



What Challenges Would We Face In A World Without the 'Rule of Law'?

By Pang Jo Fan

“If law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”¹

That was what Ancient Greek philosopher of the 3rd century BC Plato said about the role of the law. However, Plato was an advocate of a benevolent monarchy ruled by an idealized philosopher-king who is above the law.² In contrast, his teacher, Socrates was a staunch believer of the Rule of Law such that he willingly accepted the death penalty he was sentenced to after convicted by the courts for corrupting youth and impiety although he was given the opportunity to escape imprisonment. He believed in the rule of all laws and submitted without exception, whether good or otherwise.³

Another advocator of the Rule of Law, Plato’s student Aristotle, was opposed to his mentor’s ideals of allowing higher officials to exist above the law. In his book entitled “*Politics*”, he said that, “it is more proper that law should govern than any one of the citizens... they should be appointed only as guardians and servants of the laws.”⁴

Around the same time in the Far East, the Huang-Lao School of Daoism in China rejected legal positivism advocated by the School of Legalism and was in favour of natural law that even the ruler would be subjected to.⁵

Decades later, in the 1st century BC, Cicero, an ancient Roman statesman exclaimed: “We are all servants of the laws in order that we may be free!”⁶

As observed, even since the ancient days, philosophers have propagated their ideals for the Rule of Law to achieve a free and fair society, to actualize its’ fullest potential, free from oppression and the tyranny of human rulers.

In his book, *The Social Contract*, 16th century philosopher Jean Jacques Rousseau also attempted to define principles for a functioning rule of law. His interpretation of the Rule of Law consists of 3 parts: The Scope (of which the law governs), The Character (of laws) and The Institutions (their relationship under the law).⁷ His principles uplifted equality before the law, comprehensible laws and separation of powers. Modern philosophers such as Professor Lon Fuller and Professor Joseph Raz further expounded these principles.^{8 9} Their principles of Rule

¹ John Cooper, *Complete Works By Plato* (Hackett Publishing, 1997) 1402

² Allan Bloom, *The Republic of Plato* (Basic Books, 1991)

³ Plato, *The Apology, Phædo and Crito*, trans. by Benjamin Jowett (P.F. Collier & Son, 1909–14; Bartleby.com, 2001)

⁴ Ernest Barker, *The Politics of Aristotle* (Oxford University Press, 1995)

⁵ Randall Peerenboom, *Law and morality in ancient China: the silk manuscripts of Huang-Lao* (SUNY Press, 1993) 171

⁶ Anthony Black, *A World History of Ancient Political Thought* (Oxford University Press, 2009)

⁷ Jean J Rousseau, *The Social Contract* (Penguin Books, 1968)

⁸ Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964)

of Law generally included clarity and accessibility of law, prospective law making, consistency, power of judicial review upon the courts and principles of natural justice. However, amongst all these attempts, AV Dicey's 3 main principles were the most widely accepted and are popular to this very day. The Diceyan principles of the Rule of Law can be summed up as follows:

- No man is above the law
- No man can be punished unless they are in clear breach of law
- General principles of constitution are results of judicial decisions in determining rights of private persons.

In other words, Rule of Law means that the law is supreme - the law is king. According to that same logic, what then if the law is NOT king?

Political Chaos

Under principles of the Rule of Law, governments are to be held accountable to the law for their wrongdoings, adjudicated by the courts. A nation where men are above the law would not have such mechanisms. There will be no clear separation of powers between the three main institutions as they would be under manipulation of a few key elite members of the society.

