could be a task for the future. For the present, it seems sensible to concentrate on the more limited aim of a document with which no-one can disagree. I hope that this is what, after extensive consultation within the Association, I have achieved.

It would be wonderful if the Council were willing simply to “approve” or “adopt” the attached document. However, in the expectation that this may be asking too much, the Policy Committee of the BIC supports the proposal that the following Resolution be passed by the Council at its meeting in Buenos Aires:

“The Council welcomes the Commentary on its Resolution of September 2005 presented to this meeting as a helpful explanation and useful development of the reasoning behind the Resolution”.

Francis Neate

INTRODUCTION

The following is the text of the Resolution passed by the IBA Council in September 2005:

“The International Bar Association (IBA), the global voice of the legal profession, deplores the increasing erosion around the world of the Rule of Law. The IBA welcomes recent decisions of courts in some countries that reiterate the principles underlying the Rule of Law. These decisions reflect the fundamental role of an independent judiciary and legal profession in upholding these principles. The IBA also welcomes and supports the efforts of its member Bar Associations to draw attention and seek adherence to these principles.

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment, a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law; these are all fundamental principles of the Rule of Law. Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.

The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all. It ensures adherence to principles that both liberate and protect. The IBA calls upon all countries to respect these fundamental principles. It also calls upon its members to speak out in support of the Rule of Law within their respective communities.”

Only two votes were cast against this Resolution. At the next meeting of the Council, the two members who voted against the Resolution declared their support for it and explained that they had only voted against it because they wanted it to be “stronger”. It can, therefore, be fairly said that the Resolution was passed without a single dissenting vote.

The IBA is the largest international organisation of lawyers in the world, its membership comprising about 195 Bar Associations and Law Societies from almost every nation and more than 30,000 individual lawyers, many of whom are leading international practitioners in their chosen fields. The IBA Council is the supreme governing body.

The Resolution is, therefore, an authoritative statement on behalf of the world-wide legal profession. However, it does not purport to be complete. It merely sets out **some of the essential characteristics** of the Rule of Law in a way which could be endorsed by the IBA Council and should command world-wide respect.

Since the Resolution was passed, it has become apparent that there may be some respects in which the scope of the Resolution can be expanded; and that it may also be helpful to offer an explanation of the reasoning behind the Resolution. This paper is an attempt to meet these limited objectives. It does **not** purport to be a definition.

PART I THE FOUNDATIONS

The Rule of Law is the only mechanism so far devised to provide **impartial control of the use of power by the State**. That single sentence is sufficient to explain why the Rule of Law is pre-eminently the best available system for organising civilised society.

The Rule of Law is referred to in the preamble to the Universal Declaration of Human Rights (see Note (1) below) and in other subsequent international treaties, without being defined. The relationship of the Rule of Law to other important concepts, such as Democracy and Human Rights, is discussed in Part III of this paper.

The Rule of Law is a relatively recent and developing concept. It has taken centuries for the Rule of Law to take root even in those countries which now claim to adhere to it. Those countries which, in the nineteenth century, would have claimed to be governed by the Rule of Law, have a very different view of its requirements today. Many other countries, in particular those emerging from colonial status or from various other forms of tyranny, have only recently had the opportunity to begin the attempt to establish it. It is arguable that there is no country which can claim to comply fully with its requirements.

This is why the IBA Council has not attempted to provide a definition of the Rule of Law (see Note (2) below). Rather, it has simply provided a list of some of the essential characteristics (described in the Resolution as “fundamental principles”) of the Rule of Law.

These are discussed in more detail in Part II of this paper. It may well be that, in time, it will be possible to identify other essential characteristics, or to expand upon those already listed. However, all these characteristics essentially rest upon two pillars:

- (1) Submission of all to the law
- (2) The separation of powers.

(1) Submission of all to the law

The “Rule of Law” means exactly that: the law is the ruler, the supreme authority. No-one is above or beyond the law. Everyone is subject to and governed by the law.

