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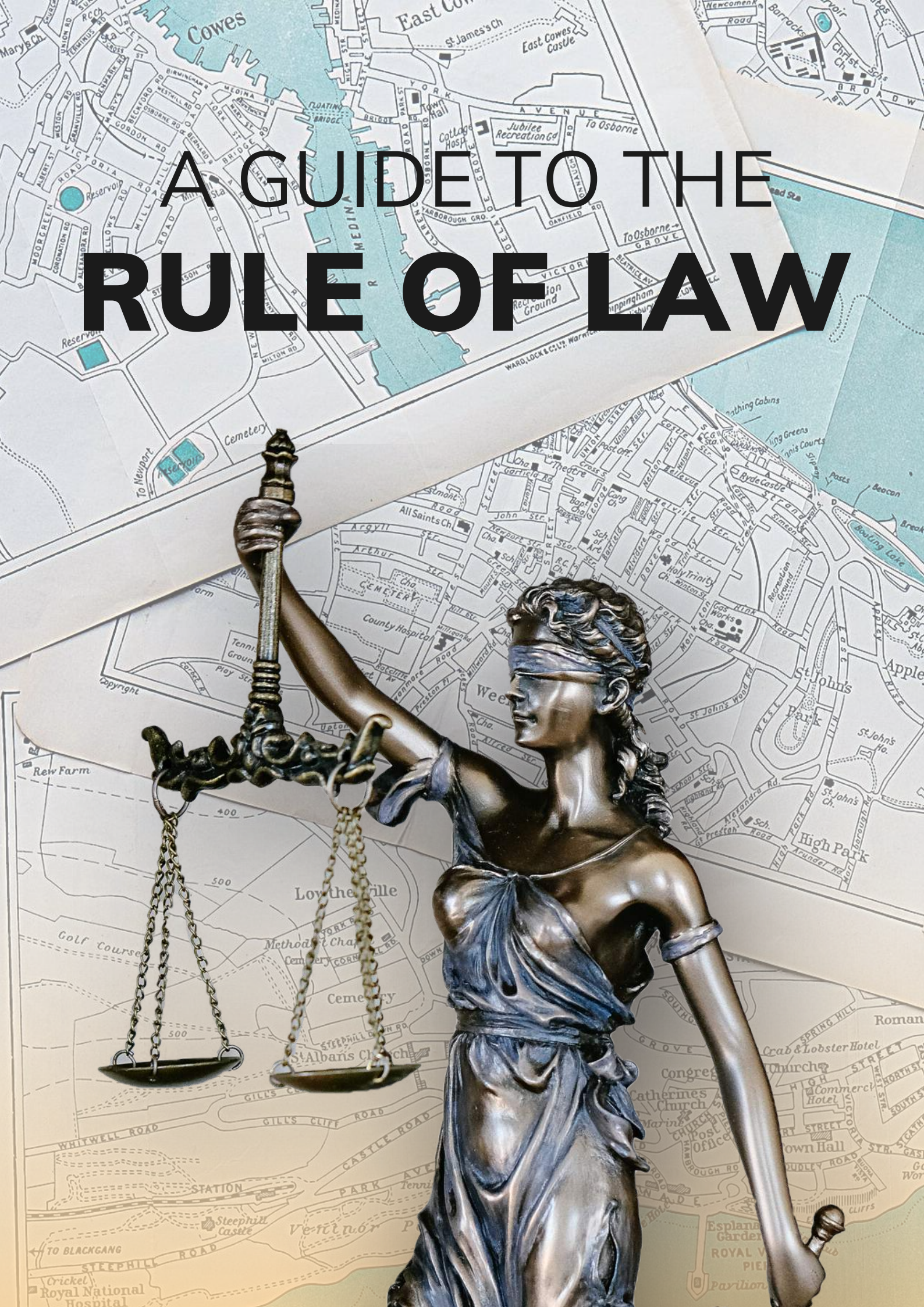
A Guide to the Rule of Law

SMU Apolitical

A GUIDE TO THE
RULE OF LAW



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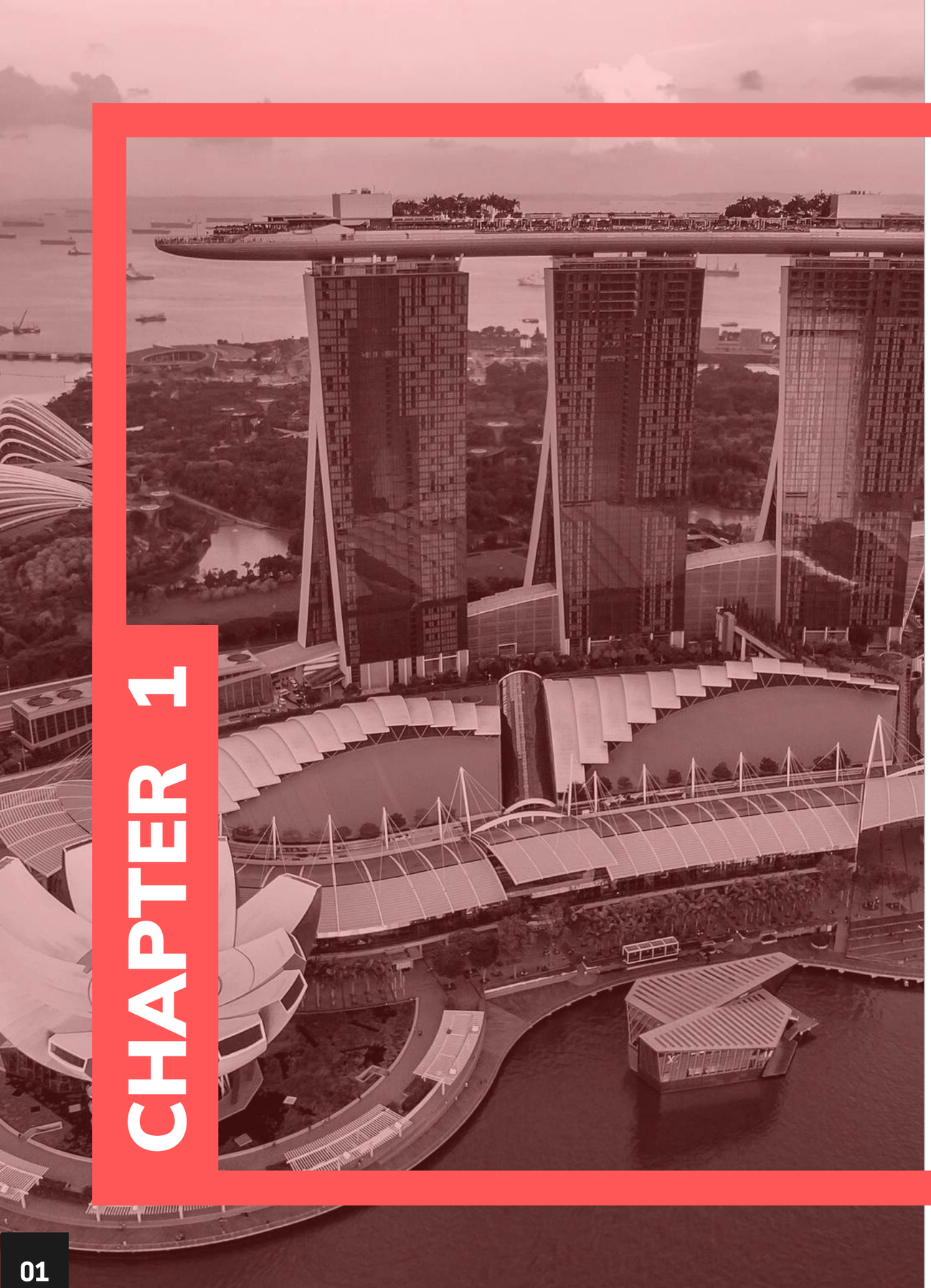
CONTENT.



CHAPTER 1

THE IDEALS AND THE ISLAND: THE RULE OF LAW IN SINGAPORE

BY KENNETH CHUA YONGDE

INTRODUCTION

One of the longest-standing dichotomies that has characterised both academic discourse and lay discussion is the East vs West dichotomy.

Applicable in such a wide variety of contexts, this particular distinction has become commonplace in analyses of political, legal, and social systems of nations. Thus, it is no surprise that this comparison occurs frequently in the discussion of Singapore's governance system.

Whether in legitimisation or criticism, politicians and academics alike employ the East vs West dichotomy to draw comparisons between the Singapore model of governance and liberal democratic models. However, one question that is rarely addressed is whether this dichotomy is helpful or accurate in representing the differences between Singapore and the so-called "Western liberal democracies."

This essay endeavours to shed light on this often-cited yet rarely-justified dichotomy as it is employed in existing discussions of the rule of law (ROL) in Singapore, in the hope that a more nuanced understanding of the issue may be achieved. By painting a comprehensive picture of ROL using legal theory, we hope that readers might find some viewpoint here that will add value to their perspective.

We will begin with an overview of key conceptualisations of ROL in Western legal philosophy. Following this, we present several prominent "ROL criticisms" that have been raised about Singapore's legal system. The analysis section will explore the merits of the "Singapore vs the West" dichotomy and consider its value in analysing ROL in Singapore before the paper concludes.

CONCEPTUALISATIONS OF THE RULE OF LAW

Most ROL literature can be categorised broadly into two schools of thought: procedural and substantive ROL. However, it is important to realise that ROL literature does not fall neatly into these two categories. Rather, ROL literature exists on a spectrum, with "procedural" and "substantive" forming the extremes, and various views in between.

Procedural Rule of Law

Procedural ROL views ROL as a quality of a legal system that has to do with functionality. As such, it excludes any norms or values like "democracy" or "human rights" (Tamanaha, 2004). As philosopher Joseph Raz conceptualises, a system with good ROL will have a system of laws that is capable of guiding behaviour. Raz elaborates by listing criteria which are present in a system with ROL (Raz, 1979).

The criteria include:

- ☑ Laws should be prospective, open, and clear
- ☑ Laws should be stable
- ☑ The independence of the judiciary must be guaranteed
- ☑ The courts must have power to enforce these principles

ROL is not considered a moral virtue that gives the law a "good" purpose or direction. As Raz puts it, "[ROL] is the virtue of efficiency" (Raz, 1979, p. 7). In the procedural view, ROL is to law what sharpness is to a knife. ROL makes law effective, (just as sharpness makes a knife effective), but it does not prescribe any particular method or objective that law should employ or fulfil, nor does it prevent law from being morally "bad" law (just like how sharpness does not determine whether the knife is used for good or bad purposes) (Raz, 1979).

Substantive Rule of Law

At the other end of the spectrum is the "substantive ROL" position, which has as its basis the procedural view, but adds certain norms or values to it. One of the key philosophers who endorsed this view was John Finnis. Finnis begins with the premise that law and ROL exist to achieve an objective which he calls "the common good" (Finnis, 2011, p. 277).

This introduces the idea of achieving "the common good" – ROL is no longer merely an instrumental feature of a legal system. It now has an (implied) definite outcome - "the common good" - which Finnis defines as a set (or sets) of conditions that allow individuals in a community to pursue reasonable objectives in their personal lives. Finnis's conceptualisation of ROL is thus a substantive one – it sets out an objective that is deemed to be desirable, and that ROL ought to achieve.

The variation in ROL theory, however, does not exist only in the conceptual binary of either procedural or substantive. Theories also differ in the specificity of the content they include in ROL. We will consider two of these theories briefly.

"Minimal Specificity of Rights" Rule of Law

Lord Bingham, former Lord Chief Justice in England, reflected in a lecture given at Cambridge that ROL may be expressed in this manner: "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts" (Bingham, 2007, p. 3). He then detailed this principle through sub-principles, similar to the way Raz did. However, unlike Raz, Bingham includes as sub-principle 4: "Law must afford adequate protection of fundamental human rights."

The rights referred to here are specific to the individual country in question. Bingham states that these "fundamental human rights" do not include "the full range of freedoms protected by bills of rights in other countries or in international instruments of human rights…", but "[t]he rule of law must, surely, require legal protection of such human rights as, within that society, are seen as fundamental." (Bingham, 2007, pp. 76-77).

One could say that Bingham includes a minimal level of specificity of rights in ROL. The specific form that rights take would be influenced by the history and culture of society, but those rights would have to meet a basic standard of being "fundamental" within that system. In Singapore, such rights might include freedom from repression and persecution, and freedom to pursue a means of earning a living.

"Specific Rights" Rule of Law

The last view of ROL we will consider is what might be termed the "specific rights" view of ROL. This view is held by modern institutions such as the International Bar Association (IBA) and the World Justice Project (WJP), its defining element being the specificity of content included in the ROL definition. In the WJP's 2020 Rule of Law Index Report, ROL is defined to include fundamental rights like "freedom of opinion and expression; freedom of belief and religion; freedom of assembly and association; and fundamental labour rights." (World Justice Project, 2020, p. 11). The IBA concurs, stating in a report on ROL in Singapore,

> **"A strong and robust rule of law requires respect for and protection of democracy, human rights - including freedom of expression and freedom of assembly." (International Bar Association, p. 69)**

In the eyes of these institutions, ROL must contain these specific freedoms and rights. This position comes close to equating ROL with democracy, which makes it quite the opposite of the minimalist position Bingham takes. With these theories established, we now turn to the state of ROL in Singapore.

PREVAILING CRITICISMS ON THE RULE OF LAW IN SINGAPORE

The existing academic discourse on the state of Singapore's ROL ranges widely over various issues. Much of the criticism of ROL in Singapore tends to take a comparative approach – analysing Singapore's ROL against ROL in modern Western liberal democracies. Given the wide-ranging discussion, we will selectively elaborate on three issues that are pertinent to ROL: (1) the power of judicial review; (2) the robustness of institutional checks; and (3) the importance of individual rights and liberties.

Judicial Review as an Effective Check on Power

Article 93 of the Singapore Constitution vests judicial power in the Supreme Court and its subordinate courts. When read together with Article 4 of the Constitution which entrenches the Constitution as the supreme law of the land, Article 93 grants the judiciary power to review legislation and executive action, and void them if they are unconstitutional or unlawful. Wee Chong Jin, Singapore's first Chief Justice after independence, affirmed the relevance of the principle of judicial review, stating:

> **…the notion of a subjective of unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. (Chng Suan Tze v Minister for Home Affairs 1988, para. 3).**

Despite these affirmations, criticisms have been raised about the power of the courts to review exercises of executive power. In *Chng Suan Tze*, a case involving the exercise of executive power under the Internal Security Act, the Court of Appeal (CA) rejected a subjective test that precluded judicial review of a minister's discretionary action that was authorised by statute (*Chng Suan Tze v Minister for Home Affairs*, 1998).

