

TOWARD A COMMON GROUND DEFINITION OF THE RULE OF LAW INCORPORATING SUBSTANTIVE PRINCIPLES OF JUSTICE

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INTRODUCTION

In an interview with the *Washington Post*, the Chinese President, Hu Jintao, declared that, “we will continue to expand people’s democracy and build a socialist country under the rule of law in keeping with China’s national conditions.”¹

In addressing Parliament the Deputy Prime Minister of Singapore, Wong Kan Seng, stated that “I believe that Singaporeans understand and support the fundamentals that have made Singapore what it is today. What are these fundamentals? The first fundamental is the rule of law.”²

Dmitry Medvedev, President of the Russian Federation has recently stated that if we believe in the viability of our democratic institutions and will insistently develop them to make Russia a thriving society, based on principles of liberty and justice. We believe in the rule of law³

It has been said that “[t]he beauty of the ‘rule of law’ is that it is neutral. No one—the human rights community, the business community, the Chinese leadership—objects to it.”⁴ Indeed, human rights advocates believe that the rule of law can prevent and remedy human rights abuses; security analysts believe that establishing the rule of law is crucial to rebuilding states plagued by internecine conflict; development experts assert that the rule of law is a

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1. Written Interview by *Wall Street Journal* and *Washington Post* with President Hu Jintao (Jan. 17, 2011), available at <http://et.china-embassy.org/evig/zgxx/+789150.htm>.

2. Wong Kan Seng, Deputy Prime Minister and Home Affairs Minister, Cos Speech (Feb. 28, 2008) available at http://www.mba.gov.sg/news_details.aspx?nid=MTE20A%3D-16mkxurrgec403D.

3. Dmitry Medvedev, President of the Russian Federation, Meeting with Russian Ambassadors and Permanent Representatives to International Organizations (July 12, 2010), available at <http://www.rusemb.org.uk/article/73>.

4. Matthew Stephenson, *A Trojan Horse in China?*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 196 (Thomas Carothers ed., 2006).

critical factor behind economic growth. No single political ideal has ever been so widely accepted and endorsed.⁵ While such universal support may reasonably stem from the intrinsic value of law, it also comes from a certain elasticity of meaning. In fact, there are multiple definitions and understandings of the rule of law. This presents a challenge to the international community, where discussions about implementation can flounder because of a lack of a clear and widely accepted definition of the rule of law. What does it mean when a government pledges to uphold the rule of law? To what standard should it be held?

This article will discuss the conceptual approaches to defining the rule of law premised on two contemporary models: a formal definition and a substantive definition.⁶ Within the substantive approach to defining the rule of law, the article discusses the variants between derogable and non-derogable rights. Where a non-derogable right is systematically threatened, curtailed, or derogated from, the rule of law cannot be said to exist. However, non-universal principles deemed to be derogable could be viewed as flexible, allowing a state to customize its interpretations in order to respect the interest of the community more widely, including the cultural values enshrined in that state. The article uses Singapore as an example of how this concept of derogable and non-derogable rights can be utilized to assess a state's adherence to the rule of law.

FORMAL APPROACH TO THE RULE OF LAW

At its core, a formal definition of the rule of law echoes Aristotle's dictum: government by laws and not of men. The essential premise is that a free state is characterized by the superiority and predictability of law, and by separation of powers—concepts that remain fundamental to contemporary definitions.⁷ The formal approach stresses the predictability of governance through “clarity, prospective applicability, stability and publicity of rules.”⁸ British legal scholars such as Edward Coke, William Blackstone, David

5. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004); Balakrishnan Rajagopal, *Invoking the Rule of Law in Post-Conflict Rebuilding: A Critical Examination*, 49 WM. & MARY L. REV. 1347, 1348 (2008).

6. See RONALD DWORKIN, A MATTER OF PRINCIPLE 11–13 (1985). Ronald Dworkin has aptly named these approaches the “rule-book” model and the “rights” model, respectively. *Id.*

7. See Friedrich A. Hayek, *The Origins of the Rule of Law*, in THE CONSTITUTION OF LIBERTY 162, 165–66 (1960).

8. Mark David Welton, *Islam, the West, and the Rule of Law*, 19 PACE INT'L L. REV. 169, 175 (2007).

Hume, and John Locke all had a significant impact on the development of this approach to the rule of law.⁹ Their writings reinforced Aristotle's notion that law should be superior, non-arbitrary, and enforceable by an independent judiciary, and should treat individuals equally.¹⁰

However, it was A.V. Dicey, a British jurist and constitutional law theorist, who coined the phrase "rule of law" in 1885.¹¹ Dicey emphasized three principles of the rule of law: (1) no man is punishable "except for distinct breach of law established in the ordinary legal manner before the ordinary court of law"; (2) "no man is above the law and all men are equal before the law"; and (3) "the general principles of the constitution are the result of judicial decisions determining the rights of private persons in particular cases brought before the courts."¹² According to Dicey, the rule of law is an effective "mechanism to restrain discretionary governmental action and protect citizens from arbitrary use of overly broad governmental power."¹³

Writing in the 1930s, American legal scholar Lon Fuller expanded on this definition by identifying eight procedural goals that the law should meet. These include: (1) laws must be general; (2) laws must be promulgated (publicity of the law); (3) except when necessary for the correction of the legal system; (4) laws should be clear and understandable; (5) the legal system must be free of contradictions; (6) laws cannot demand the impossible; (7) the law must be constant through time; and (8) there should be congruence between official action and declared rules.¹⁴ In effect, Fuller's definition can be seen as a set of principles requiring that rules be established, that they be transparent and easily understood, and that they apply equally to all citizens. Although a number of scholars have interpreted Fuller's elements to be no more than functional "conditions of efficacy," Fuller has rejected such interpretations and insisted that his criteria are part of the very definition of the law.¹⁵

9. HAYEK, *supra* note 7, at 168–73.

10. *Id.* at 165–66.

11. ALBERT VENN DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885) (referring to the rule of law); *Dicey A.V.*, NEW WORLD ENCYCLOPEDIA, Apr. 2, 2008, http://www.newworldencyclopedia.org/entry/A._V._Dicey.

12. S.A. PALEKAR, COMPARATIVE POLITICS AND GOVERNMENT 64–65 (2009).

13. Jennifer C. Root, *The Commissioner's Clear Reflection of Income Power Under § 446(b) and the Abuse of Discretion Standard of Review: Where Has the Rule of Law Gone, and Can We Get it Back?*, 15 AKRON TAX J. 69, 72 (2000).