Experience suggests that the only way to control power is by countervailing power, not by an abstract concept such as law. It follows that the Rule of Law can only operate in a society in which it receives widespread acceptance — not just majority acceptance, but widespread acceptance. It is essential that the organs of state power — the executive branch of government, the armed forces, the police, the security services, even the Legislature and the Judiciary — all accept that they are subject to the law; and that, therefore, they may only exercise such powers as are granted to them by the law and in a way consistent with the law. It is also essential that the vast majority of the other members of society accept that they are subject to the law, even if they feel disadvantaged by it. If a sizeable minority feel themselves so disadvantaged that they have no option but to resort to disobedience or violence, civil unrest or even civil war will result.

It follows that the law must be identified, devised and administered in such a way as to continue to receive widespread acceptance within society. This requires **a culture of respect for the Rule of Law** which can take a long time to develop, and much care to maintain. “Acceptance” does not mean “approval”: nevertheless, it is this requirement for widespread acceptance which demands attention to minority rights and individual human rights. The law is unlikely to receive widespread acceptance unless it is widely regarded as reasonable, proportionate and fair.

Acceptance does not just mean obedience enforced by fear. It means respect for the body of law in general, which is demonstrated by voluntary overall compliance with the law. Experience suggests, however, that even a reasonable body of law will not continue to be acceptable to the members of a society if their basic economic needs cannot be satisfied over a significant time period.

The requirement of widespread acceptance means that the law must be responsive to the needs of the people it serves. Thus, over time, an extensive body of criminal, administrative and civil law will be developed. In many countries much of this process will take place long before the country in question can even begin to claim to adhere to the Rule of Law. All countries, even those governed by the crudest dictatorship, need or have laws, although they disregard the individual or collective rights of all or parts of the population. Indeed, apartheid was enforced with meticulous attention to legal form and detail.

If acceptance of the law can be achieved, it must be supplemented by enforcement. Acceptance of the law is irreconcilable with extensive tolerance of breaches of the law. Enforcement is a process which must itself be subject to the law.

A fair, independent and efficient process for resolving disputes between citizens and punishing criminality is, clearly, a fundamental requirement of any legal system. It is likely, therefore, that such a process will be provided by many legal systems which do not in other respects adhere to the Rule of Law. Accordingly, the IBA Council’s Resolution scarcely refers to this aspect of a legal system at all, although it would be the first characteristic which would spring to mind for many. The inclusion of this requirement among the minimum essential characteristics of the Rule of Law could encourage countries which disregard the Rule of Law in other, crucial respects, to claim adherence to it and thereby deflect attention from their shortcomings.

The law will continue to change and develop in response to the changing and developing needs of its citizens even when the foundations of the Rule of Law are in place. Indeed, the more responsive the law is to need, the more change and development is likely to occur.

The provision and administration of the Rule of Law is expensive. It is a necessity required by all, but that does not lower its price.

(2) The separation of powers

This is the other cornerstone of the Rule of Law. The primary obligation of the State is to maintain internal order and to protect its citizens from external threat. The Rule of Law does not seek to diminish the power of the State. It seeks merely to assure its proper exercise. This is achieved by separating those who make the law (the Legislature), those who interpret and apply the law (the Judiciary) and those who

have the power to enforce it (the Executive), each from the other. No-one has yet come up with a better formula. The three branches of government are not inherently hostile to each other. They work together under the Constitution and the Rule of Law, and at times their functions overlap. But the separation of their essentially different constitutional tasks must be jealously guarded.

The independence of both the Legislature and the Judiciary is, therefore, a fundamental requirement of the Rule of Law. In practice a perfect and complete separation of powers is difficult, if not impossible, to achieve: there has to be a system of checks and balances to ensure that the process of selecting and remunerating the persons entrusted with the respective powers does not compromise their independence.

As to the Legislature, it is difficult to conceive of an appropriate system of appointing it which does not involve a democratic vote. In many countries, the head of the Executive (President, Prime Minister or similar) is the leader of the majority party in the Legislature. In such cases, considerable vigilance is required to ensure that the Executive's control of the Legislature is not abused. Indeed, it is difficult to conceive of a system in which the Legislature is wholly free of influence by the Executive.

Many countries have a written constitution which guarantees, usually subject to exceptions, certain fundamental individual and minority rights. In these cases, extreme vigilance is required when the exceptions are invoked, and an even greater responsibility falls on the Judiciary, whose independence becomes all the more important.