Following the CA's decision, Parliament amended the Constitution and the Internal Security Act to overturn the decision in Chng Suan Tze, and upheld an earlier court case (Lee Mau Seng v. Minister for Home Affairs, 1971) in which the subjective test that the CA rejected was used. From then on, judicial review would only consider compliance with procedural requirements, and not the substantive implications of justice in detention orders.

One might conclude prima facie that this specific case undermines ROL by effectively removing certain executive actions from the scope of judicial review. While the courts can review a detention order to ensure compliance with procedural requirements, they are no longer able to decide if a detention order meets other requirements of lawfulness. However, in considering the issue of diminished judicial power of review, there is a relevant counter-perspective – the issue of justiciability.

In brief, justiciability is the concept of determining over what issues the judiciary ought to have decision-making power, and what issues lie outside the scope of judicial authority to review. The Singapore courts recognise that certain "issues [like] foreign affairs or national defence" lie outside the scope of judicial review (Lee Hsien Loong v Review Publishing Co. Ltd., 2007, para. 97). Thus, one could argue that, given that the subject matter in Chng Suan Tze involved national security, this was an unjusticiable issue, and fell outside the scope of judicial review.

In addition, one of the arguments raised to justify Parliament's course of action was that of "local conditions." Because non-Singapore case law had "a more protective pro-individual bias in [its] reasoning," it "was considered unsuitable for Singapore." (Thio, 2002, p. 60). Then-Minister for Home Affairs, Jayakumar stated:

> **"Economic, social, and political conditions of Singapore and United Kingdom are in fact divergent... Matters of public law, especially defence and security, are very crucial for the survival of any country. So not only must our laws meet our different circumstances but [they] must be interpreted by our own judges...who are aware of our history and of our conditions [rather than]...a body of UK judges sitting in the United Kingdom thousands of miles away, who really have no knowledge of ... our circumstances.**
> **(Par. of Sing. Debate, 1989).**

Thus, the importance of local context in national security matters was highlighted, and the application of UK legal precedent was made contingent on local acceptance.

Robustness of Institutional Checks

The second area of criticism concerns institutional checks. Institutional checks function as mechanisms of accountability both between and within the branches of government. Each branch of government (or institution) has certain powers which are kept in check by the exercise of the powers of the other bodies in the government. Specifically, we will consider the criticism of the lack of robust scrutiny of the ruling party in Parliament.

Since independence, the super-majority that the People's Action Party (PAP) has continuously held in Parliament has not provided much room for diverse views to be heard. To allow more institutional checks in Parliament, the constitution was amended in 1984, introducing the Non-Constituency MP (NCMP) positions. Occupied by opposition party candidates who wins a minimum of 15% of their constituency votes, the NCMP seats in Parliament are a means to strengthen the voice of the opposition. Similarly, the Nominated Member of Parliament scheme introduced in 1990 brought non-party members into Parliament to supplement the opposition in the House and hold the incumbent party accountable for its actions. Yet the PAP to date still holds enough seats to pass legislation and even amend the Constitution with relative ease, as it has the two-thirds majority necessary. (Thio, 2002; Fernandez, 2020).

Singapore takes its model of Parliament from the Westminster model of the UK, in which the robust Parliamentary debates feature as an important check against the ruling party. Critics argue that the lack of diversity (and the consequent weak challenge to the ruling party) in Parliament indicates a lack of government accountability. In justifying this lack of diversity, then-PM Goh Chok Tong said:

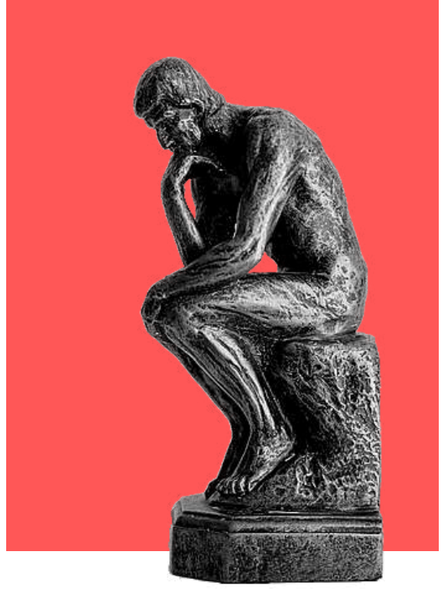
> **"A two party system would not feed, clothe, house and educate people [and] would put us on the dangerous road to contention, when we should play as one team.' Similarly, 'an opposition party consisting of bums, opportunists and morons can endanger democracy and bring about chaos, disorder and violence. Equally, a one-party parliament can safeguard democracy and bring about peace, progress and prosperity.**
> **(Thio, 2002, p. 37).**

Despite the long-standing opposition to what is seen as excessive adversariality, the recent elections potentially signal a shift in the way Parliament will conduct itself. With a stronger opposition presence in the House and the official designation of Workers' Party chief Pritam Singh as Leader of the Opposition, a more robust and dynamic challenge to the PAP may arise in the near future (Fernandez, 2020).

Constitutional Rights and Liberties before the Singapore Courts

Perhaps the issue that features most prominently in liberal Western discourse on Singapore's ROL is the issue of individual rights and liberties. Much of the discussion on this topic leaves the impression that the limitations of freedoms in Singapore are illegitimate, and that the restrictions of constitutional liberties (like freedom of speech and religious practice) are violations of fundamental human rights. Thus, the issue of "fundamental liberties," as they are called in Part IV of the Singapore Constitution, is an important issue to consider when examining ROL in Singapore.

The Privy Council of the United Kingdom, which was until 1994 the last court of appeal for certain cases tried in Singapore, reflected in Ong Ah Chuan v PP that, contrary to the Public Prosecutor's proposed interpretation of Part IV (fundamental liberties of the Singapore Constitution, "their Lordships would give to Pt IV of the Singapore Constitution 'a generous interpretation, avoiding what has been called `the austerity of tabulated legalism`, suitable to give to individuals the full measure of the [fundamental liberties] referred to'." (Ong Ah Chuan v PP, 1981, para. 23).



Drawing from this and other comments by the Privy Council, it is obvious that the Privy Council gave the constitutional rights and liberties of individuals a place of prominence in their considerations. Equally obvious is the rejection of their position by the Singapore government. Lee Kuan Yew stated in 1990:

> **"In English doctrine, the rights of the individual must be the paramount consideration. We shook ourselves free from the confines of English norms which did not accord with the customs and values of Singapore...The basic difference in our approach springs from our traditional Asian value system which places the interests of the community over and above that of the individual.**
> **(Thio, 2002, p. 66)**

Some court cases appear to espouse a similar view, such as Colin Chan v PP (1994), where questions about the constitutional rights to freedom of speech and of religion (Articles 14 & 15) arose. When Jehovah's Witnesses (JW's) brought a constitutional challenge to the prohibition of possession of their religious materials, the ruling of the court was that the refusal of JW's to participate in national service (NS) "threatened to undermine government authority in the name of religious conviction." "Their very act of objecting was deemed prejudicial to national interests and hence their rights were restricted so as to preserve 'public order'." (Thio, 2002, p. 73).

By this rationale, the JW sect and its publication, Watchtower, were banned due to failure to "conform with the general law relating to public order and social protection." According to Chief Justice Yong Pung How, sitting as the High Court, as compulsory NS is a "fundamental tent in Singapore, [a]nything which detracts from this should not and cannot be upheld." As Yong CJ stated, "The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained." (Colin Chan v PP, 1994, paras. 37, 64).

From the viewpoint of the Privy Council, the position the Singapore court took would likely be incompatible with the upholding of constitutional liberties. The reasoning of the court that "singles out a government policy, national service, confers a sacrosanct quality to it and exalts it above the Constitution" sets constitutional liberties at risk of being too easily sacrificed in the name of national security, and is unlikely to align with giving "individuals the full measure" of fundamental rights (Thio, 1995, p. 82). Citing these issues, critics have said that ROL in Singapore is only a tool to achieve administrative efficiency and public order, and fails to uphold substantive justice (Rajah, 2014).

In the discussion of these ROL issues and the Singapore legal system as a whole, there often occurs the need to adapt foreign practices and ideals to the local context. In justifying this adaptation, the "Singapore vs the West" comparison is regularly used – yet the merits of this dichotomy are rarely questioned. In the next section, we will explore the usefulness of this distinction.

ANALYSIS

The "Singapore vs the West" Dichotomy?

By this time, you are likely to have noted that all the theories of ROL discussed, though different and sometimes conflicting, have their origin in what is colloquially called "the West." Yet, unlike the impression sometimes left in discussions that employ the "Singapore vs the West" dichotomy, the "Western" theories of ROL do not all provide the same analysis about ROL or the legal system in Singapore.

Thus, one might make the observation that *the "Singapore vs the West" dichotomy tends to over-represent the substantive view of ROL, which results in an oversimplification of the concept of ROL.* Rather than being a monolithic concept, ROL is multifaceted.

One example is the "individual rights and liberties" discourse that pervades many discussions of ROL in Singapore. Oftentimes, the Western ideal of ROL is represented as emphasising individuals' rights and liberties. This "Western" ideal is then contrasted with the "Eastern" philosophy of Confucianism, which is represented as supporting ideals like placing the community before the individual and preferring the rule of virtuous leaders to the rule of law. (Peerenboom, 2004). Yet this view of the "Western" ideal is incomplete. Not all ROL theories include support for individual rights as part of ROL, and theories differ on the degree of substantive content.

Furthermore, philosophers who wrote about ROL did not conceptualise ROL as a single, unchanging standard. They expected it to differ in its appearance, based on externalities such as culture and social norms.

> **"[T]here is no one manifestation of the rule of law…The rule of law in Japan is very different from the rule of law in Germany, which is different from the rule of law in Singapore and in the United States. All of these societies have recognisably robust rule of law systems, albeit with different strengths and weaknesses. And within each society, the implications of their rule of law system – how it plays out in daily life—is a function of the surrounding political, economic, cultural and social environment." (Tamanaha, 2004, p. 247).**

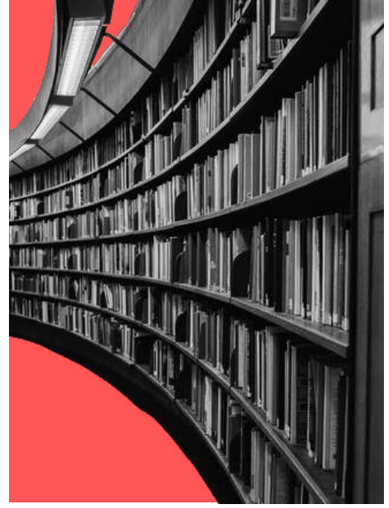
A second observation to be made about the "Singapore vs the West" dichotomy is that, when employed in the discussion of ROL, there is a tendency to set up ROL as an end, and not as a means to an end. A brief study of relevant philosophers reveals that these philosophers considered ROL as a means to a broader purpose. Joseph Raz, for instance, states: "Conformity to [ROL] makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal…the rule of law is meant to enable the law to promote social good." (Raz, 1979, p. 9).

John Rawls, another key legal philosopher, observed that "a decent…system of law, in accordance with its common good idea of justice, secures for all members of the people what have come to be called human rights…Among the human rights are the right to life (to the means of subsistence and security); to liberty; and to formal equality…" (Rawls, p. 65).

By contrast, discussions that compare Singapore's ROL to "Western ROL" run the risk of speaking about ROL as an objective to be achieved for its own sake, without sufficient regard to the larger aims of law. For example, the IBA's report on ROL in Singapore highlights areas in Singapore's system of law where it deems ROL to be violated, and cites "fail[ure] to recognise the increasing importance of international law", "fail[ure] to meet established international standards", and the "threaten[ing] of democracy and the rule of law in Singapore". The report also frames "a free and dynamic media" as "an essential element of a democratic state" (International Bar Association, pp. 68-69).

Yet in the same report, the IBA seldom mentions or elaborates on what the objective is in correcting these failings. While the IBA explains the importance of these standards to upholding democracy, it leaves the question of "What does achieving democracy do for Singapore?" largely unaddressed. The rule of law and democracy (especially the "Western" versions) are assumed to be the desirable end, and few questions are raised as to whether such a form of governance is beneficial or appropriate for Singapore.

This is not the position taken by the Singapore government. As Minister for Law K. Shanmugam stated:



> **"…the precepts…of the Rule of Law, must be applied with hard-nosed practicality. What matters is how the laws apply in practice. The truest test of the success of the law, of the Rule of Law, lies in the benefits it produces for society and individuals." (Shanmugam, 2012, p. 358).**

His comment agrees with Lee Kuan Yew's 1962 speech to the University of Singapore Law Society:

> **"…the acid test of any legal system is not the greatness nor the grandeur of its ideal concepts, but whether in fact it is able to produce order and justice in the relationships between man and man and between man and the State…Reality is relatively more fixed than form. So if we allow form to become fixed because reality cannot be so easily varied, then calamity must…befall us. (Bunte & Dressel, 2016, p. 319)"**

Thus, in Singapore, ROL and democracy are not uncritically accepted as the gold standard for governance. The value of a standard like ROL is judged by the outcome it is capable of producing in society.

Despite its shortcomings, the East-West dichotomy does provide a useful perspective by highlighting the importance of context when considering issues like ROL. While the dichotomy may be guilty of over-simplification and short-sightedness, yet it fosters an awareness that East is different from West – or more accurately, that every country has a unique history, culture, and society that will inevitably affect the way democracy, ROL, human rights, and liberty are viewed and implemented.

CONCLUSION

Time and space limit the depth of analysis one can make here of the difficulties that arise in the employment of the East vs West dichotomy when discussing ROL in Singapore. To complicate matters, often in discussions involving political issues, the ideologies on both sides that underpin the arguments lead to polarisation of the issues in question, and reduce the space for objective and nuanced analysis. For example, in discourse about democracy, an overly-enthusiastic commitment to liberal values can lead to equating a deviation in form to a lack of substance: in other words, if the system doesn't look like a Western liberal democracy, it isn't really democratic. Yet even the brief overview of the ROL theories in this paper reveals that the form of ROL may very well differ while the substance remains legitimate.

