

INTERNATIONAL ACADEMY OF TRIAL LAWYERS



Rule of Law

Address by President Paul Sreenan SC to the Mid-Year Meeting of the International Academy of Trial Lawyers in New Orleans, October 2022.

Dear Fellows & Guests:

It is my great pleasure firstly to announce to you the establishment of a new program in the Academy. It is called the Rule of Law Education & Advocacy Program or RoLEAP – as a short acronym. The Academy has a number of programs – all linked in some way to the rule of law. One of the missions of the Academy is to promote the rule of law. However, we do not have a program that specifically targets two areas where action is much needed. Those are education about the rule of law and advocacy for the rule of law.

The great need for education and advocacy in both of these areas has become clear to me for many years. The pointed attacks by the former President, President Trump, on the judiciary – attacks which necessitated the issue of statements on behalf of the Academy by my predecessors – brought into sharp focus the need for more work to be done on education and advocacy about the Rule of Law.

Civics is no longer being taught as a subject in schools in the United States. Throughout the western world the level of knowledge of our systems of government and the functioning of democratic society is poor. This translates into a lack of appreciation for democracy and the rule of law and what they stand for. This in turn has serious societal effects in low turnouts at elections and worse, a willingness to cast ones vote in favour of candidates and political parties espousing anti-democratic and totalitarian views who themselves have little appreciation for democracy or the rule of law.

As I have said, the purpose of this new program is to promote education and advocacy about the rule of law. I envisage that it can do this in several ways. First, it can collate material which is already available and place the most valuable items at the disposal of our Fellows and members of the public on our website.

Secondly, with access to this material I want to encourage our Fellows to volunteer to go to schools and universities and speak about the rule of law. I envisage in due course, that the Academy might prepare a structured half day teaching course that would lead to an Academy diploma for students and this program could then be replicated by Fellows in their own cities or states. Teachers and

parents should also be welcome to attend such programs. None of this is unique. ABOTA is already quite active in this area as is the National Association of Women's Judges – amongst others. What is new is that the Academy will have a specific program targeting education and advocacy and I believe that by having such a program the Academy can, as the years go by, make a positive contribution to this issue worldwide.

To drive this program forward, I have appointed Roman Silberfeld our immediate past President as Chair of this program for a three-year period. I have also appointed a Consultative Committee to the Chair that consists of:

- Former Presidents Cliff Edwards and Mark White
- Doris Cheng and Michelle Awad
- Kaveh Shahi and George Haley
- Ted Schmidt and our Dean Joe Tucker
- Rahul Ravapudi and our Admissions Chair Greg Wells
- Phil Gregory, Ricky Raven, and Debra Pole

They all unhesitatingly accepted my invitation. I want to acknowledge their commitment and enthusiasm. They will get this program off to a great start.

What is the Rule of Law

What is the rule of law? If any of us was asked, in the course of a social conversation, to explain what is the rule of law, would we be able to give an adequate and clear response? Even as seasoned trial lawyers, I am not sure that we would. We all know that it is important. We all know that it is important to democracy. But we might, to be honest, struggle to explain adequately what it means.

Many have attempted a definition of Rule of Law. None I would suggest is satisfactory. Many are not definitions but descriptions. Further, the attempt to define what is an organic and changing concept has the disadvantage of ultimately limiting its development.

To further complicate things there is no universally accepted concept of the rule of law. Historically, many non-democratic authoritarian regimes argued vehemently that they observe the rule of law because they promulgate clear rules - although in truth, the law and the judiciary were merely weapons that they used to enforce their will and suppress human rights.

The most expansive concept of the rule of law is to be found amongst democratic countries but again, it is doubtful if democracy is an indispensable requirement of the rule of law.

Like many difficult concepts in life, it can be easier to describe something not by what it is, but by what it is not. It can be easier to describe its absence than to describe its presence. Such is the case with the rule of law. This is a point made by the late Sir Thomas Bingham, one of England's most respected judges, in a book that he wrote on the rule of law.

He said:

“The hallmark of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of

prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war.”

This list was not meant to be conclusive but we get the meaning. There are many countries today which alas, fall into that category.

The concept of the rule of law goes back at least to the time of Aristotle and involves a set of interdependent principles. It is an evolving concept that allows for description but I would suggest evades definition.