There are similar issues in relation to the appointment of the Judiciary. It is fundamental to the Rule of Law that the system of appointment of the Judiciary does not impair the Judiciary's independence from influence by the Executive or the Legislature. Even more important is the requirement that the Judiciary, once appointed, should be free from any threat of removal or other form of intimidation from the other arms of government. Respect for the Rule of Law requires that there be independent, transparent mechanisms for the removal of judicial officers found guilty of misconduct, but it is essential that such mechanisms are beyond manipulation by other arms of government and do not undermine the independence of the Judiciary.

In addition, an independent Judiciary requires an efficient, functioning court system and a strong, independent, properly qualified legal profession to support it. An independent legal profession is also fundamental to the maintenance of citizens' rights and freedoms under the Rule of Law, so that they are guaranteed access to independent, skilled, confidential and objective legal advice. Similar principles are required to protect the independence of the legal profession as for the Judiciary.

These fundamental requirements of the Rule of Law also call for the highest standards of skill, professionalism and integrity among the Judiciary and the legal profession. If these are not maintained, confidence in the legal process will be undermined. So will the necessary culture of respect for the Rule of Law. If this happens, the Executive and Legislative branches will be both tempted and enabled to interfere in the processes which protect their independence.

States of emergency

The Rule of Law is most likely to come under threat, even in countries which claim to abide by it, in times of war or other emergency, when the Executive is most likely to seek and the people most likely to be willing to grant it exceptional powers. This is a time when the utmost care and calm, rational consideration is required and when it is least likely to be provided. In such cases, the absolute necessity for a rigorous separation of powers becomes all the more important, because it will be the Executive which calls for the exceptions and it will be for the Legislature to create and for the Judiciary to interpret and oversee them. A proper balance must be struck. Even in such cases, exceptions to the fundamental requirements of the Rule of Law should not be admitted, otherwise the society in question will risk self-destruction. In many countries, the threat of war, counter-revolution or other emergency is frequently used as an excuse for not introducing the Rule of Law in the first place.

Against this background, it is appropriate to examine the details of the IBA Council's Resolution. As already mentioned, the Resolution does not purport to be a definition: it merely sets out some of the **essential characteristics** (described as "fundamental principles") of the Rule of Law. These characteristics can be deduced from the twin pillars which constitute its foundations.

PART II
THE IBA COUNCIL'S RESOLUTION

In light of the foregoing, it is appropriate to consider in turn each of the characteristics listed in the Resolution:

(A) An independent, impartial judiciary

This has been discussed in Part I above.

(B) The presumption of innocence

This is a fundamental aspect of the requirement of a fair trial. In essence, it is the requirement that the burden of proof must rest with the accuser to establish guilt, not with the accused to establish innocence. In cases where people may be branded as criminals and face serious penalties, it admits no exceptions.

(C) Fair and public trial without undue delay

The essential elements of a fair trial include that the accused must be fully and promptly informed of the offence which he or she is alleged to have committed and of the evidence which will be adduced in support; and that he or she be entitled to be advised and represented by an independent, properly qualified lawyer of his or her own choice.

The independence and integrity of the advice and representation he or she receives can only be guaranteed if the legal profession is as fully independent as the Judiciary and if communications with his or her legal advisers are completely confidential.

The concept of a fair trial is a matter of legal process and the legal systems in many countries have developed the details over many years. This accumulated wisdom cannot and should not be ignored. It will invariably be the Executive which argues that these fundamental requirements of the legal process should be reduced. For that reason alone, such arguments should be rigorously examined and the fundamental principles of the separation of powers rigorously applied.

The requirement of a public trial is a specific aspect of transparency and is presently, in some countries, a subject of controversy. It is possible that, in certain unusual circumstances, it will be argued that a trial (or at least some parts of it) should be held in secret, in the interests of national security. These arguments will invariably be put forward by the Executive and should, therefore, be rigorously examined and the fundamental requirements of the separation of powers rigorously applied. It is important that the political interests of those in authority not be equated with the national interest.

