

The Rule of Law: A Brief Explanation *

I. Introduction

In *Tan Seet Eng v Attorney-General*, Chief Justice (CJ) Sundaresh Menon famously quipped that “[t]he rule of law is the bedrock on which our society was founded and on which it has thrived.”¹ Yet, the rule of law “is not one that admits of a *fixed or precise* definition” (emphasis added).² In this piece, the authors discuss the theories behind the rule of law and examine how it operates in Singapore.

II. Theories of the Rule of Law

Two main conceptions regarding the rule of law have been adopted in modern times, namely the thin conception and the thick conception.³ For the former, the rule of law is often narrowly defined as being upheld when formal procedures and requirements have been satisfied. Proponents of the thin conception include Albert Venn Dicey, Joseph Raz, and Lon Fuller. On the other hand, Dworkin is one of the jurists advocating for the thick conception.

For the thin conception, Lon Fuller’s account is particularly interesting. He suggests that there are eight requirements to achieve the rule of law: generality, promulgation, non-retroactivity, clarity, non-contradiction, non-impossibility, constancy, and congruity.⁴ According to Fuller, these requirements must be fulfilled for laws to achieve the purpose of “subjecting human conduct to the governance of rules”.⁵ Laws which fail completely in any one of these aspects cannot be law.⁶ Fuller’s conception of the rule of law ensures respect for human autonomy,⁷ as it restricts the scope of government interference to intelligible rules laid out in advance.⁸ When citizens decide how to act, they can thus take legal requirements and prohibitions into consideration.⁹

However, it must be noted that Fuller’s account has been critiqued to be a formalistic conception of the rule of law. Although few would dispute the basic criteria that he identifies,¹⁰ legal theorists disagree about the substantive content of the rule of law and what it entails.¹¹

Ronald Dworkin is one such jurist who advocates for the thick conception instead, which entails conformity with substantive standards of justice and human rights. He argues that for

* Joel Soon Jian Wei, 4th Year LL.B. student, Yong Pung How School of Law, Singapore Management University and Chang Wen Yee, 4th Year LL.B. student, Yong Pung How School of Law, Singapore Management University

¹ *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [1].

² *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [1].

³ See Jorgen Moller and Svend-Erik Skaaning, “Thin and Thick Conceptions of the Rule of Law (2012) *The Justice System Journal* 136 at 136–137.

⁴ Lon L. Fuller, *The Morality of Law* (Yale University Press, Revised Ed, 1969) at pp 46–81.

⁵ *Id.*, at pp 106, 122–130.

⁶ John M.A. DiPippa, “Lon Fuller, the Model Code, and the Model Rules” (1996) 37 *STLR* 303 at p 324.

⁷ Mark Bennett, “Leaving the Hart-Fuller Debate and Reclaiming Fuller: Form, Agency, and Morality in Kristen Rundle’s *Forms Liberate*” (2013) 44 *Victoria U. Wellington Law Review* 461 at p 465.

⁸ *Ibid.*

⁹ Colleen Murphy, “Lon Fuller and the Moral Value of the Rule of Law” *Law and Philosophy* 2005; 24(3): 239–262 at p 241.

¹⁰ *Id.*, at p 240.

¹¹ Victor V. Ramraj, *Emergencies and the Limits of Legality*, (Cambridge University Press, 2008) at p 129; See Paul Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” (1997) *Public Law* 467.

the rule of law to manifest, citizens have moral rights and duties with respect to one another, and political rights against the state.¹²

Three requirements are in place.¹³ First, it is insufficient for a legal order to merely recognise citizens' rights. It must also enforce these rights. In other words, not only must the legislation enshrine citizens' rights, but the state must also safeguard them in practice. Secondly, a legal order must not fail to accurately recognise in practice which rights citizens have. Finally, if citizens have a procedural disadvantage in access to rights in practice, a legal order will lack fairness in the enforcement of rights.

III. How the Rule of Law features in Singapore

Despite the various competing definitions of the rule of law, it is widely accepted that the rule of law is usually a staple ingredient in good governance.¹⁴ Indeed, it is considered necessary to prevent the descent of any society into lawlessness and dysfunction.¹⁵

In this regard, Menon CJ suggests that the practical outworking of rule of law values in any country will vary due to the differing social contexts.¹⁶ For Singapore, the rule of law features in no less than four aspects: equality before the law, prosecutorial discretion, judicial review, and in decisions made by the Judiciary.

First, equality before the law is a key facet of the rule of law in Singapore.¹⁷ This is not only enshrined in Article 12 of the Constitution,¹⁸ but also evidenced by fairness of proceedings involving parties of vastly different socioeconomic standings. For instance, in relation to the Parti Liyani case where domestic helper Liyani was ultimately acquitted of stealing from Changi Airport Group chairman's family,¹⁹ Law Minister K. Shanmugam said in his ministerial statement that the treatment of that case as any other theft case "is an illustration of how the rule of law applies", where parties receive "justice according to the facts and the law as the courts see it".²⁰

Secondly, the executive, in exercising its prosecutorial powers, is to conform to the rule of law. Although such powers are wide in scope, they are not absolute.²¹ In *Law Society of Singapore v Tan Guat Neo Phyllis*,²² the High Court noted that prosecutorial powers must be exercised in good faith for the purpose it is intended, that is, to convict and punish offenders, and not for an

¹² *Ibid.*

¹³ *Id.*, at p 12.

