OPENING OF THE LEGAL YEAR 2023

The Rule of Law and the duty of the Legal Service

Speech by Attorney-General, Mr Lucien Wong, S.C.

9th January 2023

May it please Your Honours, Chief Justice, Justices of the Court of Appeal, Judges of the Appellate Division, Judges and Judicial Commissioners,

Introduction

- On 14th January 2022, the Constitution was amended to establish the Judicial Service, and to reconstitute the Legal Service. This was a historic moment. Before its reconstitution, the Legal Service comprised both Legal and Judicial Branch officers. Although both Branches shared the same goal of advancing the Rule of Law in Singapore, they had different contributions towards this aim. After its reconstitution, the Legal Service now comprises officers who are organised, trained and focused on upholding the Rule of Law in the context of the executive functions of government. In this speech, whenever I refer to the "Government", I am referring to the Executive branch. As of today, there are 549 Legal Service Officers, of whom 358 are posted to the Attorney-General's Chambers while the others are serving with various Ministries and statutory boards.
- This speech is my first address at the Opening of the Legal Year as the President of the reconstituted Legal Service. This month also marks the start of my third three-year term as Attorney-General (AG). Accordingly, I am pleased to address the legal community today both on behalf of the Attorney-General's Chambers as well as the broader Legal

Service. The Legal Service's vision is to be "a trusted Legal Service, upholding the Rule of Law and advancing Singapore's interests." We consider it our sacrosanct duty to uphold the Rule of Law in Singapore. Speaking from my experience of two terms as AG, I wish to use my first address as President of the Legal Service to give a timely reminder of what the Rule of Law means and its importance to Singapore. Therefore, I have titled my speech this morning "The Rule of Law and the duty of the Legal Service".

Anti-corruption and the Rule of Law are cornerstones of Singapore's governance

- It has often been said that Singapore's success is due to two core principles: anticorruption and the Rule of Law. Indeed, Singapore is governed according to these two key principles. These key principles are also often cited by major multinational companies as a principal reason why they chose to make major investments in Singapore or locate their Asian headquarters in Singapore. Without anti-corruption and the Rule of Law, it would be meaningless to talk about a Singapore way of governance.
- 4 In this speech, I will focus on the Rule of Law.

Defining "Rule of Law"

The phrase "Rule of Law" is notoriously hard to define. There is a lot of debate in contemporary legal theory about its meaning. This speech is not the occasion to attempt an exhaustive definition of the phrase. It is, however, sufficient to say that the Rule of Law has a core meaning, which can be traced back to the ancients. As far back as 360 BC, Plato wrote in "Laws":

"For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer."

- This axiom has been repeated in some form or another throughout the centuries.

 John Adams, one of the founding fathers of the United States, envisaged the American republic to be "a government of laws and not of men". For Dicey, the great English constitutional scholar, the Rule of Law meant that "no man is above the law [and] every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals."²
- These may come off as lofty soundbites, but they are not. These are fundamental concepts and they are certainly not alien to Singapore. Some 35 years ago, our Court of Appeal held that "the notion of a subjective or 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."
- 8 How are these principles applied in practice? What relevance do they have to the governance of our modern, multi-racial society?
- 9 To answer these questions, I will adopt a working definition of the Rule of Law. In my view, a society governed by Rule of Law has:
 - a. clear, publicised and legitimately enacted laws,

Plato, *Laws: Book IV* (Translated by Benjamin Jowett); Available online http://classics.mit.edu/Plato/laws.4.iv.html (accessed 3 Jan 2023).

A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: McMillan and Co, 8th Ed, 1915), p 114; Available online http://files.libertyfund.org/files/1714/0125_Bk.pdf (accessed 3 Jan 2023).

³ Chng Suan Tze v Minister for Home Affairs and Ors [1988] 2 SLR(R) 525 at [86].