The legislature, under the rule of law, is an institution of lawmakers elected democratically to represent the voice of the people and make laws that affect all levels of society. An independent statutory body is then supposed to regulate such an election process impartially. Theoretically, this body should be independent from the influence of all institutions and be free to prosecute any wrong doers under their jurisdiction. In a nation without the rule of law, such impartiality is almost impossible to achieve as ultimately the authorities in power control this body; it is made accountable to *men* and *not law*. Case in point, the Election Commission of Malaysia has been accused for holding unfair elections with evidence of 'phantom voters'¹⁰, poorly monitored postal voting processes¹¹ and unprosecuted cases of vote buying and manipulation¹². The truth behind those allegations has yet to be decided by the courts and remains as mere allegations. Nonetheless it is undeniable that the Election Commission of Malaysia is directly accountable to the Prime Minister's Department.¹³ Even if all accusations are false, such a position should not come to be. A referee in a crucial football game between

⁹ Joseph Raz, *'The Rule of Law and Its Virtue'* (1977) 195 LQR 93

¹⁰ 'Phantom Voters and Fraud Fears for Malaysia polls' *ChannelNewsAsia.com* (Seremban, 29 March 2012)

¹¹ Lisa J Ariffin, 'Bersih Wants Postal Voting Reformed' *TheMalaysianInsider.com* (Petaling Jaya, 25 November 2011)

¹² Tashny Sukumaran, 'Video Proof of Vote Buying In Sarawak' *FreeMalaysiaToday.com* (Kuala Lumpur, 26 May 2011)

¹³ Available at <http://www.pmo.gov.my/?menu=page&page=1670> accessed 17 July 2012

Manchester United and Arsenal after all cannot be a referee who answers directly to Sir Alex Ferguson.¹⁴

The executive, under the rule of law is theoretically an institution independent from the legislature and judiciary with equal standing. This is not necessarily distinguishable especially in countries emulating the British Westminster system whereby the executive comprises of members of the majority political party in the legislature. In contrast, in the United States' system, the executive is separate from the legislature as they hold different elections to elect members of these institutions. In the US, no overlap of power occurs and each institution plays an effective role as check and balance to each other.¹⁵ Clear separation aside, it is important for these institutions to be of equal standing under the law. In cases where the rule of law is compromised, the executive finds itself above the other two institutions and occasionally, even the law. A contemporary example would be in Mugabe's Zimbabwean regime. At age 88, Robert Mugabe has held power over Zimbabwe for more than 32 years. In 2009, he was ranked 1st in Parade Magazine's 10 worst dictators in the world. Mugabe's administration is based on extreme lawlessness, as although elections are held, he is known to do whatever it takes to win the polls, and if by chance he fails, the results are made invalid, eliminating all threats to his power.¹⁶ Also, in 2011 it was reported that his regime employed violent methods such as physical abuse, arbitrary arrests and torture towards his female rivals to keep them away from politics.¹⁷ Such is one of the many consequences faced when the Rule of Law is instead replaced with the Rule of Men.

The judiciary, under the doctrine of Judicial Independence is an institution that adjudicates the Rule of Law across all levels of society. It is a completely independent body. Ideally, appointment of judges should be done by a strictly non-partisan commission made accountable to Parliament as well as providing a high security of tenure for judges, preventing any possibility of corruption. In the UK, superior judges can only be removed via resolution of both houses of parliament whilst dismissing inferior judges require approval of the Lord Chancellor. Immunity against defamation and high salaries are also one of the many safeguards securing the tenure of judges to prevent impartiality and corruption in judicial decisions.¹⁸ . However, looking at UK's appointment of judges, loopholes can also be seen contradicting the Separation of Powers there and indirectly, the Rule of Law. This is in spite the fact that power of judicial appointment

¹⁴ Manager of Manchester United.

¹⁵ J Kilman & G Costello (Eds), *The Constitution of the United States of America: Analysis and Interpretation* (2000)

¹⁶ Available at <http://www.royalafricansociety.org/component/content/article/472.html> accessed 17 July 2012

¹⁷ Available at <http://www.womensviewsonnews.org/2011/08/mugabe-regime-torturing-and-oppressing-women-report-says/> accessed 17 July 2012

¹⁸ Available at

http://sixthformlaw.info/01_modules/mod1/1_4_legal_personnel/1_4_1_judiciary/02_judges_dismissal_tenure.htm accessed 18 July 2012

has been given to the Judicial Appointment Commission (JAC) created under the Constitutional Reform Act 2005, an independent statutory body created to ensure a more impartial judiciary.¹⁹ However, even with this establishment, the Lord Chancellor who also happens to be the Secretary of State for Constitutional Affairs (an executive department created under the same statute) retains the statutory mandate to approve selections of this Commission.²⁰ In December 2011, it was reported in The Guardian that the Lord Chancellor had rejected two would-be tribunal members selected by the JAC.²¹ Although justifications have been made, they remain irrelevant in proving the independence of this commission. Two men are denied their selection by an independent commission merely because of a decision of one executive member. The bottom line is this: Can we allow an executive member to meddle in the judicial appointment process? Is the Rule of Law upheld when the Executive has large influence over an institution we entrust the law upon? Where then is the accountability of these institutions towards the law?