Thus, the East vs West dichotomy, so often used in political and academic discourse, provides but a partial view of the whole picture. ROL, even from a "Western perspective," is a complex concept, and its application in Singapore, a society with non-Western cultural values and its own unique history and context produces, unsurprisingly, a different picture from the ones seen in the West. Yet, unlike the impression the East vs West discourse frequently leaves, "different" is not quite synonymous with "illegitimate."

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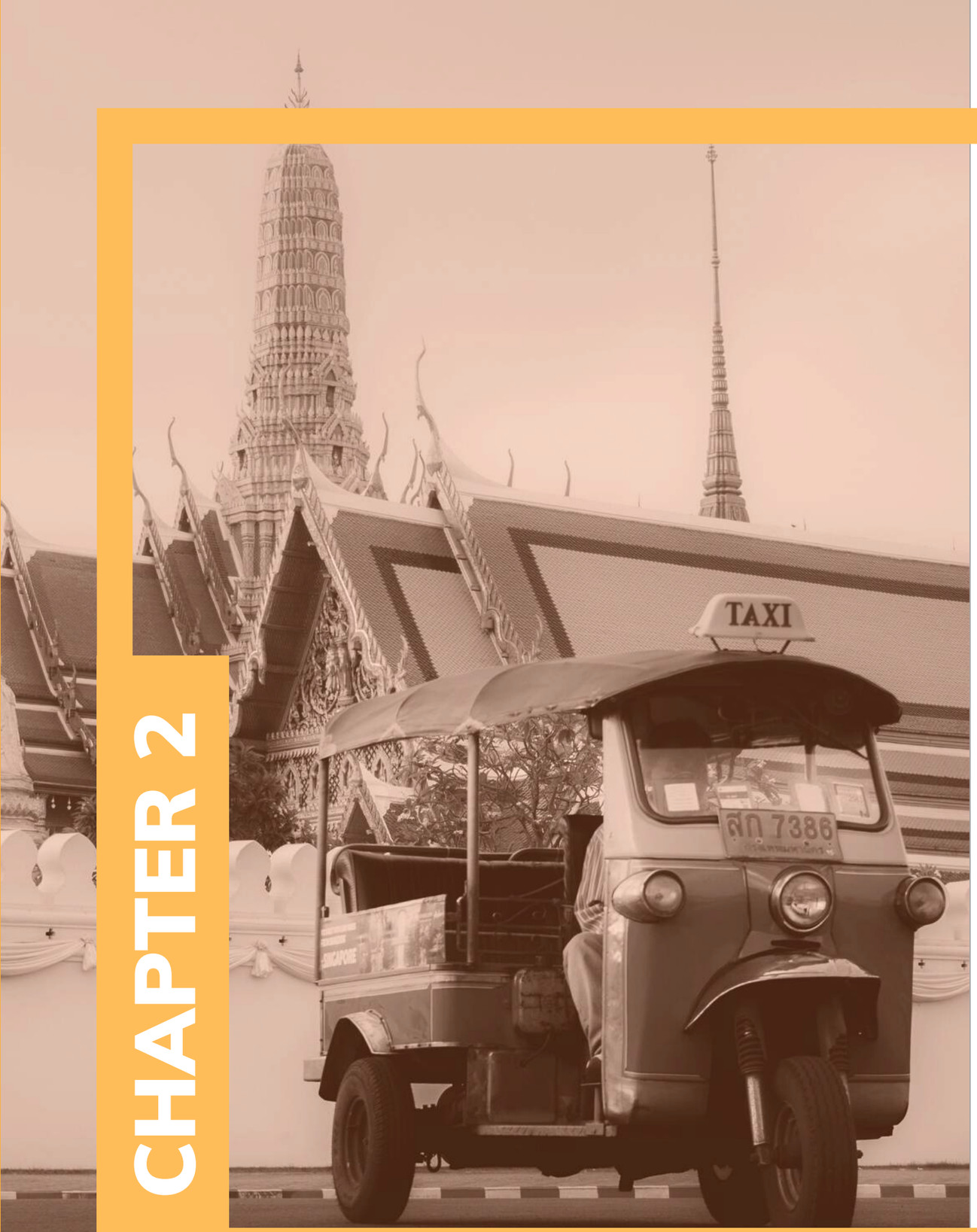

CHAPTER 2

THE TRADITIONAL TRINITY: THE RULE OF LAW IN THAILAND

BY HUI WAI YEE SAMANTHA & TAN WANXUAN

INTRODUCTION

Thailand has often been characterised as a country with a weak rule of law (Dressel, 2020). In this paper, we argue that Thailand's unique socio-political construction of a national trinity, based on nationalism tied to nation, religion, and king, is partly the reason for this condition, and we aim to explain how this traditional trinity impacts the implementation of the rule of law in Thailand in three major ways:

1. Firstly, the trinity shapes the way a significant portion of Thai society understands the nature of law and justice and their beliefs of how justice should be implemented in society. This in turn shapes their perception of the legitimacy of the rule of law.

2. Secondly, the trinity provides symbols and narratives that can mobilise groups in Thai society in ways that both help and hurt the rule of law.

3. Thirdly, nationalism based on the trinity has become a central tenet of the military and bureaucracy, wherein officials draw their legitimacy from the trinity rather than public service.

Thus, efforts to engage in the expansion of the rule of law in Thailand must address the existence of the trinity as an integral part of Thai society. The interpretation and adoption of nationalism, then, plays a central role in the exercise of rule of law in Thailand.

INTRODUCTION

The trinity comprises three key elements

"nation, religion, king"
(*chart, sasana, phra mahakasat*),

and it was formulated by King Vajiravudh who reigned from 1910-1925. Through shrewd diplomacy, the monarchy had avoided the formal colonisation of Thailand during the prior century. The legitimacy of the monarchy, though, was being challenged by the spread of Western political ideas such as constitutionalism — the notion that that the authority of government derives from and is limited by a body of fundamental law — and the growing number of urbanites that were becoming sensitive to these ideas (Murashima, 1998). In response, King Vajiravudh created and championed the trinity, which placed the monarchy at the centre of Thai nationalism to forestall the emergence of other forms of nationalism that might challenge the legitimacy of the monarchy's authority (Murashima, 1988).

In the century since King Vajiravudh, this depiction of Thai nationalism has pervaded all aspects of Thai life and Thai society thanks to long periods of military rule, which promoted nationalism as a unifying force in Thai life. Hence, the trinity continues to compete with political ideas such as constitutionalism, popular sovereignty and the rule of law as the basis of political legitimacy in Thailand (Dressel, 2010). The next section will provide an analysis of how the continuities and changes within the traditional trinity has affected the development of the rule of law in modern Thailand. While the traditional formulation of the trinity goes "nation, religion, king", we will instead discuss these elements in the reverse order — monarchy, religion, and nation, for ease of explanation.

Monarchy

In this section, we will analyse the existence of a "parallel state" between the monarchy and the military along with the presence of the Deep State in Thailand.

Firstly, there are elements of Thai society which consider the palace to exist as an element of a parallel state independent of the system of government established by the constitution (Chambers & Napisa, 2016).

One major implication is that the monarchic system potentially operates as a law unto itself, and the rule of law can only be said to exist in society if actors resort to resolving their disputes through the means of laws and legal institutions (Maravall & Przeworski, 2003). For example, the royal institution is often expected to be an intermediary in times of a political crisis (Pornsakol, 2010, p. 3). Most notably in 1992, after a series of events known as the "Black May", King Bhumibol chastised both ascetic politician Chamlong as well as Prime Minister Suchinda, a general who had led a coup the previous year, over how the former had led mass demonstrations against Suchinda for several weeks, and the latter had ordered combat troops to open fire at demonstrators. The image of the two men prostrated before the king as he reprimanded them for the damage caused by their rivalry was televised in Thailand and all over the world, demonstrating the power of the monarchy independent of political actors. When soldiers and demonstrators returned home after the meeting, the Thai public's reverence increased for King Bhumibol's image as a father figure capable of resolving even the most intractable disputes in Thailand through his sagacity.

Secondly, the influence of the monarchy as one of the pillars of the traditional trinity has had implications for the rule of law. Chambers and Waitoolkiat (2016) suggested that a "parallel state" exists in Thailand, where a nexus exists between the monarchy and the military with the goal to "sustain a palace-centered order from which the military obtains legitimacy" (p. 425). Historically, there have been periods where the monarchy and military have had close ties, such as King Vajiravudh giving the military a "saviours of the nation" role. Under King Bhumibol's reign, examples include his decree naming Field Marshall Sarit Thanarat "Defender of the Capital", after Sarit overthrew the government of Phibun who had been endeavouring to eclipse the prestige of the throne with militant nationalism. Sarit sought legitimacy from the king, and began speaking of "the army of the king" as well as the "government of the king" (Wise, 2020).

Another instance would be the appointment of palace favourite and army general Prem Tinsulanonda as Prime Minister in 1980, who had later used his influence to build "a military which would be loyal to any government that had been endorsed by the state" (Chambers & Waitoolkiat, 2016, p. 429). In light of this close relationship between the military and the monarchy, Chambers and Waitoolkiat (2016) observed that in face of threats to the monarchy's power, the military has been "intervening to re-establish the equilibrium of regal order in a coup in 1991, [through] behind-the-scenes manoeuvres to change ruling coalitions in 1997, a coup in 2006, the ousting of a government and its replacement in 2008 and a coup in 2014 and rule by a junta after that" (p. 426). In particular, Preechasinlapakun (2013) observes that in Thailand, coups are a common occurrence and have become institutionalized to the extent that there is a well-defined pattern of how coup leaders go about revoking and drafting new constitutions, with a key step being the promulgation of new constitutions by the King's royal signature. In these cases, the rule law could be said to be inevitably weakened in the process as the existing government is typically ousted mainly by means of force as opposed to the abiding by the usual due process of changing the government via electoral means.

Thirdly, Mérieau (2016) suggested that a Deep State exists in Thailand, where state agents refuse to take their orders from elected governments that they see as unfit for administering the country. Instead, they seek to maintain and strengthen the monarchy, and bypass regular state processes through a process called ang barami (to claim royal legitimacy) or peung barami (to depend on royal legitimacy) (Gray, 1986; Ünaldi, 2014). Merieau finds this most evident from the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies (Hirschl, 2011). In Thailand, the impression of a special link between the king and the judiciary is created through how they are appointed by the king and judges' official practice of issuing their rulings "in the name of the King", as well as the oath of allegiance made by judges before the king under Article 252 of Thailand's landmark 1997 Constitution (Mérieau, 2016). Altogether, Mérieau (2016) argues that Deep State agents aimed to make judges "above" politics and install them in a situation of "revered worship" close to that of the king by emphasising the relationship between the king and the judges, thereby giving judges "special powers to solve crisis" such as the power to appoint a prime minister and devise solutions for the country in times of crises. For example, Mérieau (2016) highlights that in face of elected governments under Thaksin and Yingluck threatening royal power in 2006 and 2014, constitutional rulings cancelling general elections had left the country in situations of political vacuum favourable to military takeovers, further unveiling the sovereign character of the Deep State.

As such, Hirschl (2011) notes that the judiciary's involvement in political affairs becomes concerning when they are tasked with dealing with "mega-politics:" core political controversies that define (and often divide) whole polities, with the assumption that courts —not politicians or the demos itself—are the appropriate fora for making these key decisions. Making reference to instances of the Thai judiciary's ruling on politically contentious matters such as cancelling elections and vetoing constitutional revisions by parliament, Dressel (2010) also further argues that this means that "the courts have become directly politicized," and in turn, this has "undermined the rule of law, replacing it with what is in effect a rule by judges" (p. 686).

[1] Before taking office, a judge shall make a solemn declaration before the King in the following words: "I, do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect."

Religion

In this section, we will discuss how the pillar of religion in the trinity has traditionally been linked to support of the monarchy, and how it has been used to shape the understanding of law and justice in modern Thailand.

Firstly, the legitimacy of the monarchy has always been intimately intertwined with religion remaining a cornerstone of Thai society today. Indeed, the Thai monarchy has long been linked with Theravada Buddhism, where the king sits at the top of a hierarchy due to him possessing the greatest merit of all people in the kingdom, that is, the merit an individual accumulates through generosity, virtue and mental discipline in previous lives and possibly, earlier in this life (Wise, 2020). This Buddhist cosmography of moral betters over their inferiors in turn justified the historical *sakdina* system, where the relative social position of every individual was specified in numerical units called *sakdina* that translates as control over the rice fields, with four categories of people: *chao* (royalty), *khunmang* (aristocrats), *phrai* (commoners), and *that* (slaves).

While the *sakdina* system was officially abolished in 1932, the idea of a social hierarchy structure within the Thai society remains (Wise, 2020), as evident from the elitism of Yellow shirt demonstrations against the Yingluck government in 2013-2014, where some speakers advocated that the votes of Bangkokians should have greater value than the votes of people who supported Yingluck (Red shirts who typically came rural areas), and only 30% agreed that the statement “Thais are not yet ready for equal voting rights” (‘Profile of the “Bangkok Shutdown” Protestors”, 2014). Meanwhile, red shirt protesters that were demonstrating against the Democrat-led government famously adopted the word for commoner – “*phrai*” (commoner) – to designate their position vis-a`-vis the “*amat*” (ruling aristocrats), as part of an argument that the hierarchical thinking of the “*amat*” in society and their monopolisation of political power in society was the cause of the injustice and double standards in law that they face (Hewison, 2014). Clearly, the pervasiveness of such belief in hierarchy undermines one of the basic principles of a system of the rule of law — equality before the law.

At the same time, Buddhism has been incorporated as part of the nation-building process due to its close

ideological links to the state (Reynolds, 1994; Suksamran, 1993), consequently influencing Thai law and forming the basis for interpretations of concepts such as “justice”. Most scholars had associated “justice and virtue” with “*nititham*” (judicial supremacy as the source of rights) due to its internal reference to *dhamma* (Muntarbhorn, 2004, p. 348), while relegating “*nitirat*” (supremacy of the written law) more narrowly to Western legal conceptions (Pakeerut, 2010). However, some scholars contended that the public perception of “*lak nititham*” (rule of law) remains blurred as it suggests a different “precept of law based upon a sense of justice and virtue” (Muntarbhorn, 2004, p. 347), or that Thai people may not “believe in the rule of law like Westerners, but they believe in the persistence of law” to counter informal influences in both politics and life (Nidhi Eoseewong, 2003 (1972)).