- b. that are enforced in a fair and efficient manner,
- c. disputes over which are determined by independent judges,
- d. such that no person (including and especially the Government) is above the law, and
- e. there are credible and effective means for individuals to challenge the arbitrary exercise of power.

The Rule of Law is one of Singapore's foundational principles

- To understand why the Rule of Law plays such a key role in Singapore's governance, I invite you to cast your mind back to the early days of our independence. Quoting our founding Prime Minister Lee Kuan Yew, an independent Singapore was a "political, economic and geographical absurdity." We were a small island, with no natural resources; we still are. We depended, and still depend, on Malaysia for our drinking water. We had a small population then of about two million. The population was already multi-racial and multi-religious; a large proportion comprised recent immigrants from other countries. Independence came during severe socio-political tumult. Singapore witnessed brutal racial riots, and we were still battling the looming threat of communism and external aggression.
- How did we emerge from those circumstances to become today's peaceful, thriving global city?
- In large part the answer lies in commitment to the Rule of Law by successive Governments over the years. Our success stems from our decision to organise ourselves

⁴ Alex Josey, *Lee Kuan Yew: The Crucial Years* (Marshall Cavendish, 2012) at Chapter 16.

as a multi-racial, democratic nation, governed by law. I will cite a few points to demonstrate what I just said:

- a. The Proclamation of Singapore declares that "Singapore shall be forever a sovereign democratic and independent nation". Without the Rule of Law, Singapore would cease to be a functional democracy. Ultimately, laws are the primary means by which Parliament exercises its democratic mandate.
- b. Separation from Malaysia was precipitated by deep-seated disagreements with the Federal Government over racial equality. The newly-independent Singapore was to be a multi-racial, multi-cultural meritocracy. The Rule of Law enshrines this essential value. For example, Parts 4 and 7 of our Constitution contain rights and processes that are designed to protect our multi-racial and multi-religious society. The Rule of Law ensures that in Singapore, racial and religious minorities are protected from the arbitrary whims of the majority.
- c. In the economic arena, compliance with published laws, especially by the Government, ensures transparency, legitimacy and trust. Early on, this was critical to attracting foreign investments to Singapore. Even today, I suggest that without the Rule of Law, a small island with no natural resources has little to offer to the rest of the world, no matter how many incentives and promises we dish out.
- d. An independent and efficient judiciary is the ultimate bulwark of the Rule of Law; it assures citizens and investors that their property is safe in Singapore, and their rights will be protected. Fair, impartial and effective law enforcement also demonstrates that business in Singapore is conducted even-handedly.

e. By administering our domestic and foreign affairs in accordance with the Rule of Law, we send a clear signal about what we as a nation stand for. This has enabled us to punch well above our weight in international fora and contribute meaningfully to the development of international law – thus protecting our national interests.

The importance of the Rule of Law to governance today

- Singapore was fortunate that our founding Prime Minister Lee Kuan Yew was legally trained. He understood the importance of the Rule of Law to Singapore. Lee Kuan Yew and his ministers were able to push adherence to the Rule of Law to the Government, and therefore to wider society in Singapore.
- However, one must remember that adherence to the Rule of Law is not a natural state of affairs. In recent years, we have witnessed worrying examples in what we typically consider "more developed" jurisdictions of breakdowns in the Rule of Law. To illustrate, on 6th January 2021, the world watched with horror as scores of violent rioters inundated the US Capitol, attempting to stop the certification of President Biden's election. They were acting on claims of electoral fraud, even though those claims had been debunked in the courts.⁵ The rioters simply refused to believe in the Rule of Law and took the law into their own hands.
- Such events have occurred in countries with advanced legal systems and traditions of democratic rule established over centuries. It would be complacent to think that this

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The Hill, "New study shows Trump, election claims were main motivator for Jan. 6 rioters", 20 Jul 2022; Available online https://thehill.com/policy/national-security/3568346-new-study-shows-trump-election-claims-were-main-motivator-for-jan-6-rioters/ (accessed 3 Jan 2023).

happened because these countries were in an exceptionally bad state. Rather, the lesson is that this can happen anywhere, including Singapore.

