Why rule of law remains important

By Simon Chesterman
For The Straits Times

The rule of law is like oxygen: easily taken for granted, but quickly noticed when it is absent.

If you have it, the rule of law makes organised society possible. If you lack the rule of law, it is a recipe for disorder and corruption. An extreme example of the absence of the rule of law is Somalia, where effective government has broken down completely. For many, Singapore epitomises the opposite: a state in which the rule of law is valued almost above all else.

Last week, I attended an international dialogue on this topic with government officials, practising lawyers and academics from Singapore and abroad. The discussion showed how much has been achieved – and how much more there is to do.

The rule of law has long been one of those rare ideas in politics with which everyone agrees they agree. In a 2005 declaration at the United Nations, it was endorsed by every country on the planet. Even leaders such as Zimbabwean President Robert Mugabe and Russian Prime Minister Vladimir Putin have said they believe in it.

That universal support is possible only because of vagueness about what the rule of law actually means.

Academics have been arguing for decades over whether we should emphasise structures and processes (a formal or “thin” definition) or focus on outcomes and broader notions of justice (a substantive or “thick” definition). Over time, this has evolved into a debate over whether the rule of law can exist independently of robust human rights protections and a liberal form of democracy.

But a better way of understanding the rule of law is to look at how the term is used, why it is important and how it can be promoted.

I thought it was telling, for example, that Minister for Law K. Shanmugam argued that the rule of law is the foundation of Singapore’s political stability and economic prosperity. Yet he also accepted that measures such as the Internal Security Act derogate from the ordinary process of law and require explanation.

In the same conference, Chief Justice Chan Sek Koong repeated a robust defence of the role of judges in interpreting and applying the rule of law, rejecting criticisms of the judiciary that suggest bias or an overly favourable view of the government. But he acknowledged that academics can and should criticise judgments that err in analysis of law or fact. And he stressed the important role of judges in checking the legislature and executive when issues of illegality are raised.

Overall, the tone of the conference was as interesting as the substance. Alongside familiar defences of government policy, there was also open acceptance that Singapore’s system is not perfect and could be improved through dialogue with others who are also committed to the rule of law.

These observations show three ways in which the rule of law remains important.

First, it guards against the arbitrary or abusive exercise of public power. In the case of the Internal Security Act, for example, there are some basic protections in place – but room for debate as to whether those protections are adequate. Mr. Shanmugam himself agreed that such exceptions to the rule of law must be closely scrutinised and strictly justified.

Second, it gives legitimacy to the exercise of public power. The rule of law applies to everyone, including the government, and, with an independent judiciary that applies the law to specific cases.

Third, the rule of law encourages better decisions. Having a rational basis for the exercise of public power precludes prejudicial discrimination and requires that laws apply to all people equally. It must go beyond being simply good in theory to achieve good outcomes in practice.

Some would argue that you need to go beyond to include human rights and democracy within the definition of the rule of law. This underestimates the progress that has been made in those areas, as suggested by Singapore’s acceptance of a review of its human rights record by the United Nations last year, and the robustly contested elections in the same year.

Attempts to include human rights and democracy within the rule of law like some kind of Trojan horse also underestimate the importance of a “thin” conception of the rule of law.

Many countries with autocratic governments acknowledge the importance of the law in achieving their own stability. Linking the rule of law directly and inextricably to human rights and democracy would make promoting accountability in such countries more difficult.

So how does one promote the rule of law? As the discussion last week made clear, rules and institutions are necessary but not sufficient. One also needs a rule of law culture.

The rule of law does not exist in isolation from its social context or political structures. It makes a well-ordered society possible, but it is a means rather than an end. For too long, many countries thought they had a monopoly on such debates. This was true of the United States and others in the 1960s, when the law and development movement sought to export US legal structures wholesale to the developing world – and failed.

It is also true of many countries that have resisted even constructive criticism of the manner in which they exercise sovereignty.

To me, then, the most promising aspect of the conference was not the rule of law so much as the explicit embrace of a dialogue on this important subject.

It is a conversation we need to have, and one which needs to continue.

The writer is the dean of the National University of Singapore Faculty of Law. This article is based on his closing address at the conference, A Dialogue On The Rule Of Law, organised by the Singapore Academy of Law, the National University of Singapore Faculty of Law and the Singapore Management University School of Law.