14. DEMOCRACY AND THE RULE OF LAW 68 (José María Maravall & Adam Przeworski eds., 2003).

15. See Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

Joseph Raz, one of the most prominent living advocates of legal positivism, puts forth many of the same elements, but emphasizes the role of institutions and the importance of establishing limits on the arbitrary exercise of power. He believes that an independent judiciary must be guaranteed, courts must be accessible, and state actors should not have discretion to bend the law.¹⁶ Most importantly, however, Raz argues that the rule of law must not be “confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”¹⁷ For Raz, the rule of law should possess “no more than *prima facie* [sic] force.”¹⁸ Raz is an unequivocal advocate of the formal approach, believing that questions of morality belong outside the institutions and mechanisms of law and should be addressed through strong notions of legality rather than substantive legal norms. Laws do not cease to become laws simply because they are unjust.¹⁹ Herein lies the key divergence between the two approaches.

SUBSTANTIVE APPROACH TO THE RULE OF LAW

The problem with a strictly formal definition of the rule of law is that it provides no guidance vis-à-vis regimes that establish clear legal rules yet commit egregious human rights violations and flout international obligations. For example, Zimbabwe might well be characterized as a rule of law state; it has a clear and transparent legislative base supported by a judiciary that, although ineffective, could be seen as independent. It has an elected legislative branch. However, legislative edicts have authorized the murder, displacement, and torture of thousands of people, in violation of virtually every international human rights instrument in existence.

The same can be said of South Africa during the apartheid era. As Arthur Chaskalson, former Chief Justice of South Africa stated:

[t]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalised discrimination, vested broad discretionary powers in the

16. Joseph Raz, WORLD LINGO, http://www.worldlingo.com/ma/enwiki/en/Joseph_Raz (last visited Oct. 11, 2010).

17. Joseph Raz, *The Rule of Law and its Virtue*, 93 LAW Q. REV. 195, 196 (1977).

18. *Id.* at 210.

19. Raz, *supra* note 16.

executive and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is “an empty vessel into which any law could be poured.”²⁰

Thus, the rule of law cannot mean simply a set of institutions, statutes, and procedures. It is not insignificant that early theorists of the rule of law were writing about democracies. What we find today, vis-à-vis many authoritarian states, is that basic legal standards and procedures are not sufficient to deter the arbitrary exercise of government power. In response to this, and in tandem with developments in international law, a substantive approach has gained new favor. This approach begins with formal definitions of law, but reaches beyond the letter and procedure of law to incorporate qualitative principles of justice.

Lord Tom Bingham of the United Kingdom is referred to as “the pre-eminent lawyer of his generation.”²¹ He is one of the key international scholars behind the substantive model. He first sets forth a formal definition of the rule of law, based on the core principle that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”²² He then includes several additional normative principles: clarity, limitation of discretion, equal application of the law to all, capability to appropriately resolve civil disputes, appropriate exercise of public powers, and fair adjudicative procedures.²³ However, Lord Bingham acknowledges that such measures are not sufficiently comprehensive, and thus incorporates two additional elements, namely: adequate protection of human rights, and compliance by the state with its obligations in international law.²⁴ By adding that the rule of law must include protection of human rights and adherence to international law, he introduces a substantive component and also links the concept to modern international legal conventions.

20. Arthur Chaskalson, Remarks at the World Justice Forum I, July 2008. See Paul Hoffman, *Accountability and the Rule of Law*, LEGALBRIEF TODAY, Nov. 27, 2009, <http://www.legalbrief.co.za/article.php?story=20091127105455794>.

21. *Lord Bingham of Cornhill*, TIMES ONLINE, Apr. 21, 2008, <http://business.timesonline.co.uk/tol/business/law/article3757961.ece>.

22. TOM BINGHAM, *THE RULE OF LAW* 37 (2010).

23. ROGER SMITH, JUSTICE, *THE FUTURE OF THE RULE OF LAW* 5 (2007), available at <http://www.justice.org.uk/images/pdfs/futureruleoflaw.pdf>.

24. *Id.*

This approach is not without controversy. Supporters of the formal approach have argued that:

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.²⁵

The counter-argument to Bingham clearly establishes the conflict between the two approaches to the rule of law. Citing the example of Nazi Germany, Lord Bingham maintains that a state “which savagely represses or persecutes sections of its people cannot . . . be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp . . . is the subject of detailed laws duly enacted and scrupulously observed.”²⁶

For Lord Bingham, the timing of the European Convention on Human Rights and the creation of the Universal Declaration of Human Rights (UDHR) was no accident, but a key response to the tyranny that engulfed Europe during World War II. Thus, Lord Bingham asserts that “it is a good place to start for public authorities to observe the letter of the law, but not enough if the law in a particular country does not protect what are there regarded as the basic entitlements of a human being.”²⁷

International legal associations have also added to the rule of law debate. In 2005, the International Bar Association (IBA) adopted a Rule of Law Resolution that sought to identify the fundamental principles of the rule of law, many of which are the same as those put forth by Lord Bingham. The IBA’s Resolution does not purport to be a definition, but rather “is an authoritative statement on behalf of the worldwide legal profession . . . [that] merely sets out some of the essential characteristics of the Rule of Law.”²⁸ Such characteristics include:

an independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of

25. Raz, *supra* note 17, at 196.

26. Lord Bingham, *The Rule of Law*, 66 C.L.J. 67, 76–77 (2007).

27. *Id.* at 84.

28. International Bar Association, Commentary, *Rule of Law Resolution 2* (2005), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUId=A89CFFB1-BD4A-445C-8CAB-553AF21BD7A7>.

confidential communications between lawyer and client; equality of all before the law.²⁹

According to the IBA, the rule of law requires strict adherence to fundamental principles that “both liberate and protect.”³⁰ The American Bar Association (ABA) has set forth a similar, though less extensive and more formal, definition of the rule of law:

It is a rules-based system of self-government with a strong and accessible legal process. It features a system based on fair, publicised, broadly understood and stable laws; and diverse, competent and independent lawyers and judges. The rule of law is the foundation for sustainable communities and opportunities.³¹

Moreover, the UN Secretary-General defines the rule of law with many of the same principles set forth by the IBA and the ABA. Although heavily reliant on a formal approach, there is an important recognition of substantive human rights principles. The Secretary-General defines the rule of law as:

[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.³² (emphasis added).

Even the U.S. military has expanded its rule of law definition to include mention of substantive Principles:

Rule of Law is a principle under 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 that are consistent with international human rights principles . . .*³³ (emphasis added).

29. INTERNATIONAL BAR ASSOCIATION, RULE OF LAW RESOLUTION (2005), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A19DE354-A0D7-4B17-A7FF-F6948081CD85>.

30. *Id.*

31. ROGER SMITH, THE FUTURE OF THE RULE OF LAW 7 (2007), available at <http://www.justice.org.uk/images/pdfs/futureruleoflaw.pdf>.

32. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

33. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-07: STABILITY OPERATIONS 1-9 ¶ 1-40 (2008). This definition is based in part on that contained in U.N. Secretary-General, *supra* note 32. This definition was also adopted by the Multinational Corps-Iraq Commander as early as 2006. See Appendix 2 to Annex G

Development organizations have further weighed in with attempts to measure states' adherence to the rule of law. The World Bank, having emerged as a key actor in contemporary rule of law programming, has articulated a four-part test: "(1) the government itself is bound by the law; (2) all in society are treated equally under the law; (3) and the government authorities, including the judiciary, protect the human dignity of its citizens; and (4) justice is accessible for its citizens."³⁴

Still more ambitious in its attempt to measure the rule of law is the World Justice Project Rule of Law Index.³⁵ This Index consists of 16 factors and 68 sub-factors, including, for example, (1) governmental and non-governmental checks; (2) "clear, publicized" and "stable" laws; (3) property protection; (4) "fair and efficient" administration; (5) impartial judicial system; (6) compliance with international law; and (7) protection of fundamental rights.³⁶

The Index clearly and appropriately incorporates both formal and substantive standards. However, it gives equal weight to each factor and sub-factor. Thus, a country that scores exceptionally high on protecting property rights and providing alternative dispute resolution but low on protecting human rights could still end up with a relatively high weighted average on its final rule of law "score." This represents a major weakness of such quantitative measures.

An alternative approach that should be incorporated into the Index originates from John Rawls' theory of 'Justice as Fairness,' in which he proposes two principles.³⁷ The first principle, relating to basic rights, is that each person should have the same inalienable claim to a fully adequate protection of basic liberties.³⁸ The second principle relating to the redress of social and economic inequality requires that there should be equality of opportunity for all, and that social and economic resources should be allocated to the greatest benefit of the least advantaged.³⁹ While the contents of his principles are open to debate, the key aspect of Rawls' theory is that the

to MNC-I Operation Order 06-03.

34. THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 3 (2002).

35. Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *Measuring Adherence to the Rule of Law around the World*, RULE OF LAW INDEX 2.0, 7 (Nov. 2009), available at <http://worldjusticeproject.org/rule-of-law-index/index-2009/Executive-Summary>.

36. *Id.* at 7-8.

37. JOHN RAWLS, A THEORY OF JUSTICE 52 (rev. ed. 1999).

38. *Id.* at 53.

39. *Id.*

principles must be met in order of “lexical priority.”⁴⁰ Thus the first principle must be entirely fulfilled before the requirements of the second can be met, and fulfilment of the second principle cannot compensate for shortcomings in achieving the first.⁴¹ Imposing a lexical order on any type of Rule of Law Index ensures that the most basic and fundamental rule of law principles are met in full before additional criteria are met. More importantly, this would preclude a scenario where achievement of non-fundamental rights can somehow compensate for a state’s failure to promulgate fundamental rights that are guaranteed to all people.

While indices may be a bellwether of progress (or decline) along various parameters, what is needed is a gold standard according to which states can be held accountable.

NON-DEROGABLE/DEROGABLE RIGHTS

For me, it is appropriate that the standard for rule of law be based on a formal, procedural definition. However, without a strong substantive component that embraces universal principles of justice, the rule of law becomes meaningless. Indeed, a country that has a solid institutional legal framework but fails to protect fundamental human rights is at best a country ruled *by* the law but should not be considered a country based on the rule *of* law. And this is the paradigm shift that must occur. It is disingenuous to refer to a country as adhering to the rule of law when it fails to protect fundamental, substantive rights found in international law.

International sensibilities regarding fundamental rights have shifted. The impetus for this shift was the realization that state sovereignty has changed.⁴² The once accepted doctrine that human rights law was the exclusive domain of the sovereign state is now dated.⁴³ In the traditional view, states were the only relevant actors.⁴⁴ However, the adoption of human rights conventions at the end of World War II and following the Cold War marked the beginning of a new era in which certain international human rights principles “could trump state sovereignty.”⁴⁵ From a substantive perspective, human rights can now be

40. *Id.* at 37.

41. *Id.* at 37, 53.

42. See Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT’L SEC. LAW. POL’Y, No. 1 (2006).

43. *Id.*

44. *Id.*

45. *Id.*

regarded as a concomitant principle of the rule of law. Indeed, this idea has gained broad currency; the Charter of the United Nations, the Universal Declaration of Human Rights (“UDHR”), multilateral treaties, international humanitarian law and many other human rights instruments have inextricably linked the protection of human rights to the rule of law.⁴⁶ While there continues to be debate about which rights and freedoms are “fundamental,” certain principles contained within customary international law point to rights that must be protected. This body of rights should be viewed as transcending common law, civil law, and Islamic law.

I recognize that a heavy emphasis on the substantive approach could be criticized for lacking practical application. Also, a broad rights-based approach could pose problems in certain non-Western cultures, where concepts of “justice” and “human rights” may be understood and applied differently than in Western, Anglo-American societies. However, I suggest that such objections can be overcome if we distinguish between principles from which derogation is never appropriate, and principles that might allow compromise according to local values and customs.

Substantive rights would thus be broken down into categories of *derogable* and *non-derogable* rights. For instance, in the specific context of multilateral human rights treaties, derogation is a formal and often legislative process. States can refuse to enforce a certain right, to the extent that this limitation is strictly necessary in response to a pressing emergency that threatens the life of a nation.⁴⁷ However, even in national emergencies, these treaties delineate certain freedoms which may not be curtailed; as a result, these specific, listed rights are often labelled “non-derogable.”⁴⁸ Thus, where a non-derogable right is systematically breached, curtailed, or derogated from, the rule of law cannot be said to exist.

However, non-universal principles deemed to be derogable could be flexible, *except* where a state’s method of penalty is so severe that it strips citizens of the fundamental, non-derogable right to rational and proportionate punishment.

46. See Universal Declaration of Human Rights art. 5, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]; U.N. Charter.

47. See Organization of American States, American Convention on Human Rights art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; International Covenant on Civil and Political Rights art. 5, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; The European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, E.T.S. No. 5 [hereinafter ECHR].

48. *Id.*

There is no doubt that to denote all fundamental rights as non-derogable would produce much disagreement. As Lord Bingham puts it, there is “an element of vagueness about the content” of fundamental rights, “since the outer edges of fundamental human rights are not clear-cut.”⁴⁹ However, he goes on to note that “there will ordinarily be a measure of agreement on where the lines are to be drawn” and that “[t]he rule of law must, surely, require legal protection of such human rights.”⁵⁰

Indeed, it is doubtful that the international community can, in the short run, reach full consensus on this issue. However, I think the international community can get very close. I believe it is both possible and crucial to identify principles and guarantees from which no state should be permitted to derogate.