More critically, an example of how Buddhism could be employed to justify violence would be the vindication of heavy-handedness against suspected Muslim insurgents in Southern Thailand, and the acts of impunity committed by Buddhist sects such as Santi Asoke during the anti-red-shirt protests in 2006 and 2014 (Dressel, 2018). The Thai perception of rule of law is deeply infused with Buddhist notions, involving conceptual ambiguity in the interpretation of key principles like “justice”, thus differing from the typical application of the rule of law that is highly predictable and rule based (Dressels, 2018).

Nation

In this section, we will discuss how the pillar of the nation in the trinity has been central to upholding the legitimacy for the monarchy, and how political leaders, like military strongman Phibun and politician Thaksin, have sought to stake their legitimacy on the pillar of “nation” at the expense of the other pillars of “religion and “king”, and how this pillar has been leverage on to delegitimize other political actors. Historically, a high value is placed in Thai society on unity, and it is joined with a preoccupation of its opposite — disunity. One powerful historical narrative would be the shattering defeat and utter destruction of Ayutthaya (an ancient Siamese Kingdom that was a precursor to Thailand) at the hands of the Burmese in 1767. Since then, Thai leaders have urged that the horror and humiliation of 1767 can be avoided if Thais unite against external threats like France and Britain, and more controversially, other internal threats like communism (Wise, 2020).

Naturally, the ideas of the nation and unity have been utilised by royalists to legitimize their rule. For instance, King Chulalongkorn called upon the people of Siam to recognize that “the only type of unity appropriate for Siam” was a unity around the middle path of the king” (Copeland, 1993, p. 30). Likewise, King Bhumibol has argued the indivisibility of the monarchy and the nation was essential to unity, writing in his memoir: “The King and People become one. The Throne and the Nation become one, and a profound meaning is thus given to the Throne. It becomes the personification of Thai nationhood, the symbol of the Nation’s unity and independence, the invariable constant above the inconsistencies or politics” (Hewison, 2014, p. 61). However, the equation of the nation with the monarchy means that affronting the monarchy is affronting the nation (Wise, 2020). This has formed the basis of lèse-majesté laws in Thailand that criminalises defaming, insults or threatening the royal institution, in which offenders are punished with high imprisonment term does not meet the principle of proportionality of sentences (Kamatali, 2014). The Human Rights Watch (2014) has also contended that such arrests are used by the military regime more to prove its loyalty to the monarchy, rather than its commitment to the rule of law, given that state authorities are often afraid of rejecting allegations of lèse-majesté in fear of disloyalty accusations.

Furthermore, ideas of national pride and unity have been harnessed by a variety of political figures. In general, Thais have strong national pride, with over 80 percent of respondents scoring themselves as “Very Proud” to be Thai in surveys (Ricks, 2019). Indeed, the name of Thaksin’s original political party, Thai Rak Thai means “Thais love Thais”, and its later incarnations — Pheu Thai and Thai Raksa Chart — referring to “For Thais” and “Thais Save the Nation” respectively. Similarly, military strongman Phibun (years in office) promoted nationalism aimed at supplanting the monarchy with Thais as a priority before the idea of a non-royal leader embodying national sovereignty (evidently, with himself in mind). He also altered the trinity to become “Nation, Religion, King and Constitution”, as part of his attempt to shift Thailand towards a constitutional monarchy (Wise, 2020).

Lastly, accusations of not being “Thai” and of seeding disunity have been powerful political weapons. For instance, with communism framed as un-Thai in its ideas and as a way of life (Jumbala & Xuto, 1987), the curtailment of various rights and freedoms in relation to the rule of law could be justified with the basis of ensuring national security. Such past examples include the passing of an Anti-Communist Act in 1952 by Phibun to prevent the spread of communist insurgency, which allowed the police to detain without specific charges up to 480 days and officials to engage in "Communist suppression operations" to conduct searches without warrants (Samydorai, 2002). The establishment of the Internal Security Operation

Command (ISOC) also aided in the consolidation of junta power to combat communism, and under the said act, security agencies had the right to try communist suspects at a military tribunal instead of civilian courts (Sivaraman, 1998). In these instances, it is evident that national security laws have impacted the rule of law in Thailand. Under the nationalist rhetoric, civil liberties are inevitably undermined as policing acts could be easily enforced against protestors and suspected communist insurgents without the usual trial process since national interests involving a unified and state-approved concept of "Thainess" are prioritised above human rights. Hence, individuals who failed to conform to such national narrative were often denied protections granted by the rule of law as broad state discretionary powers could be used against them when national interests are at stake (Dressel, 2018).

Another example would be the justification of the 2006 coup by the military to oust Thaksin as a response to "conflict, partisanship, and disunity on a scale unknown in the history of the Thai nation" (Hewison, 1997). This was likely a reference not only to the street demonstrations by protestors that had erupted in 2006, but also to Thaksin's mishandling of the Malay-Muslim-based insurgency, which had been operating at a low level before his missteps caused it to flare up (Abuza, 2011). This is significant as since Chulalongkorn's centralising reforms to take control of traditionally semi-autonomous tributary statelets, preserving the unity of Thailand as an ethnically diverse state has been a critical challenge (Wise, 2020). Nonetheless, it is evident that unity has been a reason for the military to oust civilian leaders in a manner that would be deemed unconstitutional in Western democracies.

OTHER FACTORS AFFECTING THE RULE OF LAW IN THAI SOCIETY

Here, we will briefly note other relevant factors affecting the implementation of the rule of law in Thailand, such as democracy as a competing narrative to the trinity, and material factors such as inequality in Thailand.

Indeed, while major political actors in Thailand have resorted to all or some of the elements of the trinity to justify their legitimacy, the trinity is of course no longer the only framework for them to justify their power. It is undeniable that "foreign" ideas of constitutionalism and democracy have entered into the consciousness of Thailand. This can be seen from how the trinity has been recast twice in Thailand's history, first to "Nation, Religion, King and Constitution," under Phibun, and then in 1976 as "Nation, Religion, Monarchy and Democracy with the King as the Head of State" — with democracy added in recognition that the 1973-76 era had "revealed aspirations for liberty, participation and self-expression which were too powerful to suppress" (Baker & Phongpaichit, 2014, p. 236).

It is also important to recognise that beliefs in the elements of the trinity are not the only cause of difficulties in implementing the rule of law in Thailand. Weaknesses in the implementation of the rule of law are naturally linked to the wider issue of wealth distribution and the balance of power amongst different groups in Thailand. Based on a survey on protesters by the Asia Foundation (2013), the income profiles of the Red and Yellow protesters were quite different — the Reds towards the lower end of the income scale and the Yellows towards the higher end.

It was obvious to any observer that the Yellow protests comprised Bangkok business people and office workers while the Red ones were drawn from the smaller farming communities of the provinces and labour migrants from similar backgrounds (Phongpaichit & Baker, 2015). It is thus worth noting that the perpetuation of a rigid and oppressive social hierarchy embedded in the notion of the trinity serves the interests of the network of royalists and the Bangkok middle class.

Therefore, to an extent, political actors invoking elements of the trinity use them as a cloak of legitimacy, which they pull over the cold, calculations they make based on their naked self-interest, as they step into the political arena to vie for resources. Nevertheless, it is certainly possible for these actors to sincerely believe in elements of the trinity. Furthermore, the ideas of the trinity are powerful as they determine whether the demands and needs of political actors are seen as legitimate needs to be met in society.

CONCLUSION

In conclusion, the three principal institutions of traditional trinity (nation, religion, and monarchy), remain a powerful ideological narrative that is deeply entrenched in the political landscape of Thailand today, and affect the implementation of the rule of law in the country. The trinity shapes the way a significant portion of Thai society understands the nature of law and justice, serves as a potent repository of symbols and narratives to mobilise actors for or against the rule of law, and has helped legitimise the political participation of actors from civilian leaders, to the military, to the judiciary.

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CHAPTER 3

CONSTRUCTING A PLURALISTIC HUMAN RIGHTS REGIME IN ASEAN

BY WAN CHUN SUM ASHLEY

INTRODUCTION

Ideals are how the world should be. Reality describes what the world is.
Norms describe how the world ought to be.

In the social sciences, institutions are collections of interrelated societal rules, but norms isolate single standards of behavior or broad beliefs (Finnemore & Sikkink, 1998). For example, universal suffrage is an internalized norm which operates within governments, a political institution. Norms can emerge through conscious design in a top-down fashion, or organically from society. In this regard, norms are especially powerful because they generate moral approval or disapproval (Wiener, 2014).

This essay focuses on the Association of Southeast Asian Nations (ASEAN), which was founded in 1967 as a regional intergovernmental organization to promote “peace, freedom, social justice and economic well-being” through the Bangkok Declaration (Association of Southeast Asian Nations, 1967). Since then, ASEAN has grown from 5 to 10 member states (Association of Southeast Asian Nations, 2008).

In viewing the rule of law (ROL) as a norm, we argue that ASEAN (as an organization) has deliberately adopted rule by consensus instead of the ROL. In describing ASEAN’s historical context and how past attempts to incorporate the ROL have failed, we unpack ASEAN’s norm hierarchy and determine the organization’s fundamental norms.

We examine human rights (HRs) as a norm and unpack how the United Nations (UN) defines the ROL and HRs. We then identify its importance vis-à-vis ASEAN’s norm hierarchy, thus arguing that civil society played a pivotal role in propagating HRs into ASEAN, and that ASEAN has successfully adapted HRs into its regional context.
Finally, we describe how HRs can be strengthened in ASEAN.

CONCEPTUALISING ASEAN'S RULE

The ROL can be conceptualized as a norm that restrains sovereign power. Previous essays have defined procedural definitions in terms of *how* the ROL is implemented and substantive definitions in terms of *why* the ROL is implemented. Here, we borrow from Chesterman (2008b) in describing the ROL in terms of its three *functions* in society:

1. **Government of laws: The sovereign's power is not arbitrarily exercised.**
2. **Supremacy of the law: The law applies to all, even the sovereign.**
3. **Equality before the law: The law protects all equally, without prejudicial discrimination.**

The ROL serves domestically to restrain sovereigns in a vertical hierarchy with their subjects, but Chesterman (2008b) argues that internationally, states exist in a horizontal plane of equal sovereigns. ASEAN embodies this horizontal relationship through soft law (i.e. operating informally and eschewing legally-binding arrangements), and by building consensus in decision-making through the "ASEAN Way" (Ewing-Chow & Tan, 2013).

The "ASEAN Way" refers to the region's emphasis on soft law, state sovereignty and non-interference in domestic affairs. This is drawn from Westphalian state sovereignty (Narine, 2012), and it has translated into an emphasis on regional unity. This was formerly codified and institutionalized in the 1976 Treaty of Amity and Cooperation, where ASEAN committed to promoting peace and cooperation, through mutual respect, non-intervention in domestic affairs, and effective cooperation (Association of Southeast Asian Nations, 1976). This principle was eventually formalized in the ASEAN Charter (Association of Southeast Asian Nations, 2008), as a legal recognition of its historical aims and achievements (Tay, 2008).

We argue that adopting a rule by consensus was an instrumental decision borne from practical considerations, since the founding members of ASEAN (in 1967) were young, emerging nations, and they needed to set aside bilateral conflicts to unite against Communism. Prior to ASEAN's founding, Southeast Asia was confronted with an undeclared military conflict between Indonesia and Malaysia, known as the Konfrontasi. This was marked by several small skirmishes between both nations, which caused the severance of diplomatic relations between them and strained relationships with the rest of Southeast Asia. Furthermore, the Vietnam War was beginning to escalate, and many nations feared that communism would spread southwards, as predicted by Eisenhower's domino theory.

We observe how ASEAN has internalized the norm of consensus in line with Finnemore and Sikkink (1998), by consistently constructing dispute resolution mechanisms that called for consensus-based decision making and resolving conflicts through intra-regional bargaining, instead of vesting power in an independent third party with objective sets of criteria (Gerard, 2018). Furthermore, ASEAN actively socializes new members, such as Vietnam (Nguyen, 2007) and Myanmar (Tan, 2013), into adopting this norm.

Additionally, Thailand unsuccessfully attempted to introduce aspects of the ROL regionally through flexible engagement. Following the 1997 Asian Financial Crisis, Thailand proposed diluting the norm of domestic non-interference in a flexible manner if domestic affairs threaten to create international externalities. This would introduce some aspects of the ROL, by ensuring that international laws would be applied equally to all members of ASEAN, without prejudicial discrimination.

Acharya (2004) argues that flexible engagement threatened to compromise the sovereignty of ASEAN states and specifically dilute the norm of domestic non-interference, without in turn enhancing ASEAN's legitimacy and influence. This norm still enjoyed legitimacy, because the "ASEAN Way" has been key to its track record of not having any military conflicts between its member countries. Furthermore, flexible engagement conflicted with ASEAN's attempts to socialize and introduce Myanmar into ASEAN, and it attracted suspicion and rejection from the other members of ASEAN (Acharya, 2004).

Consequently, flexible engagement was abandoned because it failed to attract any meaningful support from other ASEAN states.

CONCEPTUALISING HRS

The UN defines HRs through the Universal Declaration of Human Rights (UDHR). According to the UDHR's preamble, HRs should be protected by the ROL (United Nations, 1948). This involves the following.

Firstly, the UN states that HRs are universal, since all people are entitled to the same rights set forth in the UDHR (United Nations, 1948).

However, we argue that HRs are pluralistic since modern HRs are advanced internationally by non-UN actors. This includes civil society introducing minority rights and indigenous rights), democracy movements in Asia, (Messer, 1997), and more recently, African diplomats introducing the Responsibility to Protect (Acharya, 2013). Acharya (2015) goes further in defining HRs more broadly as the general protection from state-sponsored cruel treatment, which can even be found throughout history as far back as 250 BC.

Furthermore, the UN requires "legal processes [and] substantive norms [to be] consistent with human rights," because there is an "indivisible and intrinsic relationship" between the two (Rashid, n.d.). In particular, they argue that "human rights cannot be protected in societies without a strong rule of law", so a society that effectively supports HRs but not the ROL cannot exist (Rashid, n.d.). Similarly, they argue that since the ROL is undergirded by HRs, one cannot support the ROL while ignoring HRs. Thus, the ROL is both necessary and sufficient to protect HRs, which implies a substantive definition of the ROL and suggests that ASEAN cannot introduce one without the other.

The relationship between the ROL and HRs, vis-à-vis the aforementioned definitions, is summarized as such. However, procedural definitions emphasize minimal limitations on the sovereign's authority without judging its morality. In this regard, HRs can exist without the ROL, and as Chesterman (2008b) notes, the UN promulgates HRs through its treaties, but the UN itself is not a party to these treaties since it is a supranational organization. In this regard, the UN is above the law, but this fails to impact their promulgation of HRs.

