Evolution of a Revolution

Forty years of the Singapore Constitution

Edited by
Li-ann Thio and **Kevin YL Tan**

Cavendish

Evolution of a Revolution

Between 1965 and 2005, changes to Singapore's Constitution were so tremendous as to amount to a revolution. These developments are comprehensively discussed and critically examined for the first time in this edited volume.

With its momentous secession from the Federation of Malaysia in 1965, Singapore had the perfect opportunity to craft a popularly-endorsed constitution. Instead, it retained the 1958 State Constitution and augmented it with provisions from the Malaysian Federal Constitution. The decision in favour of stability and gradual change belied the revolutionary changes to Singapore's Constitution over the next 40 years, transforming its erstwhile Westminster-style constitution into something quite unique. The Government's overriding concern with ensuring stability, public order, Asian values and communitarian politics, are not without their setbacks or critics.

This collection strives to enrich our understanding of the historical antecedents of the current Constitution and offers a timely retrospective assessment of how history, politics and economics have shaped the Constitution. It is the first collaborative effort by a group of Singapore constitutional law scholars and will be of interest to students and academics from a range of disciplines, including comparative constitutional law, political science, government and Asian studies.

Dr Li-ann Thio is Professor of Law at the National University of Singapore where she teaches public international law, constitutional law and human rights law. She is a Nominated Member of Parliament (11th Session).

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Singapore, May 2008

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Foreword

A constitution functioning for forty years is a tribute to the population. A resident body of scholars writing a collection of learned essays to commemorate the anniversary is a glorious asset. A delectable pun in the title of one of the essays is an allurement to read on.

In the forty years – indeed in the thirty years – before the inauguration of the present constitution, Singapore had been one of the Straits Settlements, a territory occupied by Japanese forces, a British colony, a state of the Malaysian federation and an independent sovereign state. Rapid changes of status and fortune have been replaced by continuity and prosperity.

Even a person of the intelligence and imagination of Stamford Raffles might not have foreseen the reversal between former imperial power and erstwhile colony. Singapore has joined the small band of countries with both a constitution and a sovereign legislature while the United Kingdom has left it, the Westminster Parliament now being subject in its competence to the superior law of the European Union.

The contrast between the present state of constitutional studies and that at their inception at the university in 1957 is stark. Then there were hardly any legal scholars; there was hardly anything written; the existing constitutional arrangements in Singapore had hardly any expectation of life. As about half the number of undergraduates was from the mainland, and a federal structure makes for more jurisprudence than a unitary one, the constitutional law of the Federation of Malaya attracted more attention than that of Singapore, but the federal constitution was only a few weeks old and not yet the subject of judicial interpretation. Singapore joining the mainland federation was not yet an imminent possibility. The constitutional future of the island was unpredictable except for a general expectation that it would not be a colony much longer. The law as it stood could be learnt and commented on, as could the history of the Straits Settlements, and it may justly be observed that the study of what is ephemeral or over and done with is not useless. Much of the law examined in the course of legal education will not endure, and valuable transferable skill can be acquired for all that by considering it, but it is not usual to require much undergraduate effort to be put into what is known to be about to be superseded.

In the middle of 1956, when planning legal education in the university in Singapore had ceased to be a dateless contemplation and had to result in something actually starting little more than a year later, a crucial question for anyone who was going to lecture on constitutional law or conduct tutorials was: what are the students going to be invited to read? The text of the future constitution of the Federation of Malaya had not yet been finalised. Internal self-government in Singapore was in a transitional phase which ended with a new constitution in 1959. Very few people apart from the late Professor Hugh Hickling could claim detailed knowledge of the legal systems in Borneo. Textbooks from England were available, and from other English-speaking countries, but a library of up-to-date Malayan constitutional law did not require more than a few inches of shelf space. Scholars from many walks of life, including a few from the legal profession, had written books or papers on Malayan law, or on aspects of it, over the centuries, but history, though interesting and relevant to legal education, does not make a legal textbook.

As mentioned by Professor Kevin Tan in his essay "Writing the Constitution," the first academic appointment in the university's Department of Law after the chair had been filled was part of the preparation for teaching constitutional law, but no one with a law degree was available. On 1st October 1956, on the recommendation of Professor Silcock, professor of economics, in whose faculty she had been an undergraduate, Miss Mavis Scharenguival, recently returned from Manila with an M.A. in public administration, was appointed as research assistant with a view to establishing a bibliography. (She left before long to become a civil servant but ended her career – as Mrs. James Puthucheary holding a chair in the University of Malaya in Kuala Lumpur and wrote some interesting papers on constitutional matters.) She was succeeded early in 1957 by Mrs. Julia Heah, who was a lawyer, and progress was made by the time the first undergraduates were admitted to the LL.B. course, but teaching and research on constitutional law were not on a firm footing until Professor Harry Groves took the Chair of Constitutional Law in July 1960. Since then they have gone from strength to strength, as the present volume demonstrates.

