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# Applying the Rule of Law<sup>†</sup>

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## I. Introduction

The Rule of Law, in essence, embodies a number of important interrelated ideas. First, there should be clear limits to the power of the state. A government exercises its authority through publicly disclosed laws that are adopted and enforced by an independent judiciary in accordance with established and accepted procedures. Secondly, no one is above the law; there is equality before the law. Thirdly, there should be protection of the rights of the individual.

In modern society, the value of Rule of Law is that it is essential for good governance. Governments must govern in accordance with established laws and conventions and not in an arbitrary manner. The law must set out legitimate expectations about what is acceptable behavior and conduct of both the governed and the Government. This principle is important: the laws must apply equally to the Government and individual citizens.

## II. The Importance of Context: We Cannot View the Rule of Law in the Abstract

We cannot view issues of Rule of Law in the abstract. It must be within a certain socio-political and historical context. This context includes the prevailing political and legal institutional arrangements for the enactment of laws and the manner in which a people elect their government at regular intervals.

The concept of the Rule of Law, per se, does not address the substantive content of laws. Hence it does not guarantee that only good laws are enacted or that bad laws will be repealed. It also does not specify the process of enacting laws or specify the balance that

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<sup>†</sup> This paper is based on the Address which Professor Jayakumar gave on October 19, 2007 at the Rule of Law Symposium at the International Bar Association Conference in Singapore.

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should be struck between the rights and interests of the individual and the rights and interests of the society as a whole.

It is not possible to have a universal prescription when applying the Rule of Law. These issues have to be determined according to the social, cultural, and political values of each society.

In England, for example, the Lord Chancellor was the Head of the Judiciary and a member of the Executive, and this system worked admirably well for centuries. Only recently, in 2006, did the British government transfer the Lord Chancellor's judicial functions to the Lord Chief Justice of England and Wales, a move closer to that of the Constitution of the United States of America, where there is separation between the Judiciary and the Executive.

### III. My Context and Perspective

I approach the subject of Rule of Law as someone who is legally trained. My personal perspective has also been shaped by my experience as a Minister in the Government of Singapore. My positions include Minister for Law and Coordinating Minister for National Security, a position that includes overseeing efforts to combat terrorism. Together with my Cabinet colleagues I have had to grapple with issues of law, order, and security in my various capacities in the past twenty-three years.

Singapore is a very small, young, and densely populated nation in Asia, with a size of 704 square kilometres, about the size of New York City. Singapore has a population of 4.68 million, of whom slightly more than 1 million are foreigners. It is one of the world's most densely populated countries. It is about a quarter of the size of Rhode Island, the smallest State in the United States, but with more than four times its population. We received some 9.7 million tourists in 2006.

We are a multi-racial, multi-lingual, and multi-religious society. The people of Singapore are principally Chinese, Malays, and Indians. For us, racial and religious harmony are not just desirable objectives to achieve but are the fundamental bases for our social stability, cohesion, and security.

### IV. Rule of Law and the Balancing of Interests

There may be universal agreement on the content of some laws in a few areas—for example, nearly all countries do not condone murder, rape, or theft of personal property, etc. Likewise, in some areas there can also be universal agreement *on the process*. For example, an accused should normally be punished only after due process before an independent judiciary.

But for most other areas, especially in the implementation of principles, there is no universal agreement. Very much depends on a balance between individual and societal rights. The Rule of Law does not spell out what this balance must be. How each society strikes this balance must be a function of its social, cultural, and economic construct. Ultimately, each society has to find that right balance and operate the Rule of Law to achieve good governance.

Both developed and developing societies grapple with this issue of finding the right balance. We witnessed the public debate that ensued in mid-2007 in the UK when several

terrorists were tried and found guilty. The public was asking why these terrorists, before their arrest, were free to move in and out of the UK to perpetrate their ill-intentions. Why was there not greater surveillance and restriction of their movement?

Societies and cultures will inevitably differ in approach in striking this balance. Asian societies, like Singapore, generally give greater importance to the larger interests of the community in arriving at this balance. In Western societies, the tilt is towards more emphasis on the rights of the individual. It is not possible to criticize one approach as wrong or applaud another approach as right.

There is, however, one important caveat: The contextual approach should not become an excuse for arbitrary or capricious Government. There is a core set of fundamental principles undergirding the Rule of Law that should exist in every society. These include the right to an independent judiciary; the right not to be arbitrarily arrested and when arrested the right to a fair trial; the right to free and fair elections so that people can change the government of the day; and the right to personal safety and security.

## V. Illustrations from Singapore's Experience: Social, Law and Order, National Security

### A. SOCIAL

A homogenous population with settled customs and expectations can get on without many explicit laws because so much is understood without having to be spelled out. Social responsibility in such societies is enforced by peer pressure.

Non-homogenous societies face unique challenges. In societies that are less homogenous, the Rule of Law is all the more important, as it makes expectations transparent. In countries that have only recently become nations, and in which people of different ethnic, cultural, and religious backgrounds rub shoulders, the rules that prevent friction and that make life in a crowded society bearable have to be stated explicitly and enforced fairly and consistently. Otherwise, there will be constant strife and misunderstanding. Harmony in a diverse society cannot be achieved with a *laissez-faire* system; with such a system, the different ethnic, religious, cultural, and language groups will have their own song sheet, and the government as conductor will not produce harmony.

