

Modern definition of rule of law

Law



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Introduction to the Rule of Law & the modern definition. Rule of Law in the layman perspective is the principle that nobody is above the law and that every man's act is subject to the law. The law referred, in our context, is the Malaysian Constitution which embodies the definition, expressly in many of its provisions. The constitution has the absolute power as against the arbitrariness and discretionary power of the government. This concept is commonly practiced in democratic countries.

Rule of Law and Rule by Law should be distinguished as the latter is merely a government's tool for the purpose of ruling and governing only. It is not a good approach as compared to the Rule of Law because law is made by the people, for the people. The concept used under Rule by Law could lead to abuse of power and unfairness especially in the context of human rights. The countries practicing Rule by Law are mostly the autocratic countries where the law is followed because they are forced to, not because they respect the supremacy of the law.

According to De Smith, the concept of Rule of Law is one of open texture with wide range of interpretation, or in other words, flexible. Dicey propounded 3 principles of Rule of law in his writings, 'Law of the Constitution'. However Dicey's ideas are no longer in use as modern democratic society has emerged. It is only a fashion now to insert Dicey's to retain the basic values of Rule of Law but it must be interpreted according to our modern needs of society. Dicey's ideas on ROL includes that; - 1) Absolute supremacy of regular law.)Equality before the law 3) The Rule of Law includes the results of judicial decisions determining the rights of private persons. Internationally, the Rule of Law was even stated in the Preamble of

the Universal Declaration of Human Rights adopted in 1948; where it was laid in the third paragraph that if the government does not want the people to revolt as their last resort to overcome tyranny by government, then it is important for the fundamental liberties of the people to be defended. The way to defend their liberties is through the Rule of Law. The UDHR has 30 articles which upholds human rights.

An international meeting to discuss and make declaration on the fundamental principle of rule of law was held in 1959 named the International Commission of Jurists(ICJ). The ICJ is the modern revelation of Rule of Law that fits the present circumstances. They declared that the rule of law implies certain rights and freedom to create a conducive social, economic, educationand cultural norms to achieve human dignity. Joseph Raz, in his writing, “ Rule of Law & It’s Virtues” had outlined a set of characteristics, a total number of 13 virtues of rule of law.

The most basic aspect is that the people must be protected by the rule of law, and nothing can happen without the sanction and permission of the law. Others include that the law must be prospective rather than retrospective; the law must be stable and certain and not changeable; the independence of judiciary has to be assured; the law must be fair, just and reasonable; the people should have the access to the courts; principles of natural justice concerning the right to be heard and the judge must not be bias should be observed and many other important characteristics.

All 13 virtues should be complied and applied to make sure that the rule of law exists in a country practicing it. Ingredients of The Federal Constitution The Rule of Law is interrelated with the principles of human’s rights and <https://assignbuster.com/modern-definition-of-rule-of-law/>

dignity and these can be seen in our own Federal Constitution. Part II of the Federal Constitution enumerates a number of fundamental liberties which devotes 9 articles altogether. Few are: 1) Liberty of the person 2) Protection against retrospective criminal laws and repeated trials 3) Equality 4) Freedom of speech, assembly, association 5) Freedom of religion and few more.

The Parliament has made extensive use of emergency powers, sanctioned by the Constitution. Part XI with regards to emergency powers must be read together with the Fundamental Liberties. By Article 149, it permits the suspension of the Fundamental Liberties, since it validates any legislation otherwise outside the legislative power of Parliament. The Proclamation of Emergency provided in Article 150 permits Parliament and YdPA to override all provisions of the Constitution. This is not to say rule of law is not stable, but that the regular law operates alongside a system of emergency law which is much more draconian.

An example is the powers of preventive detention, or International Security Act, which will be discussed further. Constitutionalism Crisis: International Security Act The International Security Act or more commonly known as ISA is an old and inhumane law which is against with the principle of Rule of Law. ISA is a cruel and harsh law and has always been an issue which has yet to be solved in satisfaction. Proposals for the ISA to be reviewed and subsequently, be abolished has been made since Tun Mahathir and Tun Abdullah Ahmad Badawi's times as Prime Minister, and once again, now made by our present Prime Minister, Datuk Seri Najib Razak.

It has been 50 years since the ISA came into force but the government has still yet to take any actions in viewing this problem. The ISA made it seems

as though the Rule of Law does not exist in Malaysia or less effective. The ISA is a preventive detention law that allows the force to detain a person without trial or criminal charges under lawful circumstances and he will be detained by the police for up to a maximum period of 60 days or the full period. It seems like that the ISA either does not understand or does not believe in the Rule of Law or the Human Rights.

Under an ordinary law, every person has his own rights and chance to stand trial if he has committed an offence. When ISA first came into force in 1960, it was made based on the promise made by our first Prime Minister that the law will be used rationally and only against government's enemies, which was then the communists. Nowadays ISA is used on reasons to deal with problems relating to sensitive issues like conflicts in a multi-ethnic, multi-religious, multi-cultural society. The essence of ISA is to allow detention without trial which goes against the right of a person to a fair hearing.