For me, non-derogable rights are those rights that are internationally accepted as *jus cogens* norms. The very fact that there is consensus on these norms solidifies their status in international law. Thus, a *jus cogens* norm that prohibits the breach of a certain right is strong evidence of that right’s fundamental importance. Of course, determining which rights attain the non-derogable status is not without its own complexities, but there are reliable indicators as to the gravity of a right. For instance, multilateral rights treaties often implicitly create a hierarchy of rights by qualifying some, and not others.⁵¹ This is by no means a perfect method of differentiation, but it is a useful starting point. However, it is important to stress that a *jus cogens* norm is mandatory upon states and cannot be abnegated, subverted, or weakened by any unilateral state action. Nor can states attempt to alter their adherence to these inviolable norms because of perceived cultural, regional, or national differences (*e.g.*, from an Islamic, Western, or Asian perspective). The reason is that non-derogable rights bind all nations; a state’s breach of any one of them is unlawful.

The following is not intended to be an exhaustive list of non-derogable rights, but a starting point.

49. Bingham, *supra* note 26, at 76–77.

50. *Id.* at 77.

51. *See* ECHR, *supra* note 47, arts. 3, 10.

NON-DEROGABLE RIGHTS

The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment

The prohibition on torture is enshrined in numerous international law instruments including the UDHR,⁵² the International Covenant on Civil and Political Rights (ICCPR),⁵³ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁵⁴ as well as many regional human rights treaties.⁵⁵ According to multilateral human rights treaties, state parties may not suspend the guarantee against torture, in any circumstance.⁵⁶ There are also recent cases from various jurisdictions that state that the prohibition against torture is a *jus cogens* norm.⁵⁷ In short, the use of torture is an anathema to the idea that individuals must be treated with dignity.

A state that permits torture must be seen as in breach of the rule of law because the authority upon which the state operates disappears completely when it violates this fundamental protected right. One of the most poignant and insightful defences of this principle came in a 1999 decision by Israel's Supreme Court, which rejected the government's position that the use of torture against Palestinian detainees was justified in certain instances.⁵⁸ Writing for the Court, Chief Justice Aharon Barak said:

This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The *rule of law* and the liberty of an individual constitute important components in its

52. UDHR, *supra* note 46, art. 5.

53. ICCPR, *supra* note 47, art. 7.

54. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984).

55. See Organization of African Unity, African Charter on Human and Peoples' Rights art. 5, June 17, 1981, 21 I.L.M. 58 [hereinafter ACHPR]; ACHR, *supra* note 47, art. 5, para. 2; ECHR, *supra* note 47, art. 3.

56. See ACHR, *supra* note 47, art. 27, para. 2; ICCPR, *supra* note 47, art. 4, para. 2; ECHR, *supra* note 47, art. 15, para. 2.

57. *E.g.*, Suresh v. Minister of Citizenship and Immigration, [2002] S.C.R. 1, para. 46 (Can. S.C.C.); Tavake v. Kingdom of Tonga [2008] TOSC 14, 52 (Tonga); Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya, [2006] UKHL 26 (H.L.) [14] (appeal taken from Eng.).

58. HCJ 5100/94 Public Comm. Against Torture in Israel v. State of Israel 53(4) PD 817 [1999] (Isr.).

understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.⁵⁹ (emphasis added).

The prohibition on cruel, inhuman, or degrading punishment or treatment is often coupled with the prohibition on torture.⁶⁰ Respect for both of these norms is fundamental to the concept of human dignity. Thus, the right not to be tortured or subjected to other cruel, inhuman, or degrading treatment or punishment falls squarely within the definition of a non-derogable right; it is of clear importance and its prohibition is internationally accepted. Its status as a *jus cogens* norm and its prevalence within multilateral treaties places it as a right that is binding on all states and that is a necessary component of the rule of law.

The right to a fair trial

The right to a fair trial is intimately tied to notions of equality and protection against the arbitrary use of coercive power. Indeed, it has been referred to as a “cardinal requirement” of the rule of law.⁶¹

This principle is enshrined in numerous international instruments, including Article 10 of the UDHR, Article 6 of the ECHR, and Article 14 of the ICCPR.⁶² As per Article 14(1) of the ICCPR, anyone who is charged with a criminal offence, or whose rights and obligations might be affected by a given case, is “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁶³ Article 14(2) requires that individuals “charged with a criminal offence . . . be presumed innocent until proven guilty.”⁶⁴ Article 14(3) also provides a wide range of guarantees for those charged with any crime.⁶⁵ These central components of the right must be respected if all individuals are to avail themselves of equal protection before the law.

59. *Id.* at para. 39.

60. See Rome Statute of the International Criminal Court art. 55(1)(b), July 17, 1998, 2187 U.N.T.S. 90; ACHPR, *supra* note 55, art. 5; ACHR, *supra* note 47, art. 5(2); ECHR, *supra* note 47, art. 3.

61. BINGHAM, *supra* note 22, at 90.

62. It should be noted that the ICCPR permits derogation of this right in times of public emergency. However, this does not detract from its fundamental nature under the rule of law. See, e.g., ICCPR, *supra* note 47, art. 14. See also ECHR, *supra* note 47, art. 6; UDHR, *supra* note 46, art. 10.

63. ICCPR, *supra* note 47, art. 14, para. 1.

64. *Id.* at art.14, para. 2.

65. *Id.* at art.14, para. 3.

The right to a fair trial is “a well-established rule of customary international law, and in the view of many, has the status of a peremptory norm of general international law.”⁶⁶ Derogation from this principle should be a *per se* violation. It is, therefore, a non-derogable right essential to the rule of law.

The right to freedom of thought, conscience and religion

Freedom of thought, conscience, and religion should similarly be regarded as fundamental to the rule of law. These are elemental aspects of identity for which many have given their lives. The right to freedom of thought, conscience, and religion is also integral to the preservation of equality and dignity. The U.N. Human Rights Committee has stated that this right is now a norm of customary international law that may not be the subject of a reservation to the ICCPR.⁶⁷

Article 18(1) of the ICCPR states that:

[E]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.⁶⁸

Article 18(2) states that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”⁶⁹ Article 18(3) sets out the possible limitations of this right, in that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”⁷⁰ It is notable that only manifestations of religious belief are subject to restriction. The right to freedom of thought, conscience, and religion is not capable of

66. Patrick Robinson, *The Right to a Fair Trial in International Law, With Special Reference to the Work of the ICTY*, 3 BERKELEY J. INT’L L. PUBLICIST 1, 11 (2009), http://bjil.typepad.com/Robinson_macro.pdf.

