

## What Challenges Would We Face In A World Without The Rule of Law? – Lim Wei Jiet

The extent of the law in which it governs our lives is far-reaching, ranging from the vertical relationship between man and the state as well as the horizontal spectrum to regulate across men on the street. It is indeed an eerie affair to imagine a world where the foundations of justice and peace are shattered, yet it may be necessary for us to truly appreciate the rule of law philosophy. The first part of this essay analyzes the concept of separation of powers which dictate the direction of democracy, while the second part narrates on the injustices of a right-less nightmare. This is followed by discussions on how the rule of law affects the economy and public order. A leap into the international arena follows, while the last part sets the tone for a future beyond the Diceyan rule of law.

“Be you ever so high, the law is above you”<sup>1</sup>

Much has been said about governments, be it a “necessary evil”<sup>2</sup> or both a “dangerous servant and a fearful master”<sup>3</sup>. They are fuelled with avarice, ambition, revenge, or gallantry that would break even the strongest cords of Constitutions.<sup>4</sup> The only leash hampering them from trampling upon men is none other than the rule of law. As Sultan Azlan Shah puts it bluntly, “Every legal power must have legal limits, otherwise there is dictatorship”<sup>5</sup>. Of course, there is no need to remind the terrifying challenge of facing mass-murdering tyrants like Stalin, Mao Zedong and Robert Mugabe.

Lurking sinisterly deeper is the infiltration of the Executive into other branches of government. The retransferring of judges in LDP-controlled Japan<sup>6</sup> and wanton disregard of human rights by the Chilean Supreme Court under Pinochet<sup>7</sup> remain historical scars of tainted judiciaries mugged by an overwhelming Executive. When the walls of checks and balances crumble to dust, the challenge man face is the denial of inherent rights and freedoms that comes with no redress. On the flipside, when judges confuse law with personal values and usurp the functions of Parliament, they risk politicization of the judiciary.<sup>8</sup> Thus, even judicial activism, taken to extremes, can spell the death of the rule of law.<sup>9</sup>

And what is left of the Legislature? If it has not been dominated already by the very despotic political party in power, a majority of Parliamentary seats are grabbed for army generals such as the case in junta-ruled Burma. The moral authority of the law then wanes as people are unable to change both lawmakers and the law.<sup>10</sup> In fact, the unprecedented upheavals happening around the

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<sup>1</sup> Dr Thomas Fuller, *Gnomologia* (published in 1733) 943, quoted by Lord Denning MR in *Gouriet v. Union of Post Office Workers* [1977] QB 729 at 762Dr.

<sup>2</sup> Thomas Paine, *Common Sense* (Philadelphia: W. & T. Bradford, 1776)

<sup>3</sup> George Washington, quote.

<sup>4</sup> John Adams, quote.

<sup>5</sup> *Pengaruh Tanah dan Galian, WP v Sri Lempah Enterprise* [1979] 1 MLJ 135 at 148

<sup>6</sup> J. Mark Ramseyer & Eric B. Rasmusen, ‘Judicial Independence in Civil Law Regimes: Econometrics from Japan’ Public Economics 9603001, EconWPA. There is empirical evidence that judges who previously join leftist organisations and ruled against the government received less attractive career paths compared to their peers.

<sup>7</sup> Hilbink, L. , *Judges Beyond Politics in Democracy and Dictatorship: Lessons From Chile* (Cambridge University Press 2007). The Supreme Court challenged the government on human rights issues in exactly zero percent of cases between 1973 and 1980.

<sup>8</sup> Archibald Cox, ‘The Independence of the Judiciary: History and Purpose’ University of Daytona Law Review, Vol 21, Spring 1996

<sup>9</sup> JD Heydon, ‘Judicial Activism and the Death of the Rule of Law’, *Quadrant*, January-February 2003

<sup>10</sup> The Hon Sir Gerard Brennan AC KBE, ‘The Role of the Legal Profession in the Rule of Law’ (Supreme Court, Brisbane, 31 August 2007) <<http://www.lawcouncil.asn.au/shared/2441848483.pdf> p.13.> accessed at 10 July 2012

world today spring from the failure of governments to hear the needs and aspirations of their people.<sup>11</sup>

“Indeed, it is when the law protects the poor, the powerless, the vulnerable and the unpopular that it knows its finest hour”<sup>12</sup>

Yet, if democracy is simply an arithmetical counting machine to determine government legitimacy, the world risks the dangers of crass majoritarianism that favour the deprivation of rights for unpopular minorities - such as present day asylum seekers or the Jews of Nazi Germany.<sup>13</sup> In the apartheid regime of South Africa where minority voices are disregarded, the rule of law becomes merely ‘an empty vessel into which any law could be poured’<sup>14</sup> instead taking into account concepts of morality.

Thus, from the ashes of World War 2, the rule of law is rejuvenated with an illuminating beacon called human rights. Entrenched in many international documents<sup>15</sup>, it is now accepted that rights such as the freedom of speech are inseparable from any true rule of law. It is when these rights are not respected, do we open the floodgates to a world of genocide, torture and disrespect towards humanity. Furthermore, legitimate aspirations and the dignities of men would never be realized without adequate social, economic, educational rights.<sup>16</sup> In a challenging age of volatile climate change and environmental degradation, a rule of law which disregards “green rights”<sup>17</sup> will spell doom for Mother Earth.

