

# Example by StudyDriver

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## An Analysis of the Rule of Law Example

Rule of law in general terms is about equality before the law where everyone are protected under the same law of the land regardless of your status in society. In narrow context, it does not really matter whether the law upholds the concept of rule of law or not, but as long as the people ought to follow the law, then it is automatically considered as the rule of law<sup>[1]</sup>. According to John Rawls, rule of law is related to liberalism where regular and impartial administration of public rule is the essence of just legal system characterised by legitimate expectation of people and several requirements must be met whereby the rule of law must only command actions which are possible that those enact the law must do so in a good faith which for instance, cases must be heard fairly and treated alike and this indirectly complies with the rule of natural justice, 'nemo iudex in causa sua'. On the other hand, rule of law can also be seen as the 'law and order' model which emphasises on a peaceful settlement of disputes without violence. This implies that where a valid law exist, there is surely a obligation of that the citizens to obey those laws being imposed to them. As to that, law and order may lead to the restrain of freedom of the citizen to a certain point<sup>[2]</sup>. For instance, any action which involves protest will violate the legal rules as to whether it is the rule protested against or otherwise, either way it will still violate legal rules. In Malaysia, the Federal Constitution gives you the freedom to assembly under Article 10 (1)(b) where it is stated that the citizen have the right to assemble peacefully without arms. On the other hand, having street protest needs to go in hand

with the procedures under Section 15 (1) and (2) of the Peaceful Assembly Act 2012 that restricts your rights by imposing conditions to assemble and failure to follow those conditions in the Act essentially gives way to the Officer in Charge of a Police District to disperse the assembly. As according to A.V Dicey's first apostolate on rule of law, 'no man is punishable in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land<sup>[3]</sup>'. Any power given to the one in authority should not be too discretionary. In other words, a person should not be punished except for conduct which is a clear breach of law. This contradicts with the case of Shaw v Director of Public Prosecution (1962) where the appellant published a booklet called 'Ladies Directory' listed on the contact details of prostitutes and nude pictures. He was convicted of conspiracy to corrupt public morals which is an offence under the Obscene Publications Act 1959. It was held that the courts were the guardians of public morals and that they ought to restrain and punish whatever that is 'contra bonos mores et decorum'. Eventhough there was no particular law against immoral act as regards to the Common Law at that time, the courts still had the duty to lay down their own decision in the judgement. The appeal was rejected. This creates uncertainty as to what act amounts to an offence which is ought to be overruled when there is no law existing on that particular matter at the point that act was carried out<sup>[4]</sup>. Dicey's first apostolate applied in Malaysia, to certain extend, the rule of law is not affirmed here and this can be seen in the case of Loh Kooi Chun v Government of Malaysia (1977) 2 MLJ 187. Loh was detained by Royal Malaysian Police under a warrant issued under the provision of Restricted Residence Enactment 1933. Federal Justice, Raja Azlan Shah delivered judgement brought about Article 5(4) of Federal Constitution specifying, 'any person arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours be produced before the magistrate and shall not be further detained in custody without the magistrate's authority.' Thus, this guarantees the rights of habeas corpus. Loh was denied this right and sued the police for damages. Unfortunately, his claim was rejected on grounds that the police has acted in compliance with warrant issued competent authority. Loh appealed to the Federal Court which heard his case four years after the original case. But however, before the appeal made, Parliament amended Article 5(4) and added a provision stating, 'Provided that this clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been integral part of this Article as from Merdeka Day.' Essentially, the amendment had retrospective effect whereby it invalidates rights of habeas