Professors Thio Li-ann and Kevin Tan have already made contributions to legal literature which are impressive in quality and quantity, and there is expectation of much more to come. The editors and all the contributors teach or have taught at the National University of Singapore and most of them were students there. The essays are informative and critical, written in engaging styles. They demonstrate how strikingly scholarship has evolved in the forty years of evolution of the constitution. An island which once, perforce, imported its entire legal system, can now export valuable knowledge of its locally made constitution and its evolution. The small but populous island, nearly all its residents the descendants of immigrants arriving after the first quarter of the nineteenth century, mainly from China

but with substantial minorities of Malays, Indians and people from many other parts of the world, faced acute governmental and economic problems on finding itself reluctantly sovereign in 1965. Independence from Malaysia was sudden and unexpected. Communist subversion was energetic. Sources of future income were uncertain. Racial harmony and a unified notion of national identity were fragile. Material wellbeing, for example in housing, was patchy. The way in which Singapore has coped, with its emphasis on a strong executive of unchanging political persuasion, supported by a legislature continuously dominated by members of the same party and a deferential judiciary, merits study by lawyers, political scientists and others interested in government everywhere. The next forty years promise to be equally interesting.

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16 August 2008

Table of cases

Table of statutes and legislation

Abbreviations

AC	Appeal Cases
AIR	All India Reporter
AJIL	American Journal of International Law
All ER	All England Reports
AMLA	Administration of Muslim Law Act
ALR	Australian Law Reports
Am J. Comp. L.	American Journal of Comparative Law
Am. U. Int'l L. Rev.	American University International Law Review
Am. U. L. Rev.	American University Law Review
ASEAN	Association of South-East Asian Nations
C.A.	Court of Appeal
Cardozo L. Rev.	Cardozo Law Review
CDC	Community Development Council
CEA	Compulsory Education Act
CEDAW	Convention for the Elimination of all Forms of Discrimination against Women
CJ	Chief Justice
CLR	Commonwealth Law Reports
CMIO	Chinese, Malay, Indian and Others
Colum. J. Asian L.	Columbia Journal of Asian Law
Colum. L.R.	Columbia Law Review
Conn. L. Rev.	Connecticut Law Review
Cornell L. Rev.	Cornell Law Review
Cox C.C.	Cox's Criminal Cases
CPA	Council of Presidential Advisors
CPIB	Corrupt Practices Investigation Bureau
CRC	Convention on the Rights of the Child
DILA	Development of International Law in Asia
ECHR	European Convention on Human Rights and Fundamental Freedoms
EHRR	European Human Rights Reports
EP	Elected President
Fordham L. Rev.	Fordham Law Review

Geo L. J.	Georgetown Law Journal
GPC	Government Parliamentary Committee
GRC	Group Representation Constituency
Harv. Hum. Rts. J.	Harvard Human Rights Journal
Harv. J. L. and Pub. Pol'y	Harvard Journal of Law and Public policy
Harv. L. Rev.	Harvard Law Review
Hastings Const. L.Q.	Hastings Constitutional Law Quarterly
H.C.	High Court
HCA	High Court of Australia
HKLJ	Hong Kong Law Journal
HKLRD	Hong Kong Law Reports and Digest
HRA	Human Rights Act
IBSA	International Bible Students Association
ICLQ	International and Comparative Law Quarterly
ICON	International Journal of Constitutional Law
Ind. J. Glob. Leg. Stud.	Indiana Journal of Global Legal Studies
ISA	Internal Security Act
JC	Judicial Commissioner
JI	Jemaah Islamiyah
JMCL	Journal of Malaysian and Comparative Law
JW	Jehovah's Witnesses
KB	King's Bench
Law and Soc. Inquiry	Law and Social Inquiry
Loy. L. Rev.	Loyola Law Review
LQR	Law Quarterly Review
LRC (Const)	Law Reports of the Commonwealth, Constitutional Division
Mal. L.R.	Malaya Law Review
MDA	Misuse of Drugs Act
Melb. U. L. Rev.	Melbourne University Law Review
MHA	Minister of Home Affairs
Mich. L. Rev.	Michigan Law Review
MLJ	Malayan Law Journal
MMP	Mixed Member Proportional
MP	Member of Parliament
MRHA	Maintenance of Religious Harmony Act
MUIS	Majlis Ugama Islam Singapura (Islamic Religious Council of Singapore)
NCMP	Non Constituency Member of Parliament
NEP	New Economic Policy
NMP	Nominated Member of Parliament
NUS	National University of Singapore
N.Y.U. L. Rev.	New York University Law Review