- Therefore, the basic question is this: <u>How do we ensure that the Rule of Law remains</u>

 <u>a fundamental principle of Singapore's governance for the next generation and</u>

 <u>beyond</u>? To answer this, we need to ask three further questions:
 - a. Firstly, why does the Government follow the law?
 - b. Secondly, what impact has the Government's record of following the law had on the development of our administrative law?
 - c. Thirdly and this is particularly important for the Legal Service how does the Legal Service serve the Government whilst being faithful to the law?

The Government is politically committed to the Rule of Law

- Why does the Government follow the law? The short answer is that any government ultimately follows the law *because it wants to*. In other words, the Rule of Law is founded on political commitment. Without this commitment, it does not exist.
- Of course, the Government follows the law according to its best understanding of the law, which is based on legal advice. Under our Constitution, the AG is appointed by the President, acting in her discretion, if she concurs with the advice of the Prime Minister.⁶ The AG has the constitutional duty to advise the Government on legal matters.⁷

⁶ Article 35(1).

⁷ Article 35(7).

- 19 Unlike some other Commonwealth jurisdictions, the AG is neither an elected Member of Parliament nor a Minister. The AG is not accountable to Cabinet or Parliament for his advice, and has no political mandate. Since the AG has no political power or influence, there is nothing to force the Government to follow his advice.
- 20 Hence, the AG is much akin to a lawyer in a private law firm (as you know, I have some experience with this). The law firm (the Legal Service) is distinct from the client (the Government). Ultimately, it is up to the client to decide whether or not to follow legal advice. While lawsuits can be brought and court orders may be made against the Government, this does not always happen – for example, there may not always be a person in a position to bring a lawsuit. In societies where the Government is determined to ignore the Rule of Law, it is naïve to think that the AG or judiciary can compel it to do otherwise by legal means. An example is El Salvador, where on 1st May 2021, a legislature dominated by the ruling party sacked the AG and all five judges of the constitutional chamber of the Supreme Court.⁸ Seen from this perspective, the repercussions of whether the Government's actions are lawful or unlawful are ultimately political; in a democracy like ours, the Government answers to the public during elections. We therefore cannot overlook the importance of the political process in maintaining the health of the Rule of Law.
- 21 Thankfully we have not had incidents where the Government ignores legal advice and knowingly violates the law - I say this from my experience as AG. If not, the ramifications will be dire:

The Economist, "Ed Salvador's parliament sacks the country's top judges", 6 May 2021; Available

online (accessed 3 Jan 2023).

- a. Our reputation as a trusted financial and business centre is built on the Rule of Law. We have spent decades assiduously cultivating this reputation. If the Government ignores legal advice, and needs to be ordered by the courts to follow the law, that reputation will be irreparably damaged. The economic consequences will be grave.
- b. More importantly, public confidence in the Government and legal institutions will be severely wounded. It may take generations to rebuild that trust with the public. Without this trust, members of the public are more likely to resort to means outside the law to resolve their grievances: this was the case for the US Capitol rioters. Our safe and peaceful Singapore will then be lost.
- This has not occurred in Singapore because the Rule of Law has been a non-negotiable commitment of the Government. In our system, the Government supplies the political will to uphold the Rule of Law; the Government's legal advisors supply the professional expertise to enable the Government to do so while implementing its mandate. The good working relationship between them is key: I will say more on this later.
- What does adherence to the Rule of Law require in the behaviour of elected office holders and public servants?
 - a. Both elected office holders and public servants recognise that the Government's electoral mandate is a mandate to uphold the law and, if necessary, to change the law. There is no mandate to ever break the law.
 - b. This means that policies proposed by the Government do not contravene existing legislation or common law; and proposed Bills do not contravene the

Constitution. Any existing legislation that contravenes the Constitution is fixed without hesitation.