Does the ROL exist?	Do HRs exist?	The UN's substantive definition of the ROL	Procedural definitions of the ROL
Yes	Yes	Possible	Possible
Yes	No	Impossible	Possible
No	Yes	Impossible	Possible
No	No	Possible	Possible

While human rights are legal rights, HRs are also a legal norm, since they are a set of moral beliefs constructed by society. Like most norms, HRs are not static. They are first institutionalized formally, before gaining social recognition and eventually becoming internalized as part of the societal culture (Wiener, 2014). Consequently, norm entrepreneurs are able to frame HRs pluralistically using local beliefs and cultures despite their different sociopolitical contexts.

Internationally, states commit to protecting HRs by signing and ratifying HR treaties negotiated under the UN, but their domestic track record belies this commitment. Furthermore, most states are disinterested in enforcing HRs in foreign states, since coercing errant states is highly costly, and it provides negligible benefits to themselves and their citizens (Goodman & Jinks, 2004). Hence, while international law and military power coercively constrain state behaviour, norms can drive actors in democratic and non-democratic states alike (Pegram, 2010) to protect a pluralistic construction of HRs more effectively.[1]

[1] A pluralistic construction of HRs can be normative regardless of the political context, but discussing if its normative power is lessened in non-democratic states (and consequently, the effectiveness of HR institutions) is best left to another essay.

Wiener (2014) argues that norms are sometimes contested and not internalized fully. While broad moral norms are typically internalized, norms governing specific standards of behavior are often contested due to conflicts of interest. Additionally, actors understand norms through their individual experiences, which can promote conflict when norms cross sociocultural boundaries. While the general importance of HRs is internalized internationally, many states still misunderstand the importance of internalizing specific standards to protect them, and civil society still campaigns to better incorporate HRs into domestic policies around the world.

LOCALIZATION

Acharya builds on Finnemore and Sikkink, in arguing that while norms can be promoted by outsiders through norm entrepreneurs, they can also be promoted by insiders through insider proponents. During a crisis, norm-takers attempt to maintain and adapt existing institutions and the norm hierarchy by incorporating foreign norms. Proponents and norm-takers thus negotiate the introduction and modification of desirable foreign norms over time through localization (Acharya, 2004).

Acharya (2004) argues that insider proponents persuade actors through the following:

1. **Framing: Proponents highlight and actively construct the link between foreign norms and existing issues**
2. **Grafting: Proponents construct associations between foreign norms and existing norms.**
3. **Localization: Proponents reinterpret and re-represent the norm into a form more congruent with the existing norm hierarchy.**

In particular, localization is likely to succeed if:

- ☑ **Insider proponents with sufficient discursive influence exist.**
- ☑ **Norm-takers believe foreign norms can enhance the legitimacy of existing social identities without fundamentally changing it**
- ☑ **Norm-takers have a strong sense of identity.**
- ☑ **Existing norms are resistant to displacement from foreign norms.**

Insider proponents are important as credible proponents are perceived to uphold local values and identity, and they are often more persuasive than external norm entrepreneurs (Acharya, 2004).

Localization works through constructivism and the logic of appropriateness (Davies, 2013), where parties identify the right option based on their societal context and society's moral judgments (Finnemore & Sikkink, 1998). Consequently, actors must believe their internalized norms are morally good (Davies, 2013).

In contrast, Finnemore and Sikkink argue that norms are not always driven by morality, because empirical research has shown that norm entrepreneurs and actors still act rationally. The logic of consequence suggests that actors identify options and instrumentally select among them based on maximizing their own utility. Consequently, decisions can be made independently of norms since parties might prescribe a morally bad norm if the benefits of doing so outweigh the costs.

The differences in their non-mutually exclusive logics are summarized below:

Does the ROL exist?	Logic of appropriateness	Logic of Consequence
Role of norms (Davis, 2013)	• Shapes one's identity and regulate one's behaviour • Norms congruent with one's identity	• Actors select norms, which mediate their outcomes • Norms, by themselves, have little explanatory power
How do norms change? (Finnemore & Sikkink, 1998)	• When norms and actions are mismatched, cognitive dissonance arises • Actors change their norms over time to conform and avoid societal disapproval	• Norms are changed by norm entrepreneurs, who seek to change other players' utility functions

HRs AND ASEAN

Can ASEAN introduce HRs without introducing the ROL?

The HR track records of ASEAN member countries have been problematic. Davies (2013) lists a litany of individual critiques against their HR track record, highlighting a large "action-identity gap" between ASEAN's actions and presumed respect for HRs. This gap is best evidenced by ASEAN's collective reaction to Myanmar's 2007 protests.

In September 2007, two months prior to the signing of the ASEAN Charter (Association of Southeast Asian Nations, 2012), Myanmar experienced week-long demonstrations led by Buddhist monks that were rebuked by force and severe repression. While ASEAN issued a statement expressing its "revulsion" to these actions (The New York Times, 2007), they also respected Myanmar's refusal to meet with the UN's representative (Association of Southeast Asian Nations, 2007).

George Yeo, the then-Chairman of ASEAN, defended these actions. He stated that ASEAN would not conduct trade embargoes or freeze bank accounts, and ASEAN would not sanction or expel Myanmar, since doing so might result in Myanmar falling into China's or India's sphere of influence, at Southeast Asia's expense (Yeo, 2007). While this suggests that ASEAN failed to introduce HRs, we instead argue that ASEAN has localized HRs.

Many ASEAN governments initially feared the politicization of Westernized HR bodies (Ewing-Chow & Tan, 2013; Yeo, 2007). HRs were promulgated initially by an informal coalition of lawyers and judges working for governments, academic institutions, and civil society, who were united by their common interest in promoting HRs regionally. They formed "The Regional Working Group for an ASEAN Human Rights Mechanism" (the Working Group), and while they made recommendations to ASEAN leaders in collaboration with civil society organizations (CSOs), ASEAN resisted. The Working Group only found success by convincing the Eminent Persons Group (EPG) in charge of producing recommendations for the proposed Charter of its importance (Narine, 2012). The EPG thus persuaded ASEAN leaders to endorse these recommendations, sparking discussions on what form ASEAN's HR mechanism should take.

This shows that the Working Group acted as insider proponents to ASEAN leaders initially, but the EPG was perceived to be more credible since it consisted of experienced and influential retired governmental officials (Collins, 2008).

However, ASEAN's actions towards Myanmar suggests an emphasis on the "ASEAN Way" (and regional unity) over HRs. As described earlier, flexible engagement failed because it attempted to dilute domestic non-interference. This is unsurprising since the ASEAN Charter was conceived in the wake of the Asian Financial Crisis, which failed to weaken ASEAN norms. Instead, the Charter sought to reinvent ASEAN and to create a community that is more economically competitive (Tay, 2008), thereby enhancing ASEAN legitimacy. Thus, the "ASEAN Way" was not diluted in the process of reinventing ASEAN.

The strength of the "ASEAN Way" is seen in ASEAN's strategy of enhanced interaction with Myanmar, which employs diplomatic pressure and the provision of developmental assistance (Tan, 2013), while excluding trade embargoes and freezing of bank accounts. This demonstrates ASEAN's internalized commitment to soft law over hard law (i.e. formal and binding obligations). Even though ASEAN was not legally precluded from punitive legal measures, it seemed inappropriate to do so, suggesting that ASEAN's norms hierarchy was governed by a logic of appropriateness.

However, this logic implies that there must be congruence between the norms one propagates and the actions one adopts, and actors change to minimize dissonance between them. Since ASEAN was partially driven by how "human rights [are] a part of the UN and of the civilized world" (Yeo, 2007) and sought to enhance their legitimacy through the

Charter, we argue that ASEAN's adoption of HRs must partially be driven by the instrumental logic of consequence.

Returning to the Charter, we note that it promised to "establish [a] human rights body" without explicitly stating the form it would take (Association of Southeast Asian Nations, 2008). This body was established as the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 (ASEAN Intergovernmental Commission on Human Rights, 2009), which subsequently prepared the ASEAN Human Rights Declaration (AHRD) in 2012 by drawing from the universality of HRs and affirming the UDHR (ASEAN Intergovernmental Commission on Human Rights, 2012).

However, the UN's substantive definition suggests that the AICHR must be accompanied by legalistic enforcement mechanisms and by sweeping reforms of ASEAN's legal system. Instead, ASEAN affirmed the importance of the "ASEAN Way" by institutionalizing it as principles in their Charter (Association of Southeast Asian Nations, 2008), and defended the instrumental benefits of adhering to its norms (Yeo, 2007). Some scholars thus argue that the AICHR was borne from immediate political concerns and betrays an "inadequate planning process" (Narine, 2012).

Instead, we argue that HRs, while broadly localized into ASEAN, still face contestation. Thus, the AICHR deliberately avoided challenging the dominance of the "ASEAN Way" by introducing HRs broadly and leaving out enforcement mechanisms.

Consequently, we argue that HRs have been localized in ASEAN because:

1. HRs were actively promoted by the Working Group to the EPG, who in turn were perceived as more credible proponent
2. ASEAN's leaders believed that incorporating HRs (sans specific standards to protect them) would enhance ASEAN's international legitimacy without fundamentally changing the nature of ASEAN.
3. The "ASEAN Way," being a core part of ASEAN's identity, could not be diluted by the AICHR.

NORM CONTESTATION

The Working Group aimed to create an HR mechanism consistent with international HR laws, and on the basis of the universality of HRs. However, this was deliberately diluted and the AICHR has failed to meet its aims. Survey results indicate that CSOs had little faith in the AICHR's ability to protect HRs and enforce binding decisions (Narine, 2012).

CSOs and the AICHR can remedy this by framing these standards in terms of ASEAN's goals, since ASEAN constructed its charter to maintain and gain political influence in the wider region (Tay, 2008), by reinventing themselves to gain international relevance. For example, the charter sets out that ASEAN should work towards a principle of "adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments." It also lists the strengthening of democracy, good governance, the ROL, promotion and protection of HRs, and fundamental freedoms as one of ASEAN's purposes (Association of Southeast Asian Nations, 2008).

Norm contestation suggests that even if ASEAN fully adopts HRs, ASEAN *governments* might still be unwilling to adopt these specific standards due to their individual preferences and historical fears of Western politicization. Consequently, CSOs and the AICHR can assist ASEAN in the following ways.

Firstly, the AICHR provides a regional intergovernmental platform for ASEAN leaders to engage with HRs after internalizing its importance. CSOs and the AICHR can address concerns through multilateral dialogue between all parties, in line with the ASEAN Way. This reduces the likelihood of subsequent conflicts, since potential differences in understanding are addressed at an early stage (Wiener, 2014), which creates a more durable institution. This also institutionalizes HRs further and increases the normative power of HRs within ASEAN, which promotes social recognition and internalization as it percolates downwards from ASEAN governments into society.

Furthermore, CSOs and the AICHR can engage national HR institutions in clarifying how rights should be protected at a domestic level and incorporated into national policies. These institutions can additionally be charged with reporting adherence to specific HR standards to their respective governments, while the AICHR itself monitors and regulates them to minimally prevent institutionalizing non-compliance (Goodman & Jinks, 2004). By having local institutions monitor HRs domestically and limiting the influence of international actors on them, this promotes a domestic understanding of HRs and develops an internal platform of legitimacy (Pegram, 2010), while ensuring that these institutions can act as credible insider proponents to their society.

Regardless, CSOs can assist individual states in the framing of HRs to locally relevant issues. For example, CSOs could direct attention to issues of social justice regionally, through existing channels such as the annual ASEAN Civil Society Conference and the ASEAN Peoples' Assembly (Collins, 2008). Instead of demanding top-down change, CSOs can assist society by promoting specific standards to protect civil and political rights if states organically become more democratic in the future. By maintaining cordial relationships with all ASEAN states, this creates an inclusive culture and intra-regional societal pressure to conform with regional HR standards.

CONCLUSION

While CSOs hoped for concrete mechanisms and binding legal obligations (Caballero-Anthony, 2008; Collins, 2008), ASEAN codified a remarkably state-centered Charter and unveiled a toothless AICHR. Regardless, this is a success, given the strength of the "ASEAN Way" and how it has proven over the last 50 years to be a core aspect of ASEAN's norms and identity.

Furthermore, ASEAN exists in a horizontal relationship of equal sovereigns, and it is more efficient to generate compliance to HRs through internalized norms than through binding obligations. To quote Yeo:, the toothless AICHR nonetheless possesses a tongue, "and a tongue will have its uses" (Chesterman, 2008a).

Moreover, the more authoritarian states in ASEAN joined with the understanding that the ASEAN Way would shield them from interference while the regime consolidates its power (Narine, 2012).

Since we cannot expect ASEAN to change its core beliefs by renouncing the "ASEAN Way," we cannot demand ASEAN to import HRs in its Western conception without modifying it to fit their local context. Even though ASEAN and its member states continue to contest the specific standards of behavior promulgated by the UN, they recognize the importance of HRs, and the AICHR and CSOs can build on this success. As time passes, we might even see the importance of the "ASEAN Way" waning. Likewise, incremental changes in the Charter suggest that minimally, ASEAN is starting to value hard law over soft law.

This suggests that the introduction of HRs into ASEAN has opened the door to further change. While the AHRD remains vague, open lines of communication between the AICHR, governments, and civil society might foster greater cooperation and promote compliance. The AICHR thus provides an intergovernmental platform for ASEAN to preemptively address individual issues with implementing HRs.

Despite priding itself on being uniquely Southeast Asian for the last 50 years, ASEAN is starting to recalibrate its norm hierarchy to be more in line with the world at large, and the AICHR can help to build the institutional capacity to prevent atrocities against civilians. Time will tell if ASEAN opens the door to engaging the wider international community, but we can find hope in liberalism and constructivism in international relations theory, which suggests that the Charter and the AICHR can promote intra-regional and international cooperation, and that the ASEAN identity and its internalized norms can change over time.

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CHAPTER 4

ACCOUNTABILITY ACROSS BORDERS IN THE UNITED NATIONS

BY TAN WANXUAN & CHONG YI EN

INTRODUCTION

It is a universal principle of law that all legal entities are to be equally held accountable for the proximate injuries its acts may cause. For many countries, this concept of the rule of law is perceived as a political ideal and fundamental in the regulation of its citizens and private entities.

As jurisprudence reflects an increasing subjection of governments to the virtues of the rule of law, there lies no cogent reason for international organizations and institutions to be exempted from the same policy.