OJLS	Oxford Journal of Legal Studies
OUCLJ	Oxford University Commonwealth Law Journal
PAP	People's Action Party
PCMR	Presidential Council on Minority Rights
PEC	Presidential Elections Committee
PEMA	Public Entertainments and Meetings Act
PERC	Political and Economic Risk Consultancy
PKMS	Pertubuhan Kebangsaan Melayu Singapura (Singapore Malay National Organisation)
PM	Prime Minister
PP	Public Prosecutor
PPSO	Preservation of Public Security Ordinance
PSC	Public Services Commission
QB	Queen's Bench
RSIA	Republic of Singapore Independence Act
SA	South African Law Reports
SAcLJ	Singapore Academy of Law Journal
San Diego L. Rev.	San Diego Law Review
SCR	Supreme Court Reports (India)
SGDC	Singapore District Court
SGHC	Singapore High Court
Sing. JICL	Singapore Journal of International and Comparative Law
Sing. JLS	Singapore Journal of Legal Studies
Sing. LR	Singapore Law Review
SLR	Singapore Law Reports
SPR	Singapore Parliament Reports
SYBIL	Singapore Yearbook of International Law
TC	Town Council
U. Cin. L. Rev.	University of Cincinnati Law Review
UCLA Pac. Basin L.J.	UCLA Pacific Basin Law Journal
U. Colo. L. Rev.	University of Colorado Law Review
UDHR	Universal Declaration of Human Rights
U. Fla. L. Rev.	University of Florida Law Review
UKPC	United Kingdom Privy Council
UMNO	United Malays National Organisation
US	United States Law Reports
Va. JIL	Virginia Journal of International Law
Vand. J. Trans'l Law	Vanderbilt Journal of Transnational Law
Vand. L. Rev.	Vanderbilt Law Review
Wake Forest L. Rev.	Wake Forest Law Review
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law journal

Introduction

Time for a revolution

Kevin YL Tan

It is rare for a revolution to be carried out without a single shot being fired, but that is exactly what happened in the former British colony of Singapore. The Separation of Singapore from the Federation of Malaysia in 1965 was a momentous event that offered Singapore and newly-created Singaporeans an opportunity to craft a popularly-endorsed constitution. However, initial plans to hold a constituent assembly to draft a Constitution were abandoned within a few months of nationhood. Instead, Singapore's government opted to adopt the most practical solution by retaining the State Constitution of 1963 and augmenting it by appropriating provisions from the Malaysian Federal Constitution through the Republic of Singapore Independence Act. This decision, which favoured stability and gradual change, belied what was to happen to Singapore's Constitution over the next 40 years.

Indeed, developments in the Constitution and constitutional law between 1965 and 2005 were so tremendous that what we saw was nothing short of a revolutionary change in its basic character. New institutions like the Group Representation Constituency, the Non-constituency Member of Parliament and the Elected Presidency have transformed Singapore's erstwhile Westminster-style constitution into something quite unique. These changes were not capricious policy moves but conscious choices made by a Government committed above all to stability, public order, the potency and primacy of Asian values and communitarian politics. These changes are not without their setbacks or critics but must be understood within the context of their creation.

The number '40' is Biblically significant. Egypt was left desolate for 40 years because of God's judgment and the Israelites spent 40 years wandering in the wilderness. The period represents a time of testing or judgment and according to the Hebrews, it also represents the passing of a generation. This book grew out of a conversation I had with Li-ann Thio and Jaclyn Neo over coffee sometime in 2005. At that time, I remarked that while much of Singapore was preparing to celebrate 40 years of independence and nationhood in 2005, no one seemed to be preparing to celebrate 40th anniversary of the Wee Chong Jin Constitutional Commission in 2006.

Our hitherto light-hearted conversation turned serious and shortly after that conversation, Li-ann and I started drawing up plans for this volume.