67. Office of the High Commissioner of Human Rights, *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994), available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/69c55b086f72957ec12563ed004ecf7a?OpenDocument>.

68. ICCPR, *supra* note 47, art. 18, para. 1.

69. *Id.* at para. 2.

70. *Id.* at para. 3.

limitation. Only manifestations that are damaging to the public good can be curtailed. The right to freedom of thought, conscience, and religion is reflected in regional treaties.⁷¹

There is global agreement on the existence of the right, and it is clearly of fundamental importance. It is, therefore, a non-derogable right within the definition espoused above.

The right to non-discrimination

Discrimination strikes at the very heart of the concept of equality and is clearly antithetical to the rule of law. Provisions in the UDHR and ICCPR expressly forbid discrimination.⁷² This is also widely reflected in regional treaties⁷³ and in national constitutions.⁷⁴ The grounds on which people may not be discriminated against are numerous. At a minimum, they include those found in the ICCPR: “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷⁵ I would further argue that states cannot discriminate on the basis of sexual orientation or gender identity; there is EctHR (European Court of Human Rights) case law to this effect.⁷⁶ The recent case of a gay couple in Malawi who were imprisoned because of their homosexuality⁷⁷ drew such international public outcry that the government offered a pardon.⁷⁸ In a press conference with the president of Malawi, the UN Secretary General stated that: “[an] outdated penal code should be reformed wherever it may exist. Any harassment or violation . . . based on sexual orientation is discriminatory. It’s against international human rights law.”⁷⁹ Thus, the prohibition of discrimination falls

71. See, e.g., ACHPR, *supra* note 55, art. 8; ACHR, *supra* note 47, art. 12; ECHR, *supra* note 47, art. 9.

72. See ICCPR, *supra* note 47, art. 2 and UDHR, *supra* note 46, art. 2 (regarding the rights set forth in those documents).

73. See ACHPR, *supra* note 55, art. 28; ACHR, *supra* note 47, art. 1; ECHR, *supra* note 47, art. 14.

74. See, e.g., U.S. CONST. amend. XIV; CONSTITUIÇÃO Federal [C.F.] [Constitution] art. 5, § XLII (Braz.); FIJI CONSTITUTION § 38; GRUNDGESETZ [GG] [Constitution] art. 3 (F.R.G.); NIHONKOKU KENPŌ [Kenpō] [Constitution] art. 14 (Japan); S. AFR. CONST. 1996, art. 9.

75. ICCPR, *supra* note 47, art. 2, para. 1.

76. See, e.g., *Dudgeon v. United Kingdom*, App. No. 7525/76, EUR. CT. H.R. (1981), available at <http://www.unhcr.org/refworld/docid/47fdfaf7d.html>.

77. Jonathan Clayton, *Malawi Court Convicts Gay Couple of Gross Indecency and Unnatural Acts*, THE TIMES, May 19, 2010, at 33.

78. Sadie Gray, *Gay Couple in Malawi Pardoned by President after Outcry*, THE SUNDAY TIMES, May 29, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article7140000.ece>.

79. *Id.*

within the definition set out for a non-derogable right and should be central to the rule of law.

The right not to be punished disproportionately

The right not to be punished disproportionately may at first appear to be a simple application of a group of other rights, such as the right not to be arbitrarily deprived of life or liberty. However, it has an important and distinctive function within the concept of non-derogable rights. It is, of course, true that there are some rights—those which can be qualified—where states will reasonably disagree as to the proper purview of their power. For instance, different jurisdictions can and do take different stances on the issue of national service. National service is, in a strict sense, a limitation on the right to liberty. However, we would not readily conceive of this practice as a breach of the rule of law.

However, if we take as an example, a person imprisoned for life as a result of failing to fulfill the obligation of national service, such a punishment would not only be disproportionate, but also a breach of a non-derogable right. This would not be because of undue restrictions on personal liberty, but because the punishment was so severe and disproportionate that it stripped the individual of more fundamental rights. Similarly, sentencing a woman to death by stoning for adultery would be disproportionate because of the non-violent nature of the crime. Article 6(2) of the ICCPR is clear that “in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.”⁸⁰ Actions relating to moral values such as adultery would not reach the level of a “serious crime” under international legal standards.⁸¹

I submit that international agreement on these principles does exist. Qualified rights under the ICCPR must only be limited in a manner which is “necessary” for specific, listed instances of the collective good.⁸² The language of the ICCPR is reiterated in many regional treaties.⁸³

80. See, e.g., ICCPR, *supra* note 47, art. 6(2).

81. Serious crime must be “intentional crimes with lethal or other extremely grave consequences.” See Economic and Social Council guidelines, “Safeguards guaranteeing protection of the rights of those facing the death penalty,” of 1984. The UN Human Rights Committee (CCPR) has held that the use of the death penalty for anything other than murder is a violation of Article 6 ICCPR (CCPR concluding observations on Iran (Islamic Republic of), 3 Aug. 1993, CCPR/C/79/Add.25, § 8 and CCPR concluding observations on Iraq, 19 Nov. 1997, CCPR/C/79/Add.84, § 10 & 11).

82. See, e.g., ICCPR, *supra* note 47, arts. 19, 22.

83. See, e.g., ACHPR, *supra* note 55, art. 11; ACHR, *supra* note 47, arts. 13, 15; ECHR, *supra* note

Disproportionate punishments are, by definition, more invasive than necessary and are thus a breach. Therefore, the right not to be disproportionately punished is both of clear substantive importance and is internationally agreed upon. It falls within the definition of a non-derogable right.

THE NEED FOR DEROGABLE RIGHTS

As indicated earlier, there are other substantive principles less widely agreed upon and therefore lacking the full force of international law. On these principles, derogation should be possible and compromise may be appropriate in order to respect the interests of the community more widely, including cultural values enshrined in individual states.

For example, while Western societies typically understand human rights as fundamentally based on individual liberty, many states put a premium on group rights, which may include the rights of the state or nation. In such a scheme, a strong government may “subsume individual liberties to community interests to maintain public order.”⁸⁴ For example, proponents of the “Asian values” perspective argue that culture, which in the Asian context might include cooperation, harmony, and order, supersedes individual rights.⁸⁵ The Singapore government’s *White Paper on Shared Values* encapsulates Asian values when it states “[n]ation over community and society above self.”⁸⁶

Some may question whether a presumptive bias toward the collective interests of society at the expense of individual civil-political rights violates the principle of individual liberty, and in turn the rule of law. I would argue that such a presumption is not a *prima facie* violation of the rule of law, but that a state’s method of punishment for violations is determinative.