In particular, at the United Nations World Summit in 2005, the Member States had reaffirmed their commitment to an international order based on the rule of law and international law, recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels. Nevertheless, key differences remain between domestic governments and the United Nations (UN) as an intergovernmental body.

As such, in this paper, we seek to analyze the rule of law at the international level through assessing the effectiveness of enforcement and compliance with regards to the decisions passed by the International Court of Justice; evaluating the degree of immunity enjoyed by the peacekeepers; as well as the accountability of the UN as a world organization.

ESTABLISHMENT OF THE UNITED NATIONS

Brief History and Principal Organs

Following the disbandment of the League of Nations on 19 April 1946, the UN was officially established on 24 October 1945 after the signing of the UN Charter was signed on 26 June 1945, in San Francisco, by the representatives of the 50 countries. Poland, which was not represented at the United Nations Conference on International Organization, signed it later and joined as one of the original 51 Member States. At present, the UN's membership includes 193 sovereign states, in which each member holds a seat in the General Assembly (UNGA). As an intergovernmental organization, the purposes of the UN include maintaining international peace and security, developing friendly relations among nations, achieving international cooperation, and serving as a center for harmonizing the actions of nations.

Along with the UN's formation in 1945, Article 7 in Chapter III of the UN Charter also established six principal organs comprising the UNGA, the Security Council (UNSC), the International Court of Justice (ICJ), the Secretariat, the Economic and Social Council, and the Trusteeship Council. Under Article 23 in Chapter V of the UN Charter, the UNSC shall consist of 15 UN members, with 5 permanent members holding veto power: The People's Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America; and 10 other non-permanent members.

Chapter VII of the UN Charter also dictates that all Member States are obligated to adhere to decisions made by the UNSC and in maintaining international peace and security, the Council may impose sanctions or authorize the use of force in the case of a breach of provisional measures provided by the Council. In addition, according to Article 94 of Chapter XIV of the UN Charter, all Member States are required to comply with the decision of the ICJ, and should there be a failure to perform their obligations under the ICJ's judgment, the other party may seek recourse from the UNSC.

This chart shows the various agencies that make up the UN family.

Endorsement of the Rule of Law Principle

In 2004, then Secretary-General, Kofi Annan, first stressed in his report on The Rule of Law and Transnational Justice in Conflict and Post-conflict Societies that for the UN, the rule of law is:

> **"A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (Tommasoli, 2012)"**

In essence, the UN endorses the "thick" definition of the rule of law (Tommasoli, 2012).

Complementary to this definition, Secretary-General Ban Ki-moon further added that the UN provides expertise and support to "the development of legislation and the strengthening of, in particular, legislative, executive and judicial institutions under such principles to ensure that they have the capacity, resources and necessary independence to play their respective roles" ("Guidance Note of the Secretary-General on Democracy," n.d.). The concept of rule of law is also embedded within the UN Charter, and it is one of the aims of the United Nations "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This sentiment is echoed in the Universal Declaration of Human Rights of 1948: "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the law."

International Model of the Separation of Powers

Three Arms of Government

The UN is arguably the closest international institution to a "world government" (Eichelberger, 1949), and as such, comparisons between domestic governments and the UN are unavoidable. Based on Article 92 of the UN Charter, the ICJ is recognized as the "principal judicial organ of the UN" and thus the judiciary of the UN, while the UN Secretariat and the UNSC could be considered the executive. This is given that the UN Secretariat plays an important role as the deliberative and decision-making body, and under Article 24 of the UN Charter, the UNSC also holds the "primary responsibility for the maintenance of international peace and security." However, the representative body for the legislative branch is less clear-cut. The conventional model of separation of powers assumes law to be legislative in origin, and while the UNGA serves as the primary deliberative, policymaking, and representative organ of the UN that passes all manner of resolutions, at best it may just be a mere element of the *opinio juris* aspect of international custom.

More specifically, as a "product of executive acts in the field of foreign affairs" where the treaty-making process is largely driven by forces outside the UNGA, international law is not legislative in origin (Haljan, 2013). The constitutional foundation for customary international law is up in the air due to the rare occurrence of it being constitutionally recognised as permissible law domestically, leading to debatable questions such as whether it is possible for *ius cogens* to *intra vires* administrative act. Nevertheless, the judiciary is still able to exercise its powers in relation to the express constitutional provisions on the legal effect of treaties which are either found in ratified treaties or are incorporated into domestic statutes.

Parliamentary Theory

Beyond a superficial likeness, there are also numerous differences between domestic governments and the UN in terms of the separation of power and the rule of law. The international rule of law, for instance, deals with issues transcending national boundaries, such as warfare, and territorial disputes, and interstate trade, which are not found at the domestic level ("Toward an International Rule of Law", 2010). Another example underlining the disparity between the national and international level would be the UN's submission to parliamentary control.

In the Note to Correspondents No. 2347, 12 June 1961, the Second Secretary-General of the UN, Dag Hammarskjöld, expressed his willingness to be subjected to checks and controls with respect to parliamentary theory. Typically under a parliamentary regime, the Prime Minister along with his cabinet of ministers, selected among the Members of Parliament, are collectively responsible to Parliament (Gay & Powll, 2004). With the basic constituency consisting of voters, the cabinet can appeal to these voters to repudiate parliament. However, no such arrangement exists in the UN model as substantiated by the absence of intrinsic factors in a parliamentary system, such as the lack of political parties and forces outside the "parliament" to appeal to (Lentner, 1965). The appointment of the Secretary-General is also decided by the Member States.

On the flip side, notwithstanding the missing parliamentary apparatuses, some scholars have contended that the concept of the responsibility of the executive to "policy-making" bodies remains relevant to the UN. For instance, apart from serving as the head of an independent organ (i.e., the UN Secretariat), the Secretary-General could also be perceived to be an executive agent of the deliberative main organs (Lentner, 1965). In sum, the question on whether the UN has indeed adopted parliamentary theory remains a contested topic.

THE INTERNATIONAL COURT OF JUSTICE: ENFORCEMENT OF JUDGMENTS IN FACE OF THE VETO POWERS

Key Relevant Provisions

As discussed earlier, Articles 93 and 94 of the UN Charter highlight the relationship between the Member States of the UN and their obligations towards any ICJ judgments towards which they are a party. Article 94 paragraph 2 in particular provides a discretionary responsibility to the UNSC to "make recommendations or decide upon measures to be taken to give effect to the judgment."

Types of Cases Under the ICJ's Jurisdiction

There are two types of cases under the ICJ's jurisdiction. Firstly, it can issue advisory opinions on legal questions that are referred to it by the UN's organs or other specialized agencies. These are called advisory proceedings.

The ICJ may also judge in legal disputes that are submitted to it by member states (contentious cases). States can only appear before the ICJ for contentious proceedings, but not so for advisory ones.

In contentious cases, the ICJ must first decide whether or not it has the jurisdiction to adjudicate on the dispute that is before it. Essentially, a contentious case may come before the ICJ under one of the following ways: (1) when states submit the dispute upon a special agreement between both parties; (2) where the treaty may contain a jurisdictional clause that submits disputes to the ICJ for resolution; or (3) where the states agree to submit to the ICJ all international disputes with other states that have also accepted under similar conditions (known as "compulsory jurisdiction").

If the ICJ does have the authority, then it may judge based on the merits of the cases presented before it. After a judgment has been issued by the Court, however, the States are supposed to, under Article 94 paragraph 1 of the UN Charter, to "comply with the decision of the [ICJ] to which it is a party".

Compliance of ICJ's Judgment in Contentious Cases

Rationale Behind Compliance

To understand why there is a need for enforcement of ICJ decisions, one must first understand why states comply with ICJ decisions in the first place.

1 States may comply because of external political pressure or influence (Jones, 2013). This may be through pressure from the international community or through the presence of international organizations. Sometimes, pressure from the international community threatens a reputational injury to states that circumvent ICJ judgments (Llamzon, 2007). Active involvement with international institutions also increases the prospects of compliance as it raises the reputational costs for reneging (Simmons, 2000).

2 States may comply because of the need for a definitive solution to an issue (Jones, 2013). This may arise as the states have a shared interest in the resolution, or have close relations. While fears of noncompliance where military clashes are concerned are unfounded (Jones, 2013), a desire to maintain peace and prevent any conflict from arising can be a factor of effective dispute resolution.

3 Compliance may depend on the substance of the judgement issued (Jones, 2013). Judicial ambiguity promotes non-compliance (Wasby, 1970; Baum, 1976; Johnson 1979); but judges may strategically use vagueness to build institutional strength (Staton & Vanberg, 2008). Also, decisions that represent a compromise between both states' positions are more likely to be complied with (Jones, 2013).

4 Compliance may depend on the domestic legal, political, and social factors (Huneeus, 2013). For example, the role of domestic mechanisms of implementation for international judgements may play a crucial role (Krsticevic, 2009). Judicial politics is also an important consideration. While independent courts are more willing to uphold and enforce treaty obligations (Simmons, 1998), independent courts can also resist judgement compliance (Alter, 2000). An active civil society (Conant, 2002) may also be a factor.

6 Compliance may depend on the type of case that comes before the ICJ (Posner & Yoo, 2005). Professors Posner and Yoo controversially asserted that the higher the level of independence that the ICJ had (depending on jurisdiction), the lower the level of compliance and vice versa. However, their methods in coming to the conclusion have been criticized (Helfer & Slaughter, 2005).

Smaller and comparatively weaker nations may comply with ICJ rulings simply out of self-interest. They desire international law to work effectively, so that they themselves can be protected by the regime. The Honorable Chief Justice of Singapore Sundaresh Menon affirmed this in 2019, "We interact with other states and participate in international organizations in a manner consistent with our international obligations and we expect other states to do the same... the 'strategic predictability' that underpins our credibility as a trusted and neutral voice is inextricable from our sustained loyalty to international law." (Menon, 2020).

Enforcement by UNSC in Instances of Non-Compliance

In the current status, the only remedy available for states is to enforce compliance through the UNSC. The responsibility for the enforcement of ICJ decisions in cases of non-compliance lies with the UNSC, as provided by Article 94, paragraph 2 of the UN Charter. It should be noted, however, that the responsibility is discretionary in nature. The Article states that the UNSC has a duty to enforce only when "it deems necessary" to do so. It is therefore up to the UNSC to decide whether or not it should act. This includes actions such as imposing economic sanctions or utilising armed forces under Article 41 and 42 of the UN Charter respectively.

While in some cases, such as the Land, Island, and Maritime Dispute between Honduras and El Salvador, "the mere threat of Security Council action was sufficient to trigger the desired response from the recalcitrant state" (Llamzon, 2007), such an effect has not been observed upon any of the permanent members of the UNSC to any noticeable degree. Very few ICJ cases have been referred to the UNSC in the first place, and where the judgment has involved one of the Permanent 5 (the "P5") states who wield the veto, it has become impossible for the UNSC to act, which in turn reinforces the "institution's Cold War stasis" (Schulte, 2011), undermining the overall authority of the Court in dealing with conflicts and disputes of international ramifications. A very classic example of this is the case of *Nicaragua*.

The Curious Case of *Nicaragua*

The case of Nicaragua was a response to alleged US military support for the "contras" (rebel groups fighting the Nicaraguan government). It was alleged that the US not only devised the contra strategy, but directly supplied the contras, actively mined Nicaraguan ports, and attacked ports, oil installations, and naval bases. When the ICJ decided that it did have the jurisdiction to hear the case, the US withdrew from any participation in the proceedings, which resulted in an unprecedented, direct challenge to the authority of the court

Nevertheless, the ICJ pressed on and ultimately ruled in favor of Nicaragua, resulting in a "stunned silence" (Highet, 1987).

Attempts from Nicaragua to have the UNSC to enforce the ICJ decision were vetoed by the US on July 31, 1986 and then again on Oct 28 of the same year. The matter was eventually "settled" by the UN General Assembly on November 6, 1986 by passing a nonbinding resolution on its members to the effect.

On the surface, Nicaragua undermined the authority of the ICJ. The US made it clear that it could defy the Court's rulings again in the future, as it did again in 2018 (Certain Iranian Assets). In both instances, the US has arguably undermined the entire UN, of which the ICJ is the principal judicial organ. However, a closer look indicates that the reputation of the ICJ has increased. Data from the ICJ's cases indicates that after 1986, there were 95 cases brought before the Court in the last 34 years, which averages 2.79 cases per year. Previously, from 1946 to 1985, the Court heard 68 cases over 39 years, averaging a much lower 1.74 cases per year. This can be attributed to the ICJ refusing to back down to the US, which gave other smaller countries more confidence in its dealings of the independence and trustworthiness of the Court. By showing the rest of the world that it refused to bow down to an unprecedented challenge to its own authority, it is arguable that Nicaragua helped to raise the stature of the Court.

Despite a rise in the number of cases that have been brought before the ICJ since Nicaragua, the number of cases involving P5 members have decreased dramatically. Before Nicaragua, the P5 member states were all relatively involved in the ICJ (36 cases involving a P5 member state over 39 years). After Nicaragua, that number fell to only 10 cases in the last 34 years.

This illustrates a pragmatic acceptance for Member States that even if they received a positive result from bringing a P5 member state in front of the ICJ in the first place, they would not be able to enforce such decisions. The costs of obtaining a ruling with little enforcement value has little meaning, especially for lesser-developed countries where costs are a factor. Furthermore, it is not in their interests to anger a P5 member state, as there may be economic or political repercussions that must be taken into account.

Evaluation of the Rule of Law

In evaluating the role of the ICJ and its role in the international rule of law context, one must always be careful to set aside expectations that are derived from the expectations that arise from domestic courts (Donoghue, 2014). The ICJ, for example, cannot be compared to the role of a "Supreme Court" in relation to the domestic courts because the ICJ's jurisdiction is dependent to the extent that the states consent to it. Another point lies in the nature of ICJ decisions. ICJ decisions are only binding on the parties of the proceedings before it. The decisions are not binding upon the ICJ, which is contrary to the basic common law doctrine of stare decisis. At most, past decisions play an "auxiliary" or "indirect" role in the determination of rule of law (Guillame, 2011). This further emphasizes that the ICJ is inherently different from domestic courts.