There will also be cases where it will be appropriate, in the interests of justice or protection of the parties (e.g. a child), for the proceedings to be held in secret. Such cases should be confined and very carefully considered.

(D) A rational and proportionate approach to punishment

A rational and proportionate approach to punishment is the alternative to cruel or degrading treatment or punishment which is expressly stated to be unacceptable later in the Resolution. It is the only rational alternative. Rationality, proportionality and fairness lie at the heart of the Rule of Law.

(E) A strong and independent legal profession

This has been discussed in Part I above.

(F) Strict protection of professional secrecy/confidential communications between lawyer and client.

This has been referred to above. It is an essential element in the protection of the individual from the power of the State and in building confidence in the administration of justice.

(G) Equality of all before the law

The starting point for the Rule of Law is that every individual is entitled to the same level of dignity and respect; and that every individual should have the same (or, at least, broadly similar) rights and obligations. An abstract concept such as the Rule of Law can only start from this rational base. To reiterate, rationality, proportionality and fairness lie at the heart of the Rule of Law. Distinctions between individuals must, of course, be made, for example between adults and children (to take an uncontroversial example) — that is an essential part of the legal process — but these must be made rationally and

proportionately, strictly in conformity with the fundamental principles of the Rule of Law and in accordance with the processes for law-making and law enforcement required by the Rule of Law.

(H) Arbitrary arrests; secret trials

These prohibitions require no elaboration.

(I) Indefinite detention without trial

Indefinite detention without trial is contrary to the Rule of Law. There are no exceptions. The key word is “indefinite”. It cannot be disputed that those accused or reasonably suspected of violent conduct can properly be detained pending trial, subject of course to independent judicial scrutiny at every stage, which is the key component for ensuring the maintenance of the Rule of Law.

(J) Cruel or degrading treatment or punishment

The phrase used in the international conventions is “cruel, inhuman or degrading treatment or punishment”. This encompasses torture. There are obvious reasons why cruel or degrading treatment of human beings is unacceptable. In addition, it is clear that evidence obtained by such methods is unreliable. There are no exceptions to the rule forbidding such behaviour.

(K) Intimidation and corruption

The IBA Council’s Resolution is clearly defective in that it refers only to intimidation or corruption “in the electoral process”. Clearly, intimidation or corruption of any kind, in any part of the legal, administrative, legislative or electoral system, is inimical and contrary to the Rule of Law. There are no exceptions.

(L) A transparent process

Confidence in the system of governance in any society cannot be maintained unless the process is open and transparent. This does not mean that no communication can be treated as confidential. Indeed, one example has already been given where confidentiality is essential to the administration of justice, and there will be many others where it will be appropriate to impose an obligation of confidence. However, wherever it is claimed that an obligation of confidence should be recognised in any part of the legal, administrative or legislative system, the burden must rest on those claiming it to establish that the confidentiality is in the best interests of the system.

This also does not mean that an individual’s right of privacy should not be respected. Freedom of information, opinion and expression, although not mentioned specifically in the Resolution, are necessary aspects of transparency. Freedom of information and freedom of opinion are (subject to legitimate rules on secrecy and obligations of confidence) fundamental to the Rule of Law. Freedom of expression, on the other hand, is a more complex issue: one obligation inherent in any society is that opinions should not be expressed in a manner unreasonably offensive or provocative or unfairly damaging to other members of that society. Thus, most societies governed by the Rule of Law will be likely to legislate some limits on freedom of expression. Any such limits need to be rigorously examined to ensure that they do not limit freedom of information or opinion; any which limit reasoned criticism of others should be viewed with suspicion; and any which limit criticism of any part of government should be viewed with the utmost suspicion.

(M) Accessible and equal to all

The law must not impose any artificial impediments on an individual’s ability to exercise his or her rights under the law. Financial impediments will always exist for some and it is an obligation of every society which abides by the Rule of Law to mitigate these to the extent practicable.

The law must be readily known, available in advance and certain and clear.

Retrospective law is almost invariably unacceptable.

In modern societies, the law is becoming increasingly complex. This forces the conclusion that a strong, independent legal profession is all the more important to a modern society adhering to the Rule of Law.