Having said that, the rule of law will not stand when traditional concepts that centre on fair procedures and equal playing fields are not taken into perspective. Firstly, unclear and unintelligible laws will create constant anxiety to the common man in every of his actions for he does not know what the law prescribes. Secondly, if laws are not equally applied, the influential class of society can unfairly escape from facing the music while the common man is then encouraged to disobey the law. Thirdly, people will be stripped off the right to a fair trial where they may be guilty before proven so, uninformed of their grounds of arrest and lack legal representation to defend themselves.

Alas, justice is not truly justice if it takes too long, if it is too expensive for people to use, or if it is not available to all.<sup>18</sup> The rule of law becomes a theoretical construct than practical reality when real access to legal rights depend on a person’s background while poor litigants are forced to accept

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<sup>11</sup> Ban Ki Moon, ‘The Rule Of Law And Global Challenges’, The Secretary-General’s remarks to the General Assembly (New York, 11 April 2011)

<[http://www.un.org/apps/news/infocus/sgspeeches/search\\_full.asp?statID=1143](http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=1143)> accessed at 10 July 2012

<sup>12</sup> *Falbo v United States* 320 US 549 at 561 (1944) (Murphy J.)

<sup>13</sup> Cherrie Booth QC, ‘The Role of the Judge in a Human Rights World’, speech delivered at the 19<sup>th</sup> Sultan Azlan Shah Law Lectures 2005 in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition* (RNS Publications 2011)

<sup>14</sup> Arthur Chaskalson, former Chief Justice of South Africa, at the World Justice Forum in Vienna

<sup>15</sup> See the Universal Declaration of Human Rights 1949 and International Covenant on Civil and Political Rights

<sup>16</sup> See the Declaration of Delhi, 1959, International Commission of Jurists: “Recognizes that the Rule of Law is a dynamic concept...but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized”. Also see the International Covenant on Economic, Social and Cultural Rights.

<sup>17</sup> See Remi Moncel, ‘Connecting Environmental Protection and the Rule of Law’, (*World Resources Institute* , 16 September 2008) <<http://www.wri.org/stories/2008/09/connecting-environmental-protection-and-rule-law>> accessed 13 July 2012. Also see Article 24 of the Constitution of the Republic of South Africa 1996, dubbed as “third generation” rights.

<sup>18</sup> Lord Saville, “Information Technology: A Tool for Justice”, speech delivered at the 18<sup>th</sup> Sultan Azlan Shah Law Lecture 2004 in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition* (RNS Publications 2011)

inexperienced lawyers in criminal trials; against weak public legal aid systems and inherently cost intensive common law system.<sup>19</sup>

Sadly, today, even liberal democracies throw human rights as well as fair procedures out the window in times of emergency and 21<sup>st</sup> century terrorism. Through the comfort of retrospective lenses, Americans have flocked people of Japanese origins to internment camps<sup>20</sup>, British courts have legitimised arbitrary executive detention<sup>21</sup> and Malaysian authorities flouted almost every single procedure on the book in exercising the Internal Security Act.<sup>22</sup> Drawing lessons on Guantanamo Bay, trials by military commission deliver a sucker punch on the rule of law as offenses are defined, prosecuted, and adjudicated by executive officials without independent review.<sup>23</sup>

As we observe closer, not only does a world without the rule of law threaten the rights of men but it actually devours the entire spirit of democracy itself. As Justice Learned Hand said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law and no court can save it".<sup>24</sup> Therefore, the greatest challenge to a world without the rule of law is how it tries to rebuild these entrenched traditions from scratch, especially when the heartbeat of democracy has long died in iron-fisted regimes.

Like cancer, the breakdown of the rule of law spreads to all spheres, even towards the economic pulse of the nation. When there are no clear commerce regulations and an impartial judiciary to enforce contracts, foreign investors will not risk the capital which is essential in improving the socio-economic wellbeing of citizens. But the world presents a new twist today: during times of economic crisis, the state itself relaxes the rule of law and interferes with the market with dirty hands reeking of political opportunism. This creates a rent-seeking state where interest groups pump in millions in persuading politicians to grant preferential or oppose harmful regulations; relegating rational policymaking in favour of personal benefits, as evidenced in the General Motors and Chrysler bailouts.<sup>25</sup> Furthermore, a lax rule of law also breeds unaccountability in public procurement, unfair accumulation of wealth via cronyism or even blocking access of international economic aid because of pure greed.