The primary purpose of the ICJ

> **Lies in its function as one of the instruments for securing peace insofar as this aim can be achieved through law (Lauterpacht, 2010)**

While the ICJ certainly has been effective as an institution for states to work out their conflicts in front of an independent panel, avoiding bloodshed and warfare in the process, however, the fact that some nations (such as P5 nations) are able to avoid having ICJ judgments enforced upon them is a dangerous point and requires reform to address the long-term issue of enforcement. Despite being the "principal judicial organ" of the UN, it has no authority of its own to compel states to comply. Its reliance on the UNSC for compliance, which may be effective in matters concerning non-P5 member states, has proven to be its Achilles heel.

As discussed earlier, while there are a variety of reasons for states to comply with the ICJ's rulings in the first place, very few, if any, of those factors have anything to do with the ICJ's ability to enforce its own judgments. Therefore, despite growing rates of compliance, in a strict sense, the ICJ itself is not effective in enforcing compliance and accountability with its judgments. Compliance with the ICJ's rulings may be largely voluntary, but even major states may wish to portray themselves as "international law-abiding", even though they may conveniently reject the jurisdiction of the court when it suits their own purposes.

The United Nation's own definition of rule of law states that:

> **All persons, institutions, and entities, public and private… are accountable to laws" (United Nations, 2020)**

It is evident that enforcing compliance, which is the same as ensuring that all are held accountable to the laws, is a job not just for the United Nations and the ICJ. The fact that the P5 member states can remove any influence upon them is indicative that the court has failed in this aspect.

As the principal judicial organ of the UN, it falls to the ICJ to uphold the UN's own position on the implementation of rule of law. It is the ICJ's responsibility to enforce the international rule of law indiscriminately. To that extent, it is clearly lacking and is clearly in need of further reforms.

Further Suggestions for Reform

Singapore Senior Minister of State for Law and Finance Ms Indranee Rajah said in a speech in 2018 that:

> **Holding all States accountable by the same rules promotes fairness and predictability over arbitrariness. This promotes peace. (Rajah, 2020)**

The ICJ's inability to enforce its decisions, whether on the topic of peace, or human, economic, or cultural rights, or maritime navigation, or even just a breach of a commercial treaty, leaves it vulnerable to its own detractors on its ineffectiveness. So while reform is needed, the exact reforms are highly debated.

<u>World Trade Organization (WTO) Retaliation Model</u>

As an international institution, the WTO, like the ICJ, lacks any formal enforcement mechanisms. Instead, the WTO allows Member states to enforce judgments by retaliating against non-compliant states. Retaliation would allow for certain actions (which are under normal circumstances would be prohibited) to be acceptable, and arguably, the threat of retaliation makes non-compliance less likely.

However, under such a regime, the incentives to comply are different for different states. As one scholar observed about the WTO's regime, "It is one thing for the EU to be excluded from the Ecuadorian market, and yet quite another thing for Ecuador to be excluded from the EU" (Mavriodis, 2012). The same imbalance between states could have a disastrous effect on world peace, as states may resort to armed violence in order to "ensure compliance". Such a regime, if introduced, would be disastrous for the UN and the ICJ's principal mission of ensuring world peace.

<u>Treaty of Lausanne's (1925) Conflict of Interest Model</u>

In the case of *Treaty of Lausanne* (1925), the Permanent International Court of Justice (PICJ) under the League of Nations ruled that the United Kingdom's vote at the Security Council could be tallied but would not carry any weight. The justification of such a ruling was that the "well-known rule that no one can judge in his own suit" held true. The PICJ ruled that the representatives at the Security Council, even those of the United Kingdom, were "duty-bound to take part in the deliberations". It also allowed the United Kingdom's representatives to participate in voting, but that was solely "for the purpose of determining whether unanimous agreement has been reached that their votes are not counted". It must be noted, however, that the PICJ's decision was an advisory one, and thus did not bind the parties before it legally. Nevertheless, it may be worthwhile for the ICJ to consider such a proposal, even if it could be interpreted as a gross overstep of the ICJs powers.

However, there is still a question of how the Security Council at large will react to such a limitation of its power—particularly amongst the P5 nations who hold veto rights. Thus far, such a proposal has never been raised beyond the academic realm, and it remains to be seen whether or not the ICJ will adopt such a precedent in the future.

Conclusion

As stated earlier, the ICJ's primary purpose is to secure peace through international law. For larger nations, especially the P5 powers, it is too expensive to wage war each time a smaller nation sues it or the ICJ rules against it. For the smaller nations, even amongst themselves, war is both a costly and risky option in their foreign policy. In that context, when smaller nations submit themselves to settle their disputes through the ICJ as an institution, they reduce the likelihood of bloodshed. To that extent, the ICJ has been successful. Compared to the UN's own definition of rule of law, however, the UN as an institution and the ICJ in particular fail the test. One of the most basic tenets of rule of law-- that the law is applied equally to all-- is violated when nations refuse to obey the ICJ's rulings or submit themselves to the ICJ's authority.

THE UNITED NATIONS' PEACEKEEPERS: THE CASE OF IMMUNITY VERSUS IMPUNITY

Key Relevant Provisions and Agreements

In order to function effectively, intergovernmental organizations like the UN would require large degrees of freedom from interference by the individual sovereigns. As such, privileges and immunities are bestowed on officials and personnel employed. In Chapter XVI of the UN Charter, Article 104 outlines that:

> **"Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. (UN Charter, Chapter XVI, Article 104)"**

Similarly, Article 105 states that the

> **"Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of the functions in connection with the Organization (UN Charter, Chapter XVI, Article 105)"**

In relation to the provisions above, the Convention on the Privileges and Immunities of the United Nations was passed by the UN GA on 13 February 1946 to give certain privileges and immunities to the UN, as well as the representatives of the Member States, UN officials and experts on mission for the UN. Additionally, such obligations can also be found in bilateral agreements like the Status of Forces Agreement (the "SOFA") signed between the UN and the host state with regards to peacekeeping operations, and in the absence of or prior to the conclusion of a SOFA, the UN Model SOFA would apply instead. SOFAs generally regulate the status, privileges and immunities of the mission and of its personnel in the host state (Deen-Racsmany, 2011).

Types of Immunities and Jurisdictional Bars

Generally, immunities can be classified roughly into three categories: organizational, personal, and functional. Organizational immunity refers to how the UN, as a world body, is immune from any legal process. All UN entities cannot be taken to court over any subject matter in any country. The UN's property and documents are also protected such that they cannot be searched or confiscated by law enforcement without permission. Besides organizational immunity, UN staff may be bestowed either personal or functional immunities. Personal immunity is given to the highest level of UN staff, including the Secretary-General, heads of offices and agencies, as well as the heads of peacekeeping operations. Other civilian staff are also given functional immunity. These individuals would not be susceptible to lawsuit or prosecution under the host country's laws for acts performed by them in their official capacity (Freedman, 2018).

On the other hand, military personnel are not granted the same immunities as their civilian counterparts (Miller, 2007). Rather, they remain under the control of their home country and the host state is barred from exercising jurisdiction in relation to crimes committed by those individuals. Under Article 47(b) of the SOFA, troop contributing countries (the "TCCs") have the responsibility to investigate and prosecute criminal conduct by their own soldiers during UN missions. In other words, peacekeeping troops would remain under the exclusive jurisdiction of their own countries instead of the host country which they are serving. While it is not immunity per se, it still operates similar to diplomatic immunity. The jurisdictional bars prevent host countries from investigating or prosecuting any crimes, regardless of whether the crime was committed as part of official functions.

However, there are also exceptions to these immunities. The doctrine of persona non grata, for example, could be used to revoke diplomatic credentials and expel the diplomat from the country. This was practised by the Government of the Federal Republic of Somalia, in which the Special Representative of the Secretary-General for Somalia and Head of the United Nations Assistance Mission in Somalia (UNSOM), Nicholas Haysom, was ordered to leave the country ("Somalia orders UN envoy to leave country", 2019).

In response to this, the UN Secretary-General António Guterres emphasized in his statement that the said doctrine is not applicable to UN envoys:

> **"As described in the 1961 Vienna Convention on Diplomatic Relations, the doctrine applies to diplomatic agents who are accredited by one State to another in the context of their bilateral relations. The United Nations is not a State and its personnel are not accredited to the States where they are deployed, but work under the sole responsibility of the Secretary-General" (United Nations, 2019)"**

Nevertheless, in such circumstances, it is evident that the immunity bestowed on the UN personnel is not absolute and may be lifted.

The UN's Approach on SEA Cases

Officially, the UN has established a zero-tolerance policy on SEA, as emphasized by the current 9th UN Secretary-General António Guterres:

> **Together, let us solemnly pledge that we will not tolerate anyone committing or condoning a crime, and in particular, crimes of sexual exploitation and abuse. Let us make zero tolerance a reality. (UN Secretary-General António Guterres)**

Even prior to this statement, then 8th UN Secretary-General Ban Ki-moon had issued an annual report on special measures for protection from SEA, where he stressed that these immunity clauses will not serve as a shield for those perpetrators of crimes from being held responsible and called for the need to combat the culture of impunity within the peacekeepers to champion its aim of enhancing the rule of law across the globe.

More importantly, Ban Ki-moon highlighted that transparency and accountability are the critical means through which the UN and its member states can demonstrate their collective commitment to uphold universal values and respect the dignity of these victims.

For instance, besides promoting transparency via the disclosure of the nationalities of all peacekeepers suspected of committing such crimes for the first time on their website, and through strengthening the speed and quality of the process by requesting for Member States to adopt a six-month timeline for investigations as their standard, which may be shortened to three months depending on the urgency of the circumstances. Member States may also choose to appoint a National Investigation Officer within a 10-day time limit.

This infographic outlines the investigation process.

Notwithstanding the past cases, admittedly, consistent efforts have been made by the UN to tackle SEA. With responses being centred on calling for UN peacekeepers to better uphold UN principles, recent figures have shown a significant drop in reported incidents from 103 SEA in 2016 to 54 allegations in 2018 ("Encouraging Progress", 2019). Most notably, the "unprecendented" sacking of Central African Republic (CAR) mission chief Babacar Gaye over the peacekeeper sex claims in 2015 (Charbonneau & Nichols, 2015) further affirmed the UN's resolution to end impunity as it indicates the UN's willingness and serious conviction in enforcing adherence to the international rule of law.

Further Suggestions for Reforms

Setting Up of Hybrid Courts

In addressing the concerns on jurisdictional boundaries, a hybrid court may be created to prosecute crimes committed within the international arena (Dickinson, 2013). Building upon the hybrid nature of mechanisms developed for countries, such as the Extraordinary Chambers in the Courts in Cambodia, this model would share combined elements not only in terms of composition and applicable laws, but also the types of crimes prosecuted (Scharf, 2007). While there has yet been any actual implementation of hybrid courts with a special focus on prosecuting crimes committed by the peacekeepers in the international arena, the discussions around their form and jurisdiction imply the possibility of setting up internationalized hybrid mechanisms. This would ensure that the international standards for fair trials are met and the rule of law is upheld.

Deployment of Political Processes

Apart from repatriating contingents and 'naming and shaming' states of the offenders who have failed to comply with their obligations, political processes could be deployed to circumvent possible legal gaps such as preventing nations from contributing troops unless a legal framework on extraterritorial criminal jurisdiction is submitted (Freedman, 2018). Given that the criminal accountability of individuals rests with the relevant country at present, having a proper framework on accountability from all TCCs would clarify the exact procedure to be undertaken in the cases of misconduct, thereby providing greater transparency in the process.

Conclusion

It is clear that when the peacekeepers abuse these local populations, they not only undermine the purpose for which the immunity clause was set out for, but also erode the concept of rule of law through the subversion of the core principles of equality, accountability, and human rights. In curbing this problem, the UN has explicitly condemned acts of SEA committed by peacekeepers through its zero-tolerance policy and enacted various "unprecedented" strategies and measures to safeguard the rights and dignity of the victims, and reinstate the international rule of law.

Nonetheless, much can still be done by enforcing states to uphold their obligations to investigate and prosecute crimes of SEA by its troops. As such, perhaps the integration of the current measures with the suggestions aforementioned would provide a successful and lasting reform to end impunity.

THE UNITED NATIONS AS A WHOLE: CHECKS AGAINST THE WORLD'S LARGEST INTERGOVERNMENTAL BODY

Forms of Accountability

At the same time, it is crucial to illuminate the contours of the complex political landscape of the UN system. Immense in its size and scope of activities, the world body contains a number of distinct power centers including the Member States and specialized agencies.

Then Secretary-General Ban Ki-Moon also declared in his address on taking the oath of office:

> **Ultimately, we are all—Secretariat and Member States alike—accountable to we the peoples. (SG/2119, GA/10558, 14 December 2006)**

Imperatively, in upholding the accountability aspect of the rule of law, fair checks against and within the UN system should also be conducted to ensure that the rules are equally enforced and independently adjudicated.

Typically, accountability at the UN may be classified into two broad categories: managerial accountability and political accountability.

Managerial accountability focuses on accountability in relation to managerial functions within an organization in the public or private sphere. More specifically within the UN, it concerns individuals with delegated authorities (i.e., the secretariats and executive heads such as the Secretary-General), and for these managerial personnel, they are held responsible for "the agreed actions taken in accordance with respective responsibilities, as well as for the performance and the manner in which the related programme was managed" (Fowler & Kuyama, 2007).

In contrast, *political accountability* centres on the need to account for organizational behavior with regards to constituencies and stakeholders impacted upon by its decisions which involve the relevant constitutions, policy directives, etc. In the UN context, it refers to namely, the accountability of the legislative organs like the Member States and the Secretariat to any stakeholders affected by the UN decisions, including both actions and inactions by what it chooses to do or not to do as well as by how well it does it (Fowler & Kuyama, 2007).

While political accountability and managerial accountability are functionally distinct, as key actors, both the Member States and the Secretariat play a shared part in promoting accountability of the UN and strengthening its credibility as an intergovernmental organization.

Allegations of Sexual Exploitation and Abuse

Case Study: The United Nations Stabilisation Mission in Haiti

For decades, the UN peacekeeping operations have brought peace and stability to countries emerging from war. However, over the years, numerous allegations of sexual exploitation and abuse (SEA) by the UN peacekeepers made international headlines, echoing the irony of UNSC's mission of protecting citizens in these host countries. Consequently, the debate on the case of immunity versus impunity arises, in which impunity is defined by Jennings (2017) as

> **"The likelihood that wrongdoing in a peacekeeping setting, up to and including criminal offenses, will go unpunished. (Jennings, 2017)"**

To get a clearer picture of how the actuality of impunity may transpire as a result of the abuse of the immunity that UN peacekeepers are granted, it is essential to look at case studies such as the United Nations Stabilisation Mission in Haiti (UNSTAMIH) which was in operation from 2004 to 2017.