For example, a state may enact strict laws prohibiting the defamation of political figures. While freedom of speech could rightly be considered a fundamental principle under the rule of law, a state that enforces strict defamation laws does not necessarily violate the rule of law. International covenants allow for some restrictions on the exercise of free speech if they are prescribed by law and are “necessary in a democratic society in the interests

47, arts. 8–11.

84. Li-ann Thio, *Lex Rex or Rex Lex? Competing Conception of the Rule of Law in Singapore*, 20 UCLA PAC. BASIN L.J. 1, 10 (2002).

85. Michael C. Davis, *Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

86. Li-ann Thio, *An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152, 154 (1997).

of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”⁸⁷ If a state imposes reasonable fines on persons who defame political figures, it could be argued that it is acceptable to permit such a derogation of freedom of speech under the rule of law. However, if a state’s method of punishment includes, for example, unreasonable prison sentences or corporal punishment, compromise is not appropriate since the punishment is so severe and disproportionate that it strips individuals of more fundamental rights.

The right to life is another example of a fundamental right with a clear and profound importance to both the individual and the community. It is impossible to conceive of equality without first stipulating that each person has a right not to be arbitrarily deprived of life. It is difficult to envision any argument to the contrary. The right to life is protected by both the ICCPR⁸⁸ and the UDHR,⁸⁹ and within multilateral human rights treaties the right to life cannot be limited in any situation.⁹⁰ It is also included in countless national constitutions, across different continents,⁹¹ and upheld by regional human rights courts.⁹²

However, there is not yet consensus on the abolition of the death penalty to conclude that its use is a breach of a non-derogable right. While I do not support the death penalty, and indeed wish to see it abolished, it remains legal under international law. Thus, the right not to be arbitrarily deprived of life does not cover circumstances where an individual is sentenced to the death penalty in accordance with the law (although there are limits regarding the method of execution, length of detention, and proportionality of punishment).

SINGAPORE

Singapore provides an interesting example of how the concept of derogable and non-derogable rights can be used to assess a state’s adherence to the rule of law. The legal system in Singapore is based upon English common law, which was introduced during British colonial rule. Singapore adopted a written constitution containing a bill of rights, as well as provisions

87. ECHR, *supra* note 47, art. 11, para. 2.

88. *See* ICCPR, *supra* note 47, art. 6, para. 1.

89. *See* UDHR, *supra* note 46, art. 3.

90. DEMOCRACY AND THE RULE OF LAW, *supra* note 14.

91. *See, e.g., supra* note 74.

92. *See, e.g.,* McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1996).

for a separate legislature, executive and judiciary, all modelled after the American legal system.⁹³ Singaporean leaders do not hesitate to describe their society as based on the rule of law. And, according to strictly formal definitions, Singapore has “ticked all the boxes.” But a close examination reveals a dichotomy between economic and political freedoms. Apparently, formal rule of law matters greatly within the economic sphere but very little in terms of upholding substantive rights or political pluralism.

Following independence, Singapore moved slowly toward constitutional autochthony, altering its constitution in ways that harnessed cultural values in support of the ruling party ideology. Law became an instrument of political power leading to the rule *by* the law, not *of* law.⁹⁴ “Economics first” became a guiding principle, whereby “maintaining social order and discipline, without attention to civil-political rights, through a managed democracy, is regarded as the key catalyst to achieving economic development.”⁹⁵ Today, many say that to become “Singaporeanized” is to become “politically inert and economically dynamic.”⁹⁶

By economic and commercial measurements, Singapore is an unqualified success. The country consistently ranks high in international recognition of its economic freedoms. The Heritage Foundation’s Index of Economic Freedom ranked Singapore second for thirteen years in a row.⁹⁷ The World Bank ranked Singapore first for “ease of doing business” in its 2008 Doing Business Report.⁹⁸ Singapore also performs well in judicial and legal system rankings, as it has been considered to possess a judicial system “on a par with those in developed Western societies.”⁹⁹ The World Justice Project ranks Singapore very high (on a scale of 0-1 where 1 signifies higher adherence to the rule of

93. Thio, *supra* note 84, at 8.

94. Kanishka Jayasuriya, *The Rule of Law and Regimes of Exception in East Asia* 4–5 (Asia Research Center, Working Paper No. 96, 2000), available at <http://www.arc.murdoch.edu.au/wp/wp96.pdf>.

95. Thio, *supra* note 84, at 25.

96. *Id.* (quoting M.C. Davis, *Constitutionalism under Chinese Rule: Hong Kong after the Handover*, 27 DENV. J. INT’L L. 275, 297 (1999)).

97. Heritage Foundation, *2010 Index of Economic Freedom*, <http://www.heritage.org/index/TopTen.aspx>.

98. INT’L BANK FOR RECONSTRUCTION AND DEV., WORLD BANK, DOING BUSINESS 2008, at 4 (2007), available at http://www.doingbusiness.org/documents/FullReport/2008/DB08_Full_Report.pdf.

99. Letter from Mark Jaryaratnam, Deputy Director, Legal Policy Division for Permanent Secretary, Ministry of Law, Singapore Government to the IBA 3 (9 April 2008), available at http://www.google.com/url?sa=t&source=web&cd=3&sqi=2&ved=0CB4QFjAC&url=http%3A%2F%2Fapp2.mlaw.gov.sg%2FLinkClick.aspx%3Ffileticket%3Duybc0xb_3m4%253D%26tabid%3D204&rct=j&q=singapore%20response%20to%20iba%209%20april%202008&ei=Ui-uTMKCJsaqlAfS_aDIDw&usq=AFQjCNGqQPr4tB9LtrPuN-Bbl3Ct2ND2Tw&cad=rja (quoting *Asian Intelligence Report 2006*, Political and Economic Risk Consultancy).

law) on areas such as protecting the security of the person (.83); protecting the security of property (.88); having an efficient, accessible judicial system (.79); having accountable government officials (.94); and fair and efficient administration (.84).¹⁰⁰ Overall, the index ranks Singapore at number one among civil law systems.¹⁰¹ The Singapore government insists that these favorable rankings reflect its commitment to the rule of law.¹⁰²

However, Singapore ranks much lower on measures of individual liberty, including “the degree to which citizens are able to participate in selecting their government and enjoy free expression, freedom of association and a free media.”¹⁰³ The 2007 Worldwide Press Freedom Index ranked Singapore a dismal 141 out of 169 nations for the protection of press freedom.¹⁰⁴ Reporters Without Borders ranks Singapore at the low end of 133 out of 175 countries surveyed for press freedoms.¹⁰⁵ The very fact that Singapore is not a party to the ICCPR is illustrative of its approach to the freedoms protected by the treaty, although Singapore is still bound by those human rights provisions contained within the treaty that are regarded as *jus cogens*.