- c. When discretion is exercised by elected office holders and public servants, it is exercised in a fair, considered and impartial manner and in the public interest.
- d. If certain policies cannot be achieved within the existing legal framework, the policy is modified or the law is amended. If required, the Constitution is amended. This is done in Parliament, in an open manner.
- e. The pervasive mindset of elected office holders and public servants must be that contravening the law is a radically worse outcome than not achieving a policy objective. It is a red line that simply cannot be crossed. Achieving a policy objective at the expense of the law is myopic and dangerous thinking. There is absolutely no place in our system for elected office holders and public servants to go ahead and do something legally questionable because the risk of being sued is low, or to carry on doing something legally questionable until a court tells them to stop. This is anathema to our core principles.
- There are also utilitarian justifications for adhering to the Rule of Law. A government that follows the law has the trust of its electorate; that government has a strong mandate that allows it greater freedom to make policy for the public good. Decisions made through fair processes not only command public confidence, but also lead to substantively better outcomes. For example, a decision about a case taken without giving all parties involved a right to be heard is more likely to be based on incomplete information. A decision affected by bias is not only unfair but also more likely to lack objectivity and therefore be a worse decision.

The Government's steadfast commitment to the Rule of Law underlies the success we have earned as a nation. It is vital that all levels of Government appreciate how critical the Rule of Law is, and that unwavering commitment is needed to ensure that we are governed by the Rule of Law for the next generation and beyond.

The "Green Light" approach in our administrative law

- This brings me to the second question: what impact has the Government's record of following the law had on the development of our administrative law? Since independence, successive Governments have had a demonstrable record of following the law. This has influenced the direction of our administrative law. In a 2010 lecture, former Chief Justice and AG Chan Sek Keong described our courts as adopting a "Green Light" approach to judicial review. The "Green Light" theory sees the primary role of administrative law not as to stop bad practices, but to encourage good ones. Under this approach, the courts are not the first line of defence against abuses of power. Control should first come internally from Parliament and the Executive, by the Government holding itself to high standards. This philosophy is reflected in our judicial review case law on, for example, standing, justiciability, and institutional competence, as well as an expressed reluctance by the courts to intrude into the legislative sphere.
- 27 Many common law jurisdictions do not adopt the same approach. There, administrative law has developed towards a "Red Light" approach, where the courts seem to exist in a combative relationship with the Executive, functioning as a more intrusive check and balance on the Executive's powers. For instance, some jurisdictions have liberal rules on standing, such that standing is either no longer essential for judicial review or is

Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 (hereafter, "The Angst to Empathy speech"). The views of Chief Justice Chan were endorsed by the Court of Appeal in Jeyaretnam Kenneth Andrew v Attorney-General [2014] 1 SLR 345 at [48]–[50].

granted to classes of people with relatively little connection to the actual dispute (such as NGOs or special interest groups). One have expanded their grounds of judicial review to include proportionality or substantive legitimate expectations. Some courts have even expressed the view that the ability of Parliament to amend the Constitution may be restricted, under the so-called "basic structure" doctrine.

A system in which the Judiciary and the Government are "locked in an adversarial or combative relationship" comes with social costs. I will illustrate with three examples. Firstly, liberal standing rules increase the number of judicial reviews that can be brought. This means even legally sound policies will be delayed while the review works its way through the courts. Secondly, the taxpayer has to pay for the legal system to deal with judicial review cases, whether meritorious or not. Thirdly, where the judiciary acts as arbiter of the merits of legislation or policy, people will inevitably seek reform through litigation rather than the political process. In systems where expensive litigation is a popular route of policy change, this will be dominated by well-funded interest groups which do not necessarily reflect the interests of the majority of ordinary people.