¹⁴ K Shanmugam, "The Rule of Law in Singapore" [2012] SJLS 357365 at 360.

¹⁵ Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAclJ 413–427 at [40].

¹⁶ *Id.*, at [9].

¹⁷ See Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAclJ 229–251 at 229.

¹⁸ Constitution of the Republic of Singapore (2016 Rev Ed) Article 12.

¹⁹ See *Parti Liyani v Public Prosecutor* [2020] SGHC 187, where her appeal against her conviction and sentence was allowed by the Singapore High Court.

²⁰ K. Shanmugam, "Why Singapore insists on equality before the law: Shanmugam" *The Straits Times* (6 November 2020) <<https://www.straitstimes.com/opinion/why-singapore-insists-on-equality-before-the-law-shanmugam>> (accessed 10 August 2021).

²¹ Gary Chan Kok Yew, "Prosecutorial Discretion and the Legal Limits in Singapore" (2013) 25 SAclJ 15 at [13].

²² [2008] 2 SLR(R) 314.

extraneous purpose.²³ The notion of an unfettered discretion is contrary to the rule of law.²⁴ Indeed, the commitment of the executive to comply with and abide by the law is critical to the rule of law and good governance.²⁵ This has also been acknowledged by the Attorney-General Lucien Wong, where he highlighted that: “[we recognise our duty] as a grave and sacred duty to use our prosecutorial discretion to serve the public interest. That is the lodestar for all prosecutors. Our motive is not to win at all costs, or to secure the most convictions, but to reach just outcomes fairly. This overriding principle informs every stage of our work.”²⁶

Thirdly, the mechanism of judicial review also prevents the abuse of discretionary power. This was most famously noted by Wee Chong Jin CJ (as he then was) in *Chng Suan Tze v Minister for Home Affairs*,²⁷ that “all power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”²⁸ Traditionally, judicial review can be requested on the grounds of illegality, irrationality, and procedural impropriety.²⁹ However, in light of the constitutional doctrine of the separation of powers, judicial review is limited to the legality of administrative action, rather than the merits of it.³⁰ Nevertheless, it has been said that because the task of reviewing any exercise of state power lies in the hands of the Judiciary, it is the courts that have the ultimate responsibility of maintaining a system which abides by the rule of law.³¹ Finally, where judges act transparently and independently in making their decisions, they uphold the rule of law. The Judiciary is aware of its responsibilities as the third arm of the state.³² As a neutral institution, it exists to ensure that the law is respected and enforced against all.³³ In this sense, the Judiciary is the “lynchpin of a democratic society and the rule of law”.³⁴ However, this is no easy task, and is heavily dependent on it being an independent institution. Contrary to criticisms made both locally and abroad, judges do not let political considerations influence their decisions; they do justice, not politics.³⁵ Indeed, as aptly put by Justice Choo in *Yap Heng Ho v Public Prosecutor*, “[J]ustice and the rule of law require that only relevant issues are addressed... Political motives and manoeuvres have no relevance ... The court is only concerned with the legal issues and no more.”³⁶ In practice, the judge must ultimately believe in and maintain the integrity that the judicial office requires of him or her.³⁷

²³ *Id.*, at [149].

²⁴ *Id.*, at [149]; *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

²⁵ Sundaresh Menon, “The Rule of Law: The Path to Exceptionalism” (2016) 28 SAclJ 413–427 at [35].

²⁶ Lucien Wong, “Opening of the Legal Year 2021” (11 January 2021) <<https://www.agc.gov.sg/docs/default-source/default-document-library/oly-2021---ag's-speech.pdf>> (accessed 12 September 2021).

²⁷ [1988] 2 SLR(R) 525.

²⁸ *Id.*, at [86].

²⁹ *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [53]–[54].

³⁰ *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [99].

³¹ *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [1], citing Brian Tamanaha, “The History and Elements of the Rule of Law” [2012] SJLS 232 at 244.

³² Chan Sek Keong, “The Courts and the ‘Rule of Law’ in Singapore” [2012] SJLS 209–231 at 213.

³³ Chan Sek Keong, “Securing and Maintaining the Independence of the Court in Judicial Proceedings” (2010) 22 SAclJ 229–251 at [2].

³⁴ Chan Sek Keong, “Securing and Maintaining the Independence of the Court in Judicial Proceedings” (2010) 22 SAclJ 229–251 at [2], citing *Lydia Brashear Tiede*, “Judicial Independence: Often Cited, Rarely Understood” (2006) 15 J Contemp Legal Issues 129 at 129.

³⁵ Chan Sek Keong, “The Courts and the ‘Rule of Law’ in Singapore” [2012] SJLS 209–231 at 214.

³⁶ *Yap Keng Ho v Public Prosecutor* [2007] 1 SLR(R) 259 at [8].

³⁷ Chan Sek Keong, “Securing and Maintaining the Independence of the Court in Judicial Proceedings” (2010) 22 SAclJ 229–251 at [6].

IV. Conclusion

To conclude, it may be apt to remember the wise words of the late Lord Bingham, which Menon CJ himself also previously cited in an Address on the Rule of Law:³⁸ “in a world divided by differences of nationality, race, colour, religion, and wealth [the rule of law] is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good governance and peace, at home and in the world at large.”³⁹

³⁸ Sundaresh Menon, “The Rule of Law: The Path to Exceptionalism” (2016) 28 SAcLJ 413–427 at [46].

³⁹ Tom Bingham, *The Rule of Law* (Penguin Books, 2011) at 174.