Based on an internal UN report by Snyder (2017) on the UNSTAMIH, it was found that there were at least 134 Sri Lankan peacekeepers who had exploited 9 children in a sex ring in Haiti from 2004 to 2007, and in wake of the report, although 114 soldiers were repatriated, none of them were convicted or charged in the Sri Lankan court. Lee & Bartel (2019) also highlighted the consequences of sexual contacts between these foreign soldiers and Haitian women, where the term '*pitit MINUSTAH*' in Kreyol, was coined in Haiti's official language by the local population to describe Haitian-born children of foreign UN peacekeepers. Evidently, these children are not a rarity, rather, it illustrates that there exists a sizable group recognised by the community as having a parentage different from other local children.

Underlying Concerns on Jurisdictional Boundaries

Effectiveness of Criminal Prosecution under National Laws

With regards to the effectiveness of criminal prosecution under national laws, the procedural barriers pose some concerns on whether legal actions are taken against these offenders after their repatriation. Upon receiving an allegation of SEA, the TCC is obligated to investigate and prosecute such crimes, with the UN being limited to administrative investigations.

After the UN has determined the troops involved, the allegation would be referred to the relevant military authorities. While it is theoretically possible for peacekeepers to be prosecuted in their home countries for crimes committed during their UN mission, it remains a rarity.

With dysfunctional host state justice systems and due process in doubt, the UN faces difficulty in requiring TCCs to investigate. Besides the likelihood of victims and witnesses being coerced or threatened, many TCCs are also reluctant to admit the misconduct of their peacekeepers since it might be traced back to inadequate training (Stern, 2015). Hence, the matter is often quietly dropped after the soldier's repatriation (Grady, 2016).

Furthermore, not all states have a legislation establishing jurisdiction over criminal acts committed by their citizens while abroad (Jennings, 2017). In improving transparency and accountability to better manage cases of misconduct, the Department of Peace Operations within the UN has requested TCCs to provide a legal framework applicable to its contingent and officers when deployed to UN missions. However, to-date, many countries have yet to submit their legal frameworks ("Standards of Conducts", n.d.).

Incompatibility with International Criminal Law Mechanisms

International criminal law (ICL) mechanisms in isolation are also inappropriate for holding accountable peacekeepers who commit serious crimes. International courts and tribunals focus on international crimes which are different from ordinary crimes committed within the international arena (Cassesse, Gaeta & Jones, 2012).

To be classified as an international crime under the Rome Statute of the International Criminal Court, the acts of sexual violence committed must be intended to persecute or strike terror into a population to form the basis of a war crime or crime against humanity; or where rape is used to prevent the future birth of children from being accepted by a particular religion or ethnicity to form the basis for genocide.

The Rome Statute also creates another jurisdictional problem due to the extent of its ratification by countries. In addition, ICL mechanisms can only be used to prosecute individuals, like military and political leaders, who are liable for international crimes. Even in those circumstances, these perpetrators if brought to justice, are done so via national courts only (Freedman, 2018).

Hence, despite the widespread of sexual abuse by peacekeepers, no evidence has shown that those crimes are committed as part of wider attempts to repress, subjugate or destroy local populations (O'Brien, 2011).

Evaluation of the Rule of Law

In extending the notion of the rule of law in the international context, UN missions serve to aid countries ravaged by civil or international conflict to restore stability, maintain public security, and to strengthen the rule of law, with the goal of establishing enabling conditions for sustainable peace. Essentially, its fundamental purpose is complementary to the definition of the rule of law as stressed by the Secretary General, which calls for legal processes, institutions and substantive norms to be consistent with human rights. This includes adherence to the key principles of equality under the law, accountability before the law, and fairness in the protection of rights ("Rule of Law and Human Rights", n.d.).

Contradicting the fundamental aim of the UN, when peacekeepers commit acts of SEA on the people they were sent to protect, they defeat the purpose of their mission and infringe upon the rights of some of the world's most vulnerable people.

This disregard of international human rights standards not only puts the locals' freedom to live in dignity in a precarious state, but it also contravenes the Universal Declaration of Human Rights which asserts that "human rights should be protected by the rule of law".

While the Model SOFA mandates for TCCs to investigate and prosecute criminal conduct by their own soldiers at UN mission sites, the lack of accountability upon their repatriation creates spatialities of injustice (Reiz & O'lear, 2016).

The fact that not every wrongdoer is being convicted or even charged under national laws also demonstrates the absence of equality as it gives the impression that no punishment can be meted out against them due to their status as UN peacekeepers.

Evidently, these are clear breaches of the principles of the rule of law. The flouting of such obligations in relation to peacekeeping would result in tensions between immunity and human rights, in turn breeding a culture of impunity. When immunity effectively becomes impunity, it sets out an attitude in which people from within and outside the UN believe that reporting is futile as proven by preceding cases where it is easy for perpetrators to 'get away' with such crimes.

Emboldened by the lack of accountability, the issue is only exacerbated with ongoing violation of the victims' rights without proper access to justice (Freedman, 2018).

Accountability within the UN System

With regards to employment disputes within the UN system, staff members may refer the matter to the Joint Appeals Boards and the Joint Disciplinary Committees. Through these two bodies, recommendations in relation to administration and discipline would be made to the Secretary-General in the former and latter respectively. Should there be an allegation of non-compliance with the terms of employment, the UN Administrative Tribunal (the "Tribunal"), which serves as the highest judicial body for the resolution of employment disputes within the UN, may review decisions made by the Secretary-General (Vicien-Milburn, 2009). In affirming the core principles of the international rule of law, past Tribunal cases have validated the UN's approach in the following ways:

<u>Consistency of laws with international human rights standards</u>

In its Fernandez judgment of 2003, the Tribunal emphasised that the right to due process is central to its proceedings, declaring that:

> **"The right to due process of law is not merely a statutory privilege to be conferred at will. It is a fundamental right which serves as the cornerstone upon which the legitimacy of any administrative Tribunal must rest. As such, the Tribunal is bound to zealously safeguard it and consequently treat with any claimed infringement of it. (Tribunal, 2003)"**

Parallel to this view on due process rights, in the Araim case regarding the dismissal of a staff member due to misconduct on the basis of evidence provided by another staff member who had surreptitiously searched his computer, the Tribunal held that: "It cannot accept that investigations could be conducted without rules and guarantees process and without giving due respect to inalienable rights as proclaimed by the Organization itself in the Declaration on Human Rights. This is regardless of what the internal regulations of the Organization say as to its rights to the contents."

The Tribunal has also established that the said right requires informing members of the allegations against them to provide them with an opportunity to defend themselves and to cross-examine witnesses before an adverse decision could be made (Vicien-Milburn, 2009). Thus, this entitles everyone to fair trial rights, in which the promise of integrity in the process that is "free from blemish", is consistent with basic human rights.

<u>Legal transparency in the implementation of laws</u>

Article 97 of the UN Charter mandates the UN Secretary-General's role as the chief administrative officer of the Organization enables him to exercise a broad degree of discretion on administrative matters. The Tribunal remained firm in promoting legal transparency in the process, stressing in the *Yung* case that the UN "does not substitute its judgment for the discretion of the Respondent, he must follow his own rules." Cohering with this view, the case of Gordon and Pelanne is a prime example.

The facts of the case were such that two staff members, Ms. Gordon and Mr. Pelanne, were denied the chance to be considered vacancies due to irregularities within the process in 1996, and based on the relevant rules, vacancy announcements must be circulated prior to that and it was a requirement for promotion decisions to be reviewed by an Appointment and Promotion Board as well. However, the Secretary-General only informed the Board that two other staff members had already been assigned to the posts in question, explaining that the filling of the 2 posts were done on an expedited basis due to urgency of the service.

Ruling in favor of the staff members, the Tribunal maintained in its *Gordon and Pelanne* judgment of 1998 that:

> **"[Although the damage suffered by the Applicants is difficult to assess in monetary terms, clearly the Applicants should have been awarded more than two months net base salary such a flagrant disregard of their rights by the very authority charged with them... Moreover, the Tribunal cannot take lightly the violation of due process Respondent, particularly when the [rules on appointment and promotion were] enacted in order to prevent the very practices to which he resorted in this case. (Tribunal, 1998)"**

Clearly, this indicates that even as the head of the UN Secretariat, the Secretary-General is also subjected to the same rules and regulations, and no exception is given in spite of his high status in the organization.

<u>Equal and independent enforcement of laws</u>

It is also necessary to enforce and apply employment rules and policies of the UN equally without any discrimination, and independent of pressures exerted by Member States. This is enshrined in Article 100(1) of the UN Charter which dictates that the Secretary-General and staff members are prohibited from "seek[ing] or receiv[ing] instructions from any government or from any other authority external to the Organization."

Endorsed in the case of Al Souki in 2005, the Tribunal ruled in favour of a staff member of the United Nations Development Programme (UNDP) Country Office in the United Arab Emirates (UAE) whose fixed-term contract was not renewed upon the UAE Government's request to UNDP to replace the current staff members with those of UAE nationals. Although Member States contribute to the budget of UNDP, the Tribunal explained that the "independent functioning of the Organization requires that [pressures from Member States] be resisted and the fundamental tenets upon which the United Nations was founded be upheld." Hence, the Tribunal remains impartial and fair in its judgment, regardless of influence by external stakeholders.

In these instances above, observations could be made that the Tribunal is determined in promoting the international rule of law in the aspects of human rights and accountability to all via an equal enforcement of laws without any external pressure or biasness. Everyone, including Member States and the Secretary-General, are bound by the rules and regulations of the UN, and anyone whose rights have been violated can seek justice through an impartial and independent body - the Tribunal.

Accountability of the UN Body

The UN was an organization formed to "save succeeding generations from the scourge of war" (UN Charter Preamble). Immunities are linked to this mandate and limited to those necessary to fulfil those functions under Article 105 of the UN Charter. The UN Secretary-General Financing Report 1996 echoed this sentiment:

> **"The international legal responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. (UN Secretary-General Financing Report, 1996)"**

With responsibility for its torts deriving from its international legal personality, the UN's immunities were designed to protect it against vexatious litigation (Rashkow, 2015).

Generally, there are two main types of legal immunity:

1. Immunity rationae persona (everything the actor does is public, and therefore immune)
2. Immunity rationae materiae (which differentiates between the actor and the conduct).

Taken holistically, the UN's immunity is functional in nature, meaning that the immunity applies only to the UN's functions.

Nevertheless, national courts have taken the view that the UN is immune because it is the UN (rationae persona). Courts have argued that immunity should be granted to IOs (like the UN) because IOs are composed of sovereign states, each of which is immune from legal jurisdiction (Wood, 1945).

In support of the extensive legal immunities enjoyed by the UN and its personnel, some of the rationales as highlighted by its proponents are listed as follows:

(i) Safeguarding the UN's independence and unique function

Without immunity, the UN would be subjected to vexatious lawsuits, retaliatory acts by member states against its representatives and organs, and lawsuits that could drain its limited resources (Wood, 1945). Immunities help to ensure that individual Member states do not exercise extra-constitutional influence on the Organization (Boon, 2016).

(ii) Serving the world as a Good Samaritan

The UN is a major provider of emergency assistance and peacekeeping, and since the Cold War, the UN has intervened in some way in 95% of armed conflicts (Boon, 2016). It is the only international organization that can provide peacekeeping functions on a global basis. The UN requires immunity to incentivize the UN's work, similar to Good Samaritan immunities in some national jurisdictions to incentivize their work (Waisman, 2013).

(iii) Absolving national courts of the need to judge international affairs

National courts may not be well placed to judge the UN's affairs which includes matters related to diplomacy and policy. They may render divergent decisions on questions of public international law, or they may display bias against the UN (Boon, 2016). Political grievances with the UN should not be settled in the domestic courts, which could seriously compromise the independence of the UN.

On the other hand, the problem with absolute immunity for the UN is that the victims of negligence, as a principle, have a right to remedy, especially when an organization is responsible for such negligence.

Just as the majority of jurisdictions see the Good Samaritan as under no duty to act (Murphy, 2001), a Good Samaritan who undertakes to perform a rescue is bound to exercise reasonable care in doing so (Waisman, 2013).

Therefore, when the UN intervenes, certain duties attach to the UN as they would to any other rescuer (Murphy, 2011), and some potential key issues arising from this includes:

(i) Question of accountability

Power entails accountability and the ceding of power and authority creates a duty to account for its exercise. The UN is bound by international human rights covenants and it must be accountable for its actions, in terms of procedural rights of access and substantive remedies (Koon, 2016).

Failure to do so may lead to a situation where member states may be constitutionally unable to uphold the UN's immunities, because they conflict with the UN's own human rights norms (Koon, 2016).

(ii) Question of distributive justice

Injuries are a predictable cost of any UN peacekeeping operation. Those who act negligently should compensate those they have injured (Culhane, 2002).

As all member states benefit from the UN's mandate of maintaining international peace and security, all member states should also share the burden of compensating for instances of UN negligence.

The position that victims should bear the burden of UN malfeasance undermines the principle of distributive justice (Franck, 2002).

Question of credibility

Immunity is questionable because it affects the credibility of an actor's commitments. Theoretically, there would be an increase in moral hazard caused by the immunity that the actor will not fulfil transactions as promised (Van Aaken, 2014).

While some would argue that the paying out of mass tort claims against the UN may bankrupt the UN, others are of the opinion that the retreat from absolute immunity will deter Troop Contributing Countries because the standard memorandum of understanding between the UN and the TCC indemnifies the TCC in the first place.

Thus, in evaluating the rule of law on the world body, immunity appears to take the shape of a double-edged sword, in which the protective clauses could be beneficial in allowing the UN to advance their mission of preserving human rights, but precautions have to be taken to avoid instances where such privilege are abused to ensure that accountability and justice is provided for all without exceptions.

FINAL CONCLUSION

In conclusion, we have analyzed the rule of law at the international level by investigating the effectiveness of enforcement and compliance with regards to the decisions passed by the International Court of Justice, and by evaluating the degree of immunity enjoyed by peacekeepers. We have also assessed the accountability of the UN as a world organization. Evidently, the UN's idealistic mission of maintaining international peace and security, coupled with its core principle of upholding the international rule of law and human rights, has been a very difficult one to achieve. Nevertheless, the UN as a world body, along with its member states, ought to be held accountable for their actions. Thus, it remains essential to recognise the existing challenges of protective clauses such as immunity, and to work on possible reforms to ensure a fair and justice world.

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