There are a number of ways in which Singapore’s emphasis on maintaining law and order at the expense of liberty violates substantive norms of the rule of law. At the most basic level, Singapore has denied the right to a fair trial. Pursuant to Singapore’s Internal Security Act (“ISA”), which is typically invoked to curtail political opposition, the government has the right to arrest and detain individuals without trial.¹⁰⁶ This legislation contravenes every major international human rights convention in existence. Regardless of whether one takes a formal or substantive approach, the right to be free from arbitrary abuse of government power lies at the very heart of any definition of the rule of law. It is a non-derogable right.

Freedom of religion and expression are also severely compromised by the Singapore leadership, who have claimed, “racial and religious harmony are

100. *The Rule of Law Index—Singapore Country Profile*, WORLD JUST. REP., 4 (Nov. 2009), http://www.worldjusticeproject.org/sites/default/files/Country_Profile_Singapore_2009-FINAL.pdf.

101. *Id.*

102. *Prosperity versus Individual Rights? Human Rights, Democracy and the Rule of Law in Singapore*, INT’L BAR ASS’N 21 (July 2008), http://www.int-bar.org/images/downloads/07_2008_July_Report_Singapore-Prosperity_versus_individual_rights.pdf [hereinafter *Prosperity versus Individual Rights*].

103. *Id.*

104. *Press Freedom Index 2007*, REP. WITHOUT BORDERS, http://en.rsf.org/spip.php?page=classement&id_rubrique=34 (last visited Sept. 8, 2010).

105. *Id.*

106. *Freedom of Expression and the Media*, ARTICLE 19 (Dec. 2005), <http://www.article19.org/pdfs/publications/singapore-baseline-study.pdf>.

not just desirable objectives to achieve but are the fundamental bases for social stability, cohesion, and security.”¹⁰⁷ However, “religious harmony” often comes at the expense of freedom. For example, in 1972, the Singapore government de-registered the Singapore Congregation of Jehovah’s Witnesses, rendering it an unlawful society and banning its publications.¹⁰⁸ In 1994, in *Colin Chan v. PP*, the Court upheld the ban, reasoning that because Jehovah’s Witnesses oppose national military service, the congregation’s existence interfered with national values.¹⁰⁹ While it was acknowledged that banning Jehovah’s Witnesses *prima facie* violated their freedom of speech and religion, it was also argued that such rights are qualified by Singapore’s laws concerning public order.¹¹⁰ Thus, the Singapore court ruled that 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.”¹¹¹

I noted earlier that we must distinguish between freedom of religious thought and manifestations of religious belief. It is true that the banning of certain religious gatherings, as above, is not in breach of a non-derogable right. However, it is worrisome that Singapore has taken such drastic action given that a similar ban in Russia was recently held by the ECtHR to be unlawful.¹¹²

In addition to issuing a ban on the religious group, the state’s method of punishment includes imprisonment for refusing national military service for religious reasons. There are currently twenty-six Jehovah’s Witnesses imprisoned for refusing service based on their religious beliefs.¹¹³ ECtHR case law however, holds that this treatment is discriminatory.¹¹⁴ This is because the right not to be discriminated against is “violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹¹⁵ Given that Jehovah’s Witnesses’

107. S. Jayakumar, *Applying the Rule of Law*, 43 INT’L LAW 1, 84 (2009).

108. While some may argue that Jehovah’s Witnesses cannot be classified as a religion, it is clear that Singapore views them as such. *See, e.g., Chan v. Pub. Prosecutor*, [1994] 3 Sing. L. Rep. 662 (High Ct.).

109. Thio, *supra* note 84, at 73.

110. *Id.*

111. *Chan*, 3 Sing. L. Rep. at 684.

112. *Jehovah’s Witnesses of Moscow v. Russia*, App. No. 302/02, EUR. CT. H.R. (2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=jehovah's%20%20witnesses&sessionid=60663086&skin=hudoc-en>.

113. *Amnesty International Report 2009: State of the World’s Human Rights*, AMNESTY INT’L, <http://report2009.amnesty.org/en/regions/asia-pacific/singapore> (last visited Sept. 10, 2010).

114. *Thlimmenos v. Greece*, App. No. 34369/97, 31 Eur. H.R. Rep. 15 (2001).

115. *Id.* at para. 44.

religious beliefs forbid them from entering military service, Singapore's failure to take this into account is discriminatory. Punishing a Jehovah's Witness for failing to do national service is, therefore, a breach of the non-derogable right not to be discriminated against.

Singapore has also been criticized for harsh defamation laws that violate freedom of expression. The government has made violation of these laws both a criminal and a civil offense, punishable by up to two years in prison, harsh uncapped fines, or both. This is a good example of a case in which punishment for a crime offers a more useful measure of the rule of law than the law itself. Singapore's strict defamation laws may not breach the rule of law—even by substantive definitions. However, the punishment for violating such laws is more problematic.

The IBA has noted that the criminalization of defamation laws is inappropriate because criminal law is reserved for acts that affect society as a whole.¹¹⁶ Defamation law, by contrast, typically involves disputes between private parties, so that the application of civil law is more appropriate. In Singapore, however, civil defamation laws have long been used as an instrument to prevent criticism, stifle political opposition and maintain a climate of political intimidation.¹¹⁷ It remains a tool to unjustifiably limit freedom of expression and undermine peoples' capacity to oppose the government.

By imposing fines for acts of defamation, Singapore has created a culture of "self-censorship" that has stripped citizens of other fundamental rights. For example, according to Singapore's Constitution, potential candidates [for elections] are ineligible to stand if they have been convicted of criminal defamation and thereby either imprisoned for one year or fined \$2,000 or more, or if they have been charged in a civil suit with damages so large as to bankrupt them.¹¹⁸ Because fines for defamation are often uncapped, they frequently leave individuals bankrupt and have become a tool "more effective than the threat of imprisonment."¹¹⁹

One of the more striking cases involves Dr. Chee Soon Juan, Secretary General of the opposition Singapore Democratic Party. Dr. Chee was arrested

116. *Prosperity versus Individual Rights*, *supra* note 102, at 26–27.

117. *Criminal Defamation*, ARTICLE 19 (2009), <http://www.article19.org/advocacy/defamationmap/overview.html>; U.S. DEP'T OF STATE, 2005 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: SINGAPORE (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61626.htm>; *Singapore: Government Misusing the Law to Muzzle Critics*, AMNESTY INT'L USA (Dec. 14, 2006), <http://www.amnestyusa.org/document.php?lang=e&id=engasa360052006>.