Perhaps the foundational principle of the rule of law is that the **law is king**. As the title to the principle suggests, we are ruled by law, not by the whim of somebody in control of the machinery of government. The primary benefit of this foundational principle is, of course, certainty and the freedom that comes with that certainty. We know the rules by which we are required to live (or at least they are publicly available and can be ascertained). They are not made up by the ruler or the government as they go, to deal with the circumstances of any particular individual. Linked to this principle, is the principle that laws should be publicly available. Equally important is that laws should not apply retrospectively. In other words, something should not be treated as being contrary to the law which was not contrary to the law at the time when it was done (or omitted to be done).

These principles may seem to us to be simple and self-evident but they were not always so and they are not currently so in many parts of the world. Again, I return to the point – imagine living in a world or in a country that did not observe such rules. Would you want to?

Another aspect of the rule that we must highlight is the importance of an **independent and impartial judiciary**. This is critical in ensuring equality before the law, a fair trial and the proper accountability of government and other state actors. These principles of fair trial, equality before the law and the ability to hold the state and government officials to account, are themselves all a fundamental part of the rule of law and dependent on an independent and impartial judiciary.

Allied to this I should mention the extent to which **corruption** exists in any society since this undermines and corrodes the rule of law. Since at least Magna Carta in 1215, corruption has been recognised as a serious threat to the rule of law.

Just as important as an independent judiciary is an **independent legal profession** free from intimidation by government or the courts. This is recognised internationally in, *inter alia*, the UN Basic Principles on the Role of Lawyers, yet it is frequently attacked and undermined. For example, the current situation of the intimidation of lawyers in Singapore - a country in which approximately 60 people remain on death row - lawyers who attempted to represent some of those death row inmates, is a matter of very serious concern.

I have mentioned that the rule of law is a developing concept. One of the most important developments in recent decades is the widespread acceptance that the rule of law demands the recognition and protection of fundamental **human rights**. Thankfully, what are fundamental human rights should no longer be the subject of debate. They are widely recognised and enshrined in international conventions such as the Universal Declaration of Human Rights (1948) and the

European Convention on Human Rights (1950) and a number of other regional conventions to similar effect.

It would be remiss of me not to mention the observance of the rule of law at the level of **countries**. It is of critical importance to humanity that the rule of law is observed internationally in relations between states and that an effective system of international courts and sanctions for breach is developed. A country that, as I speak, has clearly repudiated the rule of law in this respect is the Russian Federation. Article 2(4) of the Charter of the United Nations requires member states to *“refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purposes of the United Nations.”* And yet, the Russian Federation remains a permanent member of the Security Council.

However, just as at the domestic level, all must observe the law and the law should be applied equally, the same should apply on the international stage. Observance of the rule of law internationally is undermined if some countries, particularly powerful ones, do not obey it. In this regard it is encouraging that in such matters as the invasion of Iraq by the US and UK and the treatment of prisoners in Guantanamo and elsewhere, it is ordinary citizens and lawyers who vocally protested and sought to have the rule of law observed

Returning to the domestic stage, whether a country observes the rule of law is **not a matter susceptible to a “yes” or “no” answer**. It is a question of degree. No country perfectly observes the rule of law and the rule of law faces constant challenges.

There are many on going challenges to the rule of law. For example, the intimidation of witnesses, the public interest in the protection of sources and methods of intelligence gathering particularly in terrorism cases, all have implications for a fair trial. A further endemic challenge is the monetary and other costs of litigation for example the invasion of privacy, the delay in getting a decision and the way in which these deter effective access to a judicial remedy. Solving these problems while still observing the rule of law takes careful thought by qualified and intelligent people dedicated to upholding, not subverting, the rule of law.

There is no room for complacency – not even here in the United States. The World Justice Program publishes annually a ranking of countries in terms of their observance of the rule of law. It may (or may not) come as a surprise to you to know that in its last report, the United States, only ranked 27th out of 139 countries. That is certainly not a cause for satisfaction – and it is getting worse.

It is in this context that we have established our Rule of Law Education and Advocacy Program and I encourage each of you to play your part in arresting the slide in the observance of the rule of law that we witness in many countries and in particular, here in the United States. Organisations of lawyers worldwide should be at the forefront of this campaign – not on our own, as an elite group, but rather as educators of those who benefit with every breath from the rule of law – our fellow citizens.

Thank you for your attention.