The Wee Chong Jin Commission was the first and only constitutional commission ever convened in independent Singapore. The only other constitutional commission – headed by Sir George Rendel in 1953–54 – had been convened under British rule. The 1966 Commission and its report represented the high-water mark of constitutional engagement and discourse in modern Singapore. For many in the legal and scholarly fraternity in 1966, this Commission was the next best thing to convening a full-fledged constituent assembly to craft a constitution that would be consonant with Singapore's newly-independent status. Singapore experienced a generational evolution from a self-professed 'third world' state to a 'first world nation'. It also marks its maturity and coming of age. During this period of uninterrupted constitutional government, Singapore has seen three generational changes in political leadership including three prime ministers and six presidents.

This book presents a timely assessment of the impact of history, politics and economics in shaping the Singapore Constitution and examines whether the Constitution has met the highest aspirations its drafters had for it. This collection of scholarly essays is the first collaborative effort by a group of Singapore constitutional law scholars. Going beyond the descriptive narrative, the authors cast a critical eye over the developments of the last 40 years by evaluating and situating them amidst the larger tapestry of Singapore's historical, political and economic development.

This collection comprises 10 essays covering various broad thematic aspects of the Constitution. The authors have painted in broad strokes, overarching, retrospective commentaries on the various themes covered. The tone of the essays is evaluative and to some extent prescriptive, with the necessary narrative woven within this commentary.

We begin with the Wee Chong Jin Commission Report of 1966, what the authors consider the apogee of constitutional discourse and engagement in Singapore. In her chapter, Li-ann Thio revisits the Report of the Wee Commission and considers the impact of this seminal document. Originally conceived as a Commission merely to consider the best ways to constitutionally protect minority rights and interests in a Chinese-dominated Singapore, the report went far beyond its parliamentary remit and considered a whole host of other institutional safeguards that would be appropriate for Singapore, such as the entrenchment of its fundamental liberties provisions.

Thio considers the actual report and its recommendations in great detail and evaluates their impact on Singapore's constitutional development in the ensuing 40 years. She also gives us a personal glimpse into the workings of the Commission, based on a personal interview with Geoffrey Abisheganaden, one of two surviving members of the Commission at the time of writing. Current day developments are discussed against the

backdrop of the original recommendations of the Wee Commission and their effectiveness assessed. It is tempting but counter-factual to ask, 'What if we had adopted this, or that recommendation of the Wee Commission?' 'What about the Ombudsman proposal, for example?' Where would we be then? That would entail another volume unto itself. Quite clearly, the Wee Commission had a far greater faith in institutions than in the vagaries of mankind. What has happened in the last 40 years has been a shift to what Thio calls 'a syncretic faith in constitutionalism and good government, in tandem with the importance of having good men and good governance, predicated upon Asian particularities'.

In Chapter 2, I take off from where Thio left off. The faith in constitutionalism as manifested in public law institutions espoused by the Wee Commission is the subject of my study. I am particularly concerned with the fluidity and flexibility of the Constitution over the years, and how so few of the political and constitutional values we hold dear are not truly protected by the supreme law. Years ago, the current Attorney-General, Walter Woon remarked in Parliament that Singapore did not really have a constitution. It was perhaps a facetious way of making his point that the Constitution was too easily amendable and, given the overwhelming majority the People's Action Party commands in Parliament, no constitutional guarantee was safe from Parliamentary fiat. I argue that the institutions that have been established over the years have been more of an exercise in state building than in nation building. The former reposes power in a centralised authority, that of the state, while the latter attempts to build institutions with the ability to act as a social glue for all its constituents. Ultimately,

> . . . the institutions considered most important for entrenchment by the Wee Commission were clearly not the same as those which Singapore's political leaders deemed necessary for enhanced protection. There was a clear disjuncture between the outlook of the legal luminaries in the Commission and the battle-hardened politicians of the People's Action Party. While the lawyers sought a constitution that would limit state power, the politicians sought one that would strengthen state power.*

Having spent 40 years building state power, I argue that it is now time to compel the state to control itself and place greater faith in constitutional institutions and values.

Tan Seow Hon's chapter, 'Constitutional jurisprudence: Beyond supreme law – A law higher still?' examines the nature of the basic law against the jurisprudence backdrop of the 'debate between natural law theory and legal positivism' or the 'NLTLP debate'. Generations of students who have grown

* See p 59 of this volume.

up in pragmatic Singapore where the ends are valued above the means, are bothered by the jurisprudential value of their constitutional arguments. This attitude is problematic because generations of lawyers – and even judges – may well end up approaching constitutionally-contentious issues by reference to state imperatives and practice rather than intrinsic values enshrined in the Constitution. Taken to its extreme, no right or liberty is of value in itself, but contingent on how it affects state-individual power relationships and the eventual practical outcome of where a particular argument might lead. She deals with this dichotomy by reference to two landmark cases, *Ong Ah Chuan v PP* and *Colin Chan v PP*. In the former, the Privy Council urged judges to interpret the Constitution on the basis that the written document encompasses principles of natural justice, while the former insists that constitutional interpretation should be kept strictly within the 'four-walls' of the document. Tan argues that our choice of constitutionalism is only meaningful if the Constitution is 'understood in accordance with a higher law of morality'.