Perhaps the disaster most people can relate to is not the vertical clash between government and men, but a Hobbesian world where man fight against man in a "state of nature" where life is "solitary, poorer, brutish and short".<sup>26</sup> When there is no conflict resolution and rules are not enforced, crimes skyrocket to an all time high and the security of all will be at risk to leave a trail of dejection and despair. Slowly, what would normally be crime ceases to be thought as crime and lawlessness becomes routine. Then, people recognise that the only alternatives to the rule of law are

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<sup>19</sup> Michael Kirby, 'The Rule of Law Beyond the Law of Rules', ([http://www.michaelkirby.com.au/images/stories/speeches/2000s/2010\\_Speeches/2471-ARTICLE-AUST-BAR-REVIEW-RULE-OF-LAW.pdf](http://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2471-ARTICLE-AUST-BAR-REVIEW-RULE-OF-LAW.pdf))

<sup>20</sup> *Korematsu v United States* 323 U.S. 214 (1944)

<sup>21</sup> *Liversidge v Anderson* [1942] AC 206

<sup>22</sup> *Abdul Ghani Haroon v Ketua Polis Negara and Another Application (No 3)* [2001] 2 MLJ 689

<sup>23</sup> Baroness Kennedy of The Shaws QC, "Legal Challenges in Our Brave New World", speech delivered at the 21<sup>st</sup> Sultan Azlan Shah Law Lecture 2007 in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition* (RNS Publications 2011)

<sup>24</sup> Learned Hand, 'The Spirit of Liberty', speech at an I Am an American Day ceremony, Central Park, New York City, May 21, 1944

<sup>25</sup> Todd Zywicki, 'Economic Uncertainty, the Courts and the Rule of Law' 35 *Harvard Journal of Law & Public Policy* 195 (2012)

<sup>26</sup> Thomas Hobbes, *Leviathan*, (first published 1651, Penguin 1985) Chapter XIII

corrupting influences like the power of money, influence and guns<sup>27</sup>, which they would have to inevitably adapt to. This perpetuates a vicious cycle of instability and crime.

Alas, what countries inherit is a barren desert of hopelessness where there is no peaceful settlement of disputes. More and more actors, both private and institutional, turn to criminal elements to achieve their ends where it is now cheaper, quicker and less risky than the doors of the court – creating a “lost meaning of legality”.<sup>28</sup> As the state’s legitimacy crumbles and realistic democratic means of redress is lacking, the boiling point forces protesters to take the streets or mobilize along ethnic, religious or linguistic lines.<sup>29</sup>

From a global context, harrowing scenarios emerge from the weak rule of law. World vigilantes masquerading under the “Coalition of the Willing” declare wars against other nations without the authorisation of the United Nations Security Council, an act that blatantly undermines the post-1945 consensus on the prohibition of force.<sup>30</sup> Slobodan Milosevic massacred 200,000 people in Serbia over 9 years<sup>31</sup>, as the entire world stood idly and did nothing. When these crimes against humanity go unpunished by international tribunals, it renders the next round of war atrocities much easier and inevitable. Plus, the well-regarded “democratic peace theory”<sup>32</sup> rings a chilling possibility of international conflicts when more countries disregard the rule of law and consequently, democracy.

Modern developments and the wave of globalization have posed new challenges that force a rethink into the concept of a hypothetical world without the rule of law. The nation state is being redefined as regional blocs like the European Union possess enormous powers to enact policies which affect the lives of an entire continent. International institutions such as the World Trade Organisation have slowly replaced national laws with decision-making by anonymous officials, sometimes exhibiting a very large democratic deficit.<sup>33</sup> Multi-million business contracts now insert clauses on alternative dispute resolutions instead of litigation in court, risking decisions that substitute market forces for the rule of law. The traits of globalization like electronic transfer of money, softening of borders and offshore banking – all equally facilitate markets in drugs, arms, explosives, fissile material and human trafficking, presenting complex international crime and terrorism activities<sup>34</sup>, unlike anything we’ve dealt before.

In conclusion, some of these predictions may flex towards exaggeration, but it is pertinent to note that the examples on rule of law violations are dotted in history and are happening today even as we speak. Thus, the world must continue to champion the rule of law; for when it dies, so does the centuries of civilisation and mankind itself.

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<sup>27</sup> *Ibid* at 19

<sup>28</sup> Basil Fernando, *Sri Lanka: Impunity, Criminal Justice & Human Rights* (Asian Human Rights Commission 2010) 23

<sup>29</sup> R. Rotberg, ‘Failed States in a World of Terror’, (2002) *Foreign Affairs* 81at 130

<sup>30</sup> Richard Norton-Taylor, ‘Top judge: US and UK acted as ‘vigilantes’ in Iraq invasion’ (*The Guardian*, 18 November 2008) <<http://www.guardian.co.uk/world/2008/nov/18/iraq-us-foreign-policy>> accessed at 13 July 2012

<sup>31</sup> Ian Traynor, ‘Obituary: Slobodan Milosevic’, (*Time*, 13 March 2006)

<<http://www.guardian.co.uk/news/2006/mar/13/guardianobituaries.warcrimes>> accessed 13 July 2012

<sup>32</sup> The theory dictates that no democracies will go to war with each other, but it is subject to what defines ‘democracies’.

<sup>33</sup> *Ibid* at 19

<sup>34</sup> Tony Blair, ‘Upholding The Rule of Law – A Reflection’, speech delivered at the 22<sup>nd</sup> Sultan Azlan Shah Law Lectures 2008 in Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition* (RNS Publications 2011)

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