118. *Prosperity versus Individual Rights*, *supra* note 102, at 28.

119. *Criminal Defamation*, *supra* note 117.

on numerous occasions following the peaceful exercise of his right to freedom of expression. He was brought to court, found guilty of defamation suits brought against him by ruling party leaders, heavily fined and thereby forced into bankruptcy. Because Singapore law does not permit an individual in bankruptcy to participate in elections, exorbitant defamation fines serve to silence the opposition. In some cases, punishment for criminal defamation is arguably severe enough to eviscerate any pretence of the right to freedom of expression.

In a recent case, Alan Shadrake, aged 75, was convicted by the High Court in Singapore on charges of criminal defamation, through a finding of contempt for “scandalising the judiciary” in his latest publication: *Once A Jolly Hangman: Singapore Justice in the Dock*.¹²⁰ His book criticized the Singapore use of the death penalty.¹²¹ His arrest was made pursuant to a complaint lodged by the Media Development Authority (MDA), the Singaporean government body responsible for censoring publications and broadcasts.

The Court ruled that the book scandalized the judiciary by casting doubt on the impartiality, integrity, and independence of Singapore’s judiciary.¹²² The Singaporean government again conveniently used the rule of law as the pretext for its actions. The Attorney General argued that “all he [Mr. Shadrake] has done in his book is concoct scandals and . . . *attack the rule of law in this country*.”¹²³ (emphasis added). Mr. Shadrake faces a possible sentence of two years in jail.¹²⁴

The violations of freedom of expression are further compounded by Singapore’s failure to uphold the right to a fair trial. District Court judges do not enjoy security of tenure, and Supreme Court judges, the Attorney-General, and the Chief Justice enjoy security of tenure only until the age of 65,

120. Attorney-General v. Shadrake Alan, [2010] SGH 327 (Sing.).

121. The passages of the book in question are:

- a) “the Singapore Judiciary, in determining whether to sentence an accused person to death, succumbs to political and economic pressures, and more generally does not mete out justice impartially, lacks independence and is complicit in an abuse of the judicial process;
- b) the Singapore Judiciary is biased, particularly against the weak, poor and less educated, or is otherwise guilty of impropriety; and
- c) the Singapore Judiciary is a tool of the People’s Action Party to muzzle political dissent in Singapore.”

Id.

122. *Id.*

123. British Journalist Shadrake convicted in Singapore (Nov. 3, 2010), <http://www.pressgazette.co.uk/story.asp?sectioncode=1&storycode=46235&c=1>.

124. *Id.*

following which they are dependent upon the President, if he concurs with the advice of the Prime Minister, to extend their services for such period as the President sees fit.¹²⁵ As a result, there is a reasonable inference that political compliance could be a condition for judges to keep their judicial positions.

This problem manifests itself most clearly in politically-charged cases, and particularly the above-mentioned criminal defamation cases, initiated by the governing People's Action Party, in which judges exercise their broad discretion in awarding judgment and damages, resulting in substantially greater awards of damages being made than in non-political defamation claims.¹²⁶ An article written in 2007 claimed "[t]he Lee family¹²⁷ and other top government officials have an unbroken record of victories in defamation suits against political opponents and publications who have been critical of them."¹²⁸

For example, Joshua Benjamin Jeyaretnam, a former leader of the Worker's Party, Member of Parliament and Senior District Judge, was prosecuted in several cases between 1986 and 2001 for misuse of party funds and defamation, and appealed against bankruptcy orders against him. Many of these trials provoked comments from the international community regarding failures in fair trial standards and independence of the judiciary. An International Commission of Jurists trial observer noted that "the Court was unduly compliant to the government" and that the finding of malice resulting in the verdict of defamation was "insupportable and highly indicative of the Court's bias."¹²⁹ Additional attention was drawn to alleged politically-motivated charges against Mr. Jeyaretnam in a report issued by Lawyers' Rights Watch Canada. The report stated that "[t]he dominant purpose of the [case] appeared to be to prevent Mr Jeyaretnam from further criticising the government of Singapore and to remove him from public office," demonstrating the political motivations behind the actions brought against him.¹³⁰

125. *Prosperity versus Individual Rights*, *supra* note 102, at 52, 54.

126. *Id.* at 60.

127. Prime Minister Lee Hsien Loong, and his father, former Prime Minister and current Minister Mentor Lee Kuan Yew. *World Leaders—Singapore*, CIA (Apr. 1, 2009), <https://www.cia.gov/library/publications/world-leaders-1/world-leaders-s/singapore.html>.

128. *No Surprises Here: Singapore's Lee Family Wins in Court*, ASIA SENTINEL (Feb. 24, 2007), http://www.asiasentinel.com/index.php?option=com_content&task=view&id=393&Itemid=31.

129. *Singapore—ICJ Condemns Parody of Justice in Singapore*, INT'L COMM'N OF JURISTS (Sept. 11, 1998), URL.

130. Gail Davidson & Howard Rubin, *Report to Lawyer's Right Watch Canada in the Matter of Joshua Benjamin Jeyaretnam and Two Appeals in the Court of Appeal of the Republic of Singapore*, LAW.

CONCLUSION

It is sometimes said that the Rule of Law has so many meanings that it actually has no meaning. However, there must be a standard against which to measure state performance, and I believe there exists sufficient common ground upon which to base a workable definition. Starting from a formal approach is both necessary and appropriate. Scholars will continue to debate the nuances of procedural definitions, but the real controversy concerns whether and how substantive principles of human rights and justice should be incorporated into definitions of the rule of law.

I argue that a definition should include fundamental principles of justice, but that such principles should be defined within one of two categories—derogable and non-derogable rights. While certain principles are universal, from which derogation is never permissible, other principles are arguably less essential and may be compromised according to local value and custom. Certainly there is room for debate within the two categories, and I do not deny the arbitrary and capricious ways in which states can abuse the legal system. However, by highlighting areas in which compromise may be possible, we create an approach where there is broad agreement about what constitutes the rule of law, while simultaneously respecting local values and cultures.

It is important to stress that a country that fails to protect a non-derogable principle would *not* be designated as a country upholding the rule of law. There should be no sliding scale or allowance for good performance in some other areas. When we incorporate substantive norms into a sharpened definition of good governance, non-derogable rights become fundamental pillars of the rule of law. This approach is a corrective to indices that attempt to measure everything yet obfuscate the failure to protect fundamental rights. This is the paradigm shift that must occur in our understanding and promotion of the rule of law.

Countries cannot and should not be seen as embracing the rule of law simply because they champion economic and commercial liberalism. Without a full and unambiguous commitment to substantive, non-derogable rights these countries are failing to abide by the rule of law.