PART III FURTHER COMMENTS

It may be helpful to discuss briefly the relationship between the Rule of Law and other concepts with which it is closely associated:

- Politics The political process in a society governed by the Rule of Law is that by which the society debates and settles its differences and determines the rules by which it is governed. In a society not governed by the Rule of Law, the political process instead consists of an effort to persuade those with power not to exercise it, or to exercise it in a particular way. That is pleading, not free political debate. Thus, the Rule of Law is not part of every political process, rather it underpins and guarantees a proper process.

- Democracy It is clear that democracy cannot exist in a society without the Rule of Law. (This does not mean that a democratically elected government cannot or will not undermine the Rule of Law.) It is not so clear that universal adult suffrage is an essential characteristic of the Rule of Law, but it will probably be the ultimate outcome in a society which develops and lives by the Rule of Law. Universal adult suffrage is a relatively recent phenomenon, dating (for example) from 1920 in the U.S. and 1928 in the U.K. Development of the structures within a society which support and maintain the Rule of Law can be a slow and tortuous process. However, it will become apparent as these structures are developed that the principal function of the law is to meet the needs of its citizens, and an extensive body of criminal, administrative and civil law will be constructed. Much of this process may well occur before the foundations of the Rule of Law are established; indeed, they may be part of the process whereby those foundations are established.

- Reform The law, by its very nature, will tend to favour the status quo, because that is its function. This will inevitably be a cause of frustration to those who wish to reform their society. In a country whose constitution contains certain basic human rights, reform may be easier to achieve. This is not the place to discuss the morality of using violence to bring about reform within a society, or to advocate reform by enlightened but authoritarian rule. It is, however, relevant to point out that a society which ignores the justifiable grievances of a significant proportion of its members is unlikely to maintain the widespread acceptance of the Rule of Law which is fundamental to its survival.

- Justice The law is the law. It does not invariably deliver justice, nor would any realist claim that it did or could always do so. Apart from unavoidable cases of injustice in individual cases due to human imperfection, every system governed by the Rule of Law will have rules to protect public order or achieve other goals which are considered so important that injustice in individual cases may occur, for example periods of limitation, limitations on rights of appeal against decisions by courts or governmental authorities, and the rule of res judicata. Nevertheless, the delivery of justice must be its aim, if only to maintain widespread acceptance within society. The Rule of Law is not the same as justice, but you cannot have justice without the Rule of Law.

- Freedom The law limits freedom in many ways, so it can hardly be regarded as synonymous with freedom. However, its principal functions are (i) to liberate citizens from the tyranny of unrestrained state power and (ii) to protect citizens from exploitation or domination by others within society with greater power. The Rule of Law “both liberates and protects”.

- Human Rights Equally, the Rule of Law cannot be regarded as synonymous with human rights. Some human rights, as discussed above, are necessary basic principles of the Rule of Law, others are more contentious — often a balance has to be struck between some rights and others, and different societies will arrive at different answers, using a political process underpinned by the Rule of Law. You cannot have human rights without the Rule of Law, but all human rights are not necessarily part of the law in every society governed by the Rule of Law. However, most countries are party to some or all of the relevant international conventions, notably the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Vienna Convention on the Law of Treaties; the United Nations Convention Against Torture; and the relevant regional instruments such as the African Charter on Human and Peoples’ Rights; the American Convention on Human Rights; the Arab Charter on Human Rights; and the European Convention on Human Rights. These are in addition to the various conventions and their optional protocols relating to the rights of the child, the elimination of racial discrimination and discrimination against

women. It is, therefore, appropriate to refer to these provisions, as well as the Universal Declaration of Human Rights, in any discussion of the extent to which a country adheres to the Rule of Law.

The Rule of Law is at least as much concerned with process as it is with the content of the law. If the processes whereby the law is created and enforced are rational, proportionate, fair and transparent, it is likely that the law will receive the requisite widespread acceptance and will not merely reflect the will of a single individual or group within society.

The Rule of Law is a relatively recent and fragile phenomenon, even in those countries where it is commonly regarded as well-established. Every country has to find its own path towards establishing the Rule of Law and no country can afford to be complacent once that has been achieved.

In the pursuit of a just society, the Rule of Law is the beginning, not the end.