Therefore, does this mean that the ISA is against the human rights? Accordingly, is it contrary to the rule of law and thus does the principle rule of law exist in our country? In answering the first question, detention without trial is a blatant act and against citizen's rights. The ISA reflects that the State has failed to uphold its responsibility to this right. The judiciary is excluded from ensuring that those detained under ISA are treated according to human rights. No person should be held in detention without a fair trial because it violates the human rights.

Human rights and Rule of law are interconnected and so if ISA is contrary to human rights then it acts the same to the rule of law. This makes us question whether the rule of law still does exist in Malaysia. Any country subscribing <https://assignbuster.com/modern-definition-of-rule-of-law/>

to the rule of law, will never allow the abuse of power to detain a person without trial. This draconian legislation should be reviewed and repealed if the government still has the intention in making the rule of law as one of the general principles of the constitution. 1988 Constitutional Crisis Other constitutional crisis relating the rule of law follows the withdrawal of Tun Salleh Abas as a judge.

This case was also known the 1988 Constitutional Crisis. In 1988, Tun Salleh Abas was brought before a tribunal on grounds of bias as a judge. The Prime Minister then, Tun Dr. Mahathir Mohammad, explained that he took an action against Tun Salleh under Article 125 of the constitution, on grounds of his behavior and being unable to perform his function as the Lord President. The tribunal concluded that “ the respondent has been guilty of not only ‘ misbehaviour’, but also misconduct which falls within the ambit of ‘ other cause’ in article 125, which renders him unfit to discharge properly the functions of his office”.

The 1988 Constitutional Crisis is related to Joseph Raz’s minimum standards on rule of law. Joseph Raz included one of the virtues (among others as mentioned earlier) that the natural justice should be reviewed. The natural justice said concerned; i)the right to be heard “ audi altera partem” and ii)a judge must not be bias “ nemo judex in cause sua”. The latter part has a deep connection to what discussed in the suspension of Tun Salleh Abas. Stephen Kalong Ningkan (1966)

In 1966, Stephen Kalong Ningkan was dismissed from being the Chief Minister when the State Governor showed a letter signed by 21 members of assembly saying that they longer had no confidence in him to continue his

duty. He was asked to resign himself which he refused to do so. He alleged that the letter did not tantamount to a vote of no-confidence. He was then dismissed by the Head of State by publishing a declaration in the Gazette that Stephen Kalong Ningkan had ceased to hold the office of Chief Minister. However his dismissal was an unconstitutional one.

It was held by the court that the law under Sarawak Constitution, a Chief Minister can only vacate his office by his resignation and not by dismissal. There were no authorities stating that the Head of State has the power to dismiss a Chief Minister. Therefore looking through a rule of law's view, it could be said that the unlawful dismissal of Stephen Kalong Ningkan by the Head of State was contrary to the principles of Rule of Law. Perak Crisis (2009) The constitutional crisis which happened in Perak is similar to what happened in 1966 in the case of Stephen Kalong Ningkan.

The crisis began in February 2009 when four assemblymen of Pakatan Rakyat withdrew from the party. Pakatan Rakyat was then the ruling party in Perak, and their withdrawal from the party resulted a loss of majority representatives. Nasaruddin Hashim, was the Chief Minister of Perak before the crisis started was one of the assemblymen whom cross-floored Pakatan Rakyat. The consequence was that the Sultan of Perak, used his discretion under Art 18(2)(b) of the State Constitution, and commanded Mohammad Nizar Jamaluddin to dismiss himself from the position of First Minister. The Sultan of Perak then appointed Dr.

Zambry Abdul Kadir from Barisan Nasional to fill in the vacant position and be the next Chief Minister. Nizar claimed that there should be a fair free election since this country practices democracy, and for that announced he

refused to resign and therefore, the appointment of Dr. Zambry was null and void. The High Court held that the dismissal and appointment made by the Sultan of Perak was unlawful and an unconstitutional one and that Nizar has always been the rightful head of government. The Court of Appeal however held that the action taken by the Sultan was legally valid and certainly followed the State Constitution.

According to the Perak Constitution, the Sultan has two options in settling a conflict of lost confidence; which is either to dissolve the state assembly or appoint a new Chief Minister. The Sultan in this case did the latter. Such discretion is a Royal Prerogative. The Sultan is not subject to recommendation or approval of any other person while making the new appointment of Chief Minister. The difference between the Perak Crisis and Stephen Kalong Ningkan case is, the Perak Constitution has no exact statement of means of vote of confidence, which makes the action taken by the Sultan is constitutional and valid while the appointment of Dr.

Zambry is also valid and Mohd Nizar must tender resignation. This would also mean that it follows the definition of Rule of Law on absolute supremacy of the law on grounds the dismissal was lawful. Conclusion With all the definitions and constitutional crisis discussed, it all comes down to one question; to what extent does Rule of Law exists in Malaysia? It is with no doubt that our country is a democratic country which is against arbitrariness and upholds the supremacy of our constitution. However with constitutional crisis that has happened, this shows that the Rule of Law exists merely on the surface of it. Our judges need to be prepared to enter the fray in the struggle of persevering the human rights and fundamental liberties. Only then we can

say Malaysia is grounded on Rule of Law. Without justice, the democracy we practiced would mean nothing but just a concept. There is a need for all Malaysians to understand and appreciate the importance of the rule of law and to be vigilant that it prevails in this country. Without the rule of law, there can be no justice.