Is justice upheld? That itself is self-explanatory.

Inefficient Government

We have already seen in the previous sections on how political structures are distorted in the absence of the Rule of Law. Laws are made and adjudicated according to men's discretion; the judiciary cannot fully function as the guardian of law with the intrusion of other men-ruled institutions. Men would then be above the law and the law will no longer reign supreme. It is then only a political tool meant to impose the desires of a few onto millions of the powerless.

When the law is not king and leaders are not liable to the law, they (an elite few) can freely manipulate circumstances around them with nothing to fear. Hence their only concern is to attain more power and to enjoy the riches of the land, rather than the betterment of the welfare of its citizens. Ultimately, it is the people who are made victims.

Look towards Sarawak, the state in Malaysia richest in natural resources.²² It has petroleum in abundant quantities, dense; bountiful forests for logging, rich in gold, coal and other minerals.²³ The lavishness of these natural resources rivals the collective natural resources of all the states in Peninsular Malaysia put together. However, the people of Sarawak, alongside with

¹⁹ Constitutional Reform Act 2005, s61

²⁰ Constitutional Reform Act 2005, sch 12 (1)

²¹ Available at <http://www.guardian.co.uk/law/2011/dec/08/lord-chancellor-veto-judicial-standards> accessed 18 July 2012

²² Available at <http://www.theborneopost.com/2012/02/04/sarawak-accounts-for-only-3-pct-of-countrys-furniture-export/> accessed 18 July 2012

²³ Available at <http://www.economywatch.com/economic-statistics/country/Malaysia/> accessed 18 July 2012

neighbouring Sabah are reported by the World Bank as the poorest citizens in Malaysia.²⁴ Why is this so?

The Chief Minister of Sarawak who has been in power for more than 30 years has not been making a very good name for himself. He has been alleged to be involved in a wide assortment of scandals. Awarding multi-million ringgit contracts without transparency²⁵, monopolizing the state cement industry²⁶, native land grabs²⁷ are only amongst the many. Recently, his government has, in a rare case; lost a lawsuit brought forward by natives and was found guilty of depriving the plaintiffs of their native customary land; the source of their livelihoods and right to their property, violating Article 5 and 13 of the Federal Constitution.²⁸ In response, the Chief Minister took the chance to table the Land Custody and Development Authority (Amendment) Bill 2011 to amend the law so as to overcome the legal hurdle that caused their defeat in court.²⁹ This is only one of many instances where such steps were taken to reinforce the government's control over the people. Here, law is secondary. One man is able to manipulate legal processes to gain political leverage while welfare of the people remains side lined. Should the law be a slave to the government's whims? Surely this wasn't the state of law that Plato envisioned.

Breach of Human Rights

Ex-Lord Chief Justice and Senior Law Lord Tom Bingham (or Lord Bingham) in his book *The Rule of Law*, generally agreed with the principles that has been laid out by Dicey, but further elaborated in a more contemporary context.³⁰ One of the principles of the Rule of Law that he laid down was that the law must afford adequate protection of fundamental human rights. This is evidently true because what else should the law protect if not the welfare of all mankind?