For multi-racial and multi-religious societies, where there are several communities with different religious beliefs and values, each community will hold its moral values deeply. Without observance of the Rule of Law, the individual can and will act according to his conscience as guided by his moral beliefs even when it breaks the law. Each will do his own thing, no doubt sincerely, passionately. The result will be strife and conflict. To avoid this result, there has to be respect for the law by all in accordance with common ground rules of engagement and conflict resolution, and there must be large common secular space that belongs to all citizens regardless of race, language, or religion.

In Singapore's multi-racial and multi-religious society, these considerations have meant that maintaining racial and religious harmony has become an important tenet for us when approaching the Rule of Law.

Thus in Singapore we have the Maintenance of Religious Harmony Act and the Presidential Council on Religious Harmony. We also have a Presidential Council for Minority Rights, which scrutinizes all Bills passed by Parliament to ensure that they do not discrim-

inate against any racial or religious community. Further, Section 298 of our Penal Code makes it an offence to insult the religion of any person with intention.

We have Group Representation Constituencies in Singapore where one of the Members of Parliament (MPs) representing that constituency must be a member of a minority. This is to guarantee there will always be a certain number of MPs from the minority groups.

As an example of our commitment to multi-racial cohesion, in 2006 we prosecuted three individuals who posted racist remarks and derogatory remarks against Muslims over an online forum and on blogs. They were charged under the Sedition Act for promoting feelings of ill will and hostility between different races or classes of the population of Singapore on the Internet. One person was sentenced to a day in jail, and the second person to a month in jail. The third person was placed on probation for two years and ordered to do 180 hours of community service. In other countries, such prosecution could be considered as infringement of freedom of expression.

To have a culture of Rule of Law requires more than enactment of sound legislation and the will to enforce the legislation. It needs to be actively nurtured and fostered. In Singapore, we have set up an Inter-religious Harmony Circle where different faiths have a regular platform to engage in dialogue. In 2003, the Government adopted a Declaration of Religious Harmony, which is an affirmation on the importance of, and Singaporeans' commitment towards, peace and harmony. Every year our schools commemorate Religious Harmony Day and celebrate our diversity.

## B. LAW AND ORDER

We believe that the society at large, whether Singaporeans, foreigners, or tourists, should live and work free of molestation and harm from criminals.

We therefore take a strong stand on maintaining law and order. We have strict laws and punishments. It does not mean that we are crime free, but we do have a low crime rate. We have retained the death penalty and corporal punishment for certain offences. We have very strict laws on drug trafficking. There is death penalty for discharge of firearms in the course of committing a serious offence, even if no one was killed, and as a result the number of offences involving the use of firearms in Singapore has always been low. I appreciate that some countries, like in the EU, have abolished the death penalty. In Singapore, the death penalty is the will of the majority. A *Straits Times* survey in 2006 showed a large majority of the electorate in support of the death penalty.

This is what I mean when I say that each community needs to find its own balance and interpretation of the core values in order to strengthen and affirm its social fabric.

In turn, governance subject to laws that resonate with society's values nurtures community cohesion and brings a sense of expectation that there will be stability, safety, and security. This not only creates a sense of well-being; it is also essential for economic growth and investor confidence. In Singapore, right from independence, we realized the importance of the Rule of Law for stability of the country. Because Singapore has been recognized by independent rating agencies (PERC, WEF, IMD, and Transparency International) to uphold the Rule of Law, to have an independent and capable judiciary, to maintain high standards of transparency, and to not tolerate corruption, we have drawn in

investments from all the developed economies and also become one of the leading banking and financial services hubs in Asia.

### C. NATIONAL SECURITY: TERRORISM AND RELIGIOUS EXTREMISM

There is no better contemporary illustration of the dilemma of balancing of interests than the recent debates in various countries—USA, UK, Australia, etc.—on what measures are necessary to combat terrorism and how to reconcile the special or extraordinary measures needed by Governments to deal with terrorist threats with the Rule of Law, with due process, and with the need for safeguards to protect rights of accused or suspects.

How do we protect our people against catastrophic terrorist attacks, and how do we deal with terrorist suspects and accused persons? Is the Rule of Law violated when Governments crack down on Jihadist web sites, monitor internet chats, or intercept cell phone communications?

Terrorism is in effect a flagrant disregard of the Rule of Law. It confounds traditional approaches to law enforcement, which assume the offender does not wish to be caught and does not want to suffer the most serious penalty—the death penalty. The terrorist suicide bomber not only does not mind death, he believes death will bring martyrdom and rewards in afterlife.

If the law does not produce a response that upholds law and order, the law becomes irrelevant. The Jihadist poses a challenge outside the usual framework of ordinary criminals. Civilized societies require effective answers to this unusual group of criminals. They cannot be countered with esoteric arguments. Every society must work out pragmatic answers. Thus the U.S. response to 9/11, detention without trial, was a response that generated debate on the existence of the Rule of Law in that country. The UK and Australia have also faced similar challenges.