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In India, standing does not constitute a significant impediment in applications for judicial review. The Indian courts permit a person to present an opinion and to take such part in proceedings, if satisfied that the person is "interested" in any question of law which is directly and substantially in issue in the proceedings, and that it is necessary in the public interest to allow the person to present his opinion: Harry Woolf and Ors, De Smith's Judicial Review (Sweet & Maxwell, 8th Ed, 2018) ("De Smith's Judicial Review") at [2-088]. In New Zealand, "standing as a threshold issue is almost a dead letter": De Smith's Judicial Review at [2-091].

In the UK, proportionality is a ground of judicial review: *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [27]. This is also the law closer to home; the Malaysian Federal Court accepts proportionality-based judicial review: *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1.

Similarly, substantive legitimate expectations are grounds of judicial review in the UK: see *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7; cited in *Tan Seng Kee and others v Attorney-General* [2022] 1 SLR 1347 at [119].

The Indian Supreme Court has held that there are certain "basic features" of the Indian Constitution that cannot be altered or destroyed by the Indian Parliament: *Kesavananda Bharati Sripadagalvaru and Ors v State of Kerala* (1973) 4 SCC 225. This also appears to be the law across the causeway: see *Dhinesh a/I Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 at [120].

The Angst to Empathy speech at [29].

- If the Government's record of complying with the Rule of Law is blemished, there is no guarantee that our administrative law will not take a similar direction. Former Chief Justice and AG Chan suggested that one possible reason why Singapore's administrative law has not followed this path is that the Government has a practice of seeking the AG's legal advice before taking actions that may be subject to judicial review and "they act only when the green light is given." In my view, and in my experience too, this is critical. For there to be Rule of Law, not only must the Government proactively seek legal advice, but it must also act on that advice.
- A recent example of this is the repeal of s 377A of the Penal Code 1871. As the Prime Minister mentioned, I advised that s 377A had a high risk of being struck down by the courts in the future. Proactive steps were taken to ensure that the law was repealed before this risk materialised. The Government's philosophy is apparent from the Law Minister's recent panel discussion on s 377A: "If Parliament fails in its duty to do what is right, then the Courts will have to do what they do not want to do. ... The Courts have said this is within the province of Parliament. That does not mean the Courts are saying that they will not act. What they are saying is that they leave it to Parliament to do what is right." 17

The importance of excellent Government legal advisors

This brings me to the third question and the one which is most relevant to the Legal Service: how do we serve the Government whilst being faithful to the law?

The Angst to Empathy speech at [15].

Prime Minister Lee Hsien Loong's National Day Rally Speech in English, 21 Aug 2022; Available online https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2022-English (accessed 3 Jan 2023).

Panel Discussion on *Tan Seng Kee v AG*, and Section 377A of the Penal Code – Opening Address by Mr K Shanmugam, Minister for Home Affairs and Minister for law, 26 Sep 2022; Available online https://www.mha.gov.sg/mediaroom/speeches/panel-discussion-on-tan-seng-kee-v-ag-and-section-377a-of-the-penal-code/ (accessed 3 Jan 2023).

- In my view, our job as Legal Service Officers is to render <u>objective</u>, <u>unbiased</u>, and <u>independent</u> legal advice (and I would stress that the advice must also be of high quality). Our duty is to advise faithfully on the law. We do not let political considerations affect the advice. Our work manifests these principles in three ways.
- Firstly, the Legal Service is respectful of the Government's democratic mandate. When advising, our aim is to facilitate the Government in achieving its policy agenda, in accordance with the law. We cannot be excessively risk-averse and hinder what the electorate voted for.
- Secondly, notwithstanding this, we are firm and realistic in giving advice. We do not apologise for the law. We do not give the impression that something is legally defensible when it is not. If the Government's policy objective is inconsistent with existing law, we advise that legislation must be amended or enacted in Parliament before the policy is implemented. As with s 377A, if legislation contravenes the Constitution, we advise the Government to rectify the contravention.
- Thirdly, we have a duty to represent the Government in court; we have not refused to act for the Government, for example, just because our advice was ignored. However, when Legal Service Officers appear in court, our overarching duty is to the Court. We present the facts and the law in a fair manner before the Court.
- Allow me to illustrate how the Legal Service has carried out its role in the previous year, with two examples (there are many more):
 - a. In March 2022, the Government imposed sanctions against Russia in response to its invasion of Ukraine. The Rule of Law on the international plane is of existential importance to Singapore. It requires that the sovereignty and