corpus. However, the judgement laid down by Federal Justice Raja Azlan Shah, although in Article 4(1) of the Federal Constitution states, 'any unconstitutional law passed after independence would be void', but this does not apply to the Constitution itself as the Constitution could not be inconsistent to itself. In other words, the judgement states that the law made under ordinary legislative powers and amendments made to the Constitution were two different things altogether. Over here, it can be implied that Residence Enactment 1933 has supreme position over the Constitution as regards to arbitrary arrest and restriction of movement as Article 5(4) was not applied in the course of arresting and detaining a person Dicey's second apostolate lays down, 'no one is above the law and everyone is equal before the law regardless of social, economic and political status and they are subjected to the same law of the land.' Malaysia tries to uphold the rule of law by virtue of Article 4 of the Federal Constitution stating the Federal Constitution is the supreme law of the land. In accordance with that, the Federal Constitution acknowledges equality by virtue of Article 8 stating, 'all person are equal before the law and entitled to the equal protection of the law'. However, application of two courts system which are the Civil and Syariah court has gone against the concept of rule of law as citizens are not tried in the same court hierarchy. Prior to amendment of Article 121 of the Federal Constitution, Syariah court was considered to be subordinate court where there was encroachment by civil court on the jurisdiction of the Syariah court and upon amendment, the addition of clause (1A) to Article 121 essentially prevents Civil Courts from reviewing decision made by Syariah Court. A non- Muslims are not allowed to go to Syariah Court for relief and on the other hand, Civil Court has no jurisdiction upon personal law of Islam. Over here, there is no harmonization and even worst, rights of citizens to go to court to certain extend is denied with the existence of two courts system[5]. The doctrine of separation of powers defined by Aristotale in the book 'The Politics' states the three branches of government needs to be arranged and only when those brunches are well arranged will the constitution be bound to be well arranged. Powers needs to be distributed among three branches according to membership and functions which is essentially why we do not find the same constitution in every country for the simple reason that it is drafted differently[6]. Montesquieu formulation did not receive total acceptance which indirectly implies that a rigid separation of powers among the three branches was felt not to be expedient and too much separation or restrictions imposed to check any abuse of powers will not only hamper the due exercise of these powers but will virtually bring the government a standstill[7]. In Malaysia, we adopt the view by Madison where there can be

overlaps between three branches which comes along with check and balances. As observed in the case of *Pengarah Tanah Galian Wilayah Persekutuan v. Sri Lempah* (1979) 1 MLJ 135, 'every legal power must have legal limits, otherwise it leads to dictatorship. Every discretion cannot be free from legal restraint where it is wrongly exercised, it becomes the duty of the courts to intervene.'<sup>[8]</sup> It is fundamental as the Federal Constitution is the supreme law and constitutes the grundnorm that all laws are subjected to. It is the duty of judges to uphold justice in accordance with law and in the event where there is a written constitution, judges should administer the law to make sure laws passed by the legislative is in accordance with the constitution and should be strike down to be ultra vires if the law is deemed to be unconstitutional. The function of legislative is to enact law. As in the United States, there is a clear dividing line between the legislative and executive as the President and his cabinet cannot be part from the Congress. This is a total contrast as pertaining to Malaysia whereby by virtue Article 43(2) of the Federal Constitution, the Prime Minister belongs to the Dewan Rakyat and other cabinet ministers belong to either House. When a bill is introduced into Parliament, it needs to go through four stages before enacted as a law. The two important stages among those four will be the second stage and committee stage and it is in the second stage that the debates on the principles takes place. In Malaysia, not all bills are sent to the Select Committee to be checked and only certain important bills, like the budget bill will be sent to be scrutinized. This appears as a clear breach to the doctrine of separation of powers but there is still a check and balance as the legislative indirectly checks on the executive policies contained in the bill. Amendments may be made after scrutinizing but at the end of the day, the Minister or any member of the House may propose a motion which requires a two-third vote of the majority. As Malaysia practices the First Past The Post, majority seats in Dewan Rakyat is being concurred by the ruling party which favours the Bill to get through easily. Even worst, it is more often than not that guillotine motion and kangaroo closure is used to cut short the time of debate. An example that can be drawn upon will be the Prevention of Crime (Amendment and Extension) Act 2013 which allows criminals to be detained for up to two years. The objective of the amendment on papers is to lower down crime rates but on the other hand, it essentially has restrictions being placed unto it pertaining to our fundamental liberties. This Act passed provides detention without trial which obviously contradicts with the rule of Natural Justice, 'audi alteram partem' and in other words, this amended Act allows the court to review the detentions from a viewpoint on whether or not the procedure in making the order has been complied with or not?

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[1] Constitutional & Administrative Law, 8th Edition, Hilaire Barnett, pg 52 [2] Public Law and Human Rights, 2nd Edition, Helen Fendwick, pg 81 [3] The Constitution of United Kingdom, Peter Leyland, pg 48 [4] Constitutional & Administrative Law, 8th Edition, Michael Allen, pg 197 [5] Law, Government and the Constitution in Malaysia, Andrew Harding, pg 144 [6] Public Law and Human Rights, 2nd Edition, Helen Fendwick, pg 103 [7] Constitutional Law In Malaysia & Singapore, 3rd Edition, Kevin YL Tan & Thio Li-ann, pg 27 [8] Pengarah Tanah Galian Wilayah Persekutuan v. Sri Lempah (1979) 1 MLJ 135