This need for balance can be seen in the *Asian Wall Street Journal's* (AWSJ) response to recently enacted anti-terror law in the Philippines. Rights groups and NGOs in the Philippines had criticized this law, but AWSJ in its editorial on July 23, 2007 argued that the law did not go far enough:

*“Overall, the law lays out 22 penalties for law enforcement, and only four for the terrorists. Much of that strikes us as tipping the balance too far toward suspects at the expense of security. By so scrupulously protecting alleged terrorists’ rights, the Human Security Act may deter Filipino law enforcement from acting when it should to protect the rights of its citizens to life and safety. The three-day detention without charge provision is far too short to be effective. The explicit protections for journalists, doctors and lawyers may encourage terrorists to exploit those professions. And the outlawing of “psychological” and “moral” torture—which could be construed as almost anything—leaves law enforcements with very few tools through which to extract information out of their subjects.*

*Given that, it’s ironic—and misleading—for NGOs to rail against the Filipino law, which contains far more legal protections for terrorist suspects than it does for law enforcement. ‘The Philippine Congress should repeal or revise the act to comply with human rights standards,’ Human Rights Watch complained. Even United Nations special rapporteur Martin Scheinin called on the legislature to reconsider the law.*

*We agree, Filipino policy makers should reconsider it—and make it stronger.”*

#### D. SINGAPORE'S EXPERIENCE WITH TERRORISM AND RELIGIOUS EXTREMISM

For Singapore, dealing with terrorism is not an academic or theoretical issue. We had to deal with a serious terrorist threat in 2001. Like all countries, our concern with terrorism of course is with senseless loss of countless innocent lives and casualties. The destruction of buildings, a drop in business confidence, and the flight of tourists are also damaging, but the consequences for our racial and religious harmony may take decades to repair.

For Singapore, with our background of communist insurgency and racial riots, we have had emergency measures for detention without judicial trial since the 1950s and 1960s. In December 2001, when we uncovered the plot by the Jemaah Islamiyah (JI) to mount terrorist attacks on our train stations and other targets, these provisions became critical in dealing swiftly with the JI threat. A judicial trial is simply not possible within the constraints of terrorist intelligence and counter terrorist activity.

These provisions are not arbitrary and do not entail detention without process. For instance, there is a process of checks and balances, including review by a committee chaired by a High Court judge. The Elected President also has a safeguard role exercisable in his discretion (if the Government wants to detain someone who the Advisory Board says should be released, the President's concurrence is needed).

Contemporary terrorism, which exploits and misuses religion, is not just about the physical effects of terrorist acts. For us in Singapore, because of our multi racial society, there is an added important dimension: how to ensure that terrorists and a few religious extremists do not, by their acts, tear up the social fabric and our hard-earned racial and religious harmony. This is why we have always acted swiftly in response to threats to our cultural and religious harmony.

We have also engaged on values, as it is common values that, in the long term, ensure stability and respect for diversity. For example, when the JI plot was discovered, the Government took especial effort to assure the Muslim community that the detentions were not targeted at the Community. The Religious Rehabilitation Group, which is a voluntary group formed by individual Islamic scholars and teachers, was formed to perform counseling works on detained JI members, and its main objective was to counter the ideological misunderstanding of the JI members through counseling. In addition, the Community Engagement Programme was introduced to bring together people from different communities in Singapore to work with each other to develop understanding and to prevent and minimize racial and religious tensions in our society after a crisis, such as a terrorist incident.

We are not saying that our answers are the best answers. They are simply what have worked for us. The future will no doubt bring new challenges which will require us to refine our approach. For these to work, we must remain guided by the Rule of Law.

#### VI. Conclusion

Every society must thus decide and find the balance with which its government and citizens are comfortable, given its historical, social, and economic context. I have given illustrations from the Singapore system, not to be a model for other societies. They have worked well for us in helping a society of different races and religions to live peacefully

together. They have strengthened our social fabric; they have provided the certainty and framework for international commerce to thrive; and they have made us one of the safest cities in which to live, work, and play. Internationally, our legal system and judiciary have been held up by the World Bank as an example of how a former British colony has been able to attain integrity and efficiency, and we have had many visitors from other countries to study our courts and the legal system.

We conclude, therefore, with some irony. The Rule of Law hinges upon laws that *work*. But its continued relevance depends upon more than the law. The government must be able to enforce it, and must work with the citizenry to assiduously nurture the culture and values that support it. The courts must be able to uphold it. The citizenry must respect it. Ultimately it is undergirded by a society's perspective of its desired values, propagated by a preponderance of those values, and relevant only when its framework results in well-being for all.

This, then, is the essence of Rousseau and Locke: free society requires rules; rules require free society. For free society to thrive, we need the global capacity to work together toward common values. International cooperation is one part; wise governance within individual countries is another. There must be a will, internationally and domestically, to do all that is necessary to allow freedom under the law to flourish.