territorial integrity of all countries, large and small, must be respected. Not only did Singapore take firm action, but we also ensured that our response was consistent with international and domestic law. The Legal Service supported the Government extensively in this endeavour, from advising the Government on domestic and international law issues regarding the sanctions to drafting legislation for the sanctions.

b. In April 2022, the High Court dismissed applications seeking leave to commence judicial review against certain COVID-19 Vaccine Differentiated Measures. ¹⁸ In a small country like Singapore, the Government often needs to respond quickly to external events or to execute complex plans with many moving parts. The Government's COVID-19 response is an example. Notwithstanding the scale, urgency or complexity of the response, it was vital that all measures were compliant with the Rule of Law. The Legal Service supported the Government in ensuring this, advising on the legality of measures and drafting the implementing legislation. When some of these measures were tested in court, they passed the test.

The commitment of the Legal Service to the Rule of Law

In conclusion, the Legal Service has a central role to play in upholding the Rule of Law.

The Legal Service is a premier service within the Public Service of Singapore. We need to attract and retain some of the best lawyers to advise and act for the Government, as well as to do the vital work of Deputy Public Prosecutors. I am confident that the

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Han Hui Hui and others v Attorney-General [2022] SGHC 141.

reconstituted Legal Service will continue to be an employer of choice for some of the best lawyers in our country, who share our vision of upholding the Rule of Law.

However, the Legal Service faces considerable pressure on several fronts. Our work is becoming more complex and there is increasing demand for advice in quick time. There is more intense public scrutiny of our work, particularly on social media. We also face severe competition for good lawyers from private law firms and other companies. Nevertheless, I daresay the Legal Service will overcome these challenges and continue to make a meaningful contribution to the Rule of Law in Singapore, for the next generation and beyond.

Public Defender's Office

Finally, a word about the Public Defender's Office. In August 2022, the Public Defenders Act 2022 was passed, establishing the Public Defender's Office. The Act came into force on 1st December 2022. This is a historic initiative to facilitate access to justice, which is an important facet of the Rule of Law. During the legislative drafting process for the Act, Legal Service Officers worked closely across departments, researching foreign legislation and offering their expertise in criminal procedure to make the Act as effective as possible. We also agreed to Wong Kok Weng, one of our senior Legal Service Officers, leaving the Legal Service to take up the role of the first Public Defender. We wish Kok Weng and his colleagues at the Public Defender's Office all the best, and I am confident that under his able leadership, the Public Defender's Office will be successful in its mission.

Conclusion

- On behalf of the Legal Service, and in particular the Attorney-General's Chambers, I pledge the fullest support to the Judiciary in the discharge of your constitutional responsibility to administer justice.
- 41 Please allow me to take this opportunity to congratulate, the following:
 - a. Firstly, I congratulate all the Justices promoted to the Court of Appeal and wish you all the best in your appointments.
 - b. Secondly, please allow me to specially congratulate Justice Hri Kumar Nair on his appointment as Judge of the High Court. Justice Hri was Deputy Attorney-General for over five years and AGC has benefitted immensely from his legal acumen, wise counsel and exceptional skills as a litigator. I will personally miss having Hri at AGC.
 - c. Thirdly, I also offer the heartiest congratulations to the other newly-appointed Justices and Judicial Commissioners of the High Court. I wish you the very best in your appointments.
 - d. Lastly, I congratulate the newly-appointed Senior Counsel.
- With this, I wish the Chief Justice, Your Honours and all members of the legal community the very best for 2023.