A world without the rule of law will have no respect for human rights. Freedom of people would be fully curtailed subject to the liking of the authority of that particular time. People will

²⁴ Available at <http://www.malaysianmirror.com/homedetail/138-sabah/50474-world-bank-confirms-sabah-is-malaysias-poorest-state> accessed 18 July 2012

²⁵ Available at <http://www.sarawakreport.org/2012/02/scandal-of-salco-how-taib-plans-to-make-billions-from-bakun/> accessed 18 July 2012

²⁶ Joseph Tawie, 'End Cement Monopoly In State, Taib Urged' *FreeMalaysiaToday.com* (Kuching, 2 April 2012)

²⁷ Joseph Tawie, 'More natives reporting 'land grabs' ' *FreeMalaysiaToday.com* (Kuching, 30 January 2012)

²⁸ Stephen Tiong, 'Judge delivers damning judgment in NCR land case' *Malaysiakini.com* (Kuching, 21 February 2011)

²⁹ Keruah Usit, 'Taib changes definition of 'native' after NCR defeat' *Malaysiakini.com* (Kuching, 24 June 2011)

³⁰ Tom Bingham, *The Rule Of Law* (Penguin Books, London 2010)

have no say over their daily movements and activities. The government would then define how, where and when one lives his/her life.

Recently, Daw Aung San Suu Kyi was released after 21 years of house arrest without charge and trial.³¹ As a highly influential pro-democracy leader in Myanmar, she posed a threat to the military government exhausted all avenues to weaken the influence of her and her political party National League For Democracy (NLD). Throughout the 21 years, many of her supporters too were placed under rough conditions and illegally detained by the military government. Today, many still remain under detention as she continues to struggle for democracy and the Rule of Law in modern day Burma.³² In the absence of Rule of Law, she and her supporters were stripped of their human rights. If they were charged based on UDHR, they were not treated equally (Article 1), their life and liberty were not respected (Article 3), many were enslaved near the borders (Article 4 & 5), all of them were arbitrarily arrested (Article 9), and the list goes on.³³

As she was awarded the Nobel Peace Prize in 1991, she gained widespread international attention and support.³⁴ The international community went on to pressure the Burmese government for her release for the next 20 years to no avail, even after condemnation by two Secretary-Generals of the United Nations.^{35 36} Clearly, this is a challenge inevitable by nations without the Rule of Law- the arbitrary breach of fundamental human rights and liberties.

Conclusion

The topic of this essay was phrased such that participants were required to conceptualize a world without the rule of law and predict the challenges it would face. However, as we journey through the contents of this essay, it appears rather distinctly that we are probably not so far away from such a world. It appears that that is especially more important that the Rule of Law be upheld, especially in this day and age where information is accessible to all. As readers of the law, there is absolutely no excuse for us to remain silent as others as well as ourselves are deprived of the security and protection under the rule of law. We should instead be actively

³¹ Available at <http://www.amnesty.org/en/news/timeline-aung-san-suu-kyi-and-amnesty-international-2012-06-15> accessed 18 July 2012

³² Available at <http://news.bbc.co.uk/2/hi/asia-pacific/8664741.stm> accessed 18 July 2012

³³ Universal Declaration of Human Rights 1948

³⁴ Available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1991/ accessed 18 July 2012

³⁵ Available at <http://www.thejakartapost.com/news/2009/07/05/un-chief-leaves-myanmar-039disappointed039-with-junta.html> accessed 18 July 2012

³⁶ Available at http://articles.cnn.com/2004-05-17/world/myanmar.talks_1_yangon-aung-san-suu-kyi-nld?_s=PM:WORLD accessed 18 July 2012

participating in the pursuit “to uphold the cause of justice... uninfluenced by fear or favour” as enshrined by the Legal Profession Act 1976 upon all members of the Malaysian Bar.³⁷

I shall end this essay with a quote from Datuk Dr Ambiga Sreenevasan upon her conferment with the Honorary Doctorate of Laws, University of Exeter:

“Our years of legal study and practice teach us to see and appreciate the fundamental role that the Rule of Law plays in guaranteeing that the state governs its citizens in a just and democratic manner... I urge you to use this arsenal of knowledge and your passion for justice to fight for those who are downtrodden.”³⁸

³⁷ Legal Profession Act 1976, s42

³⁸ Available at <http://www.themalaysianinsider.com/sideviews/article/rule-of-law-rule-by-law-ambiga-sreenevasan/> accessed 18 July 2012

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