In his chapter, Arun Thiruvengadam critically examines the 'four walls' approach to constitutional interpretation by studying how local courts have used foreign judicial decisions in constitutional adjudication; what he calls a 'trans-judicial influence' on the courts. Thiruvengadam posits two competing alternative models of constitutional adjudication: the National Formalist model (as practised by states like Singapore, Australia and America); and the Cosmopolitan Pragmatism model (adhered to by judiciaries in India, Canada and South Africa) and argues that there are two distinct periods of 'trans-judicial influences'. The first period ran from 1965 to 1989, culminating in the seminal Court of Appeal decision in *Chng Suan Tze v Minister for Home Affairs*; and from 1989 to the present day. The earlier period, Thiruvengadam argues, saw a greater willingness by the courts to refer to and even apply the logic of decisions of foreign courts. On the other hand, the latter period has seen a retreat to the 'four walls doctrine' of a positivist bent. The National Formalism model of constitutionalism situates a nation's constitution within its particular history and political traditions and as such, judges of this persuasion are more likely to interpret constitutions in consonance with 'national practices, cultural habits and values'. The Cosmopolitan Pragmatism model of constitutionalism embeds in constitutions, notions of fundamental justice and judges of this ilk take seriously their duty to uphold constitutional values and traditions in keeping with the changing times. They also believe that since their peers grapple daily with similar issues, great value should be attached to foreign judicial decisions, especially those of their fellow constitutional judges.

In their chapter, 'Constitutional supremacy: Still a little dicey', Jaclyn Neo and Yvonne Lee critically consider if Singapore's Constitution is truly supreme in the light of the criteria articulated by the great Victorian jurist, Albert Venn Dicey. The written constitution is the supreme law, so

proclaim most constitutions, including Article 4 of Singapore's Constitution, but Neo and Lee argue that given the flexibility of the Constitution, especially between 1965 and 1979 and the subsequent hegemonic control the People's Action Party exerted in the legislature, few things in the Constitution are in fact sacrosanct. This is exacerbated by the disjuncture – or 'diceyness' – between the values espoused in the constitutional document and the constitutional ethos of Singapore's parliamentarians, who are more at home with parliamentary supremacy than constitutional supremacy.

The next three chapters focus on the protection of constitutional rights and liberties under Part IV of the Constitution. Li-ann Thio's chapter on 'Protecting Rights' 'explores the theory and practice of protecting rights in Singapore, as derived from domestic instruments such as the constitution, statute law, the common law, as well as international legal obligations'. Beyond the rights specifically enumerated in the Constitution, Thio asks if certain rights – such as the right to political participation – can be implied into the Constitution. She also considers the role of judicial review, and judges' judicial philosophy in protecting rights in Singapore where the common law tradition is tempered by a communitarian national culture. In particular, Thio is disturbed by the courts' preference for the 'non-balancing' approach to rights adjudication favoured by local judges. Beyond the constitutional text, Thio examines the relevance of international human rights documents and their applicability in the Singapore context.

Jaclyn Neo's 'The protection of minorities and the Constitution: A judicious balance' is a critical examination of the nature of minority rights in Singapore. Indeed, the *raison d'etre* for Parliament convening the 1966 Constitutional Commission was the protection of minority rights. Neo argues that in Singapore, the principle of equality means 'formal equality' and is not geared towards the achievement of 'substantive equality' as there are no group rights in the Constitution. Even so, Neo argues that it is the Malay-Muslim minority that has long been the focus of majority-minority management initiatives. Majority-minority relations are managed and balanced through 'a variety of formal institutions, policies and programmes as well as informal norms and methods' with the Government leading the way. In this respect, the judiciary plays but second fiddle to the state. However, this method of ethnic and minority rights management depends almost wholly 'on the goodwill and existence of a *junzi* government' and is thus open to abuse if less enlightened souls get elected to political office.

Michael Hor's chapter explores the ambit of emergency powers under Part XII of the Constitution providing for 'Special Powers Against Subversion and Emergency Powers'. Most post-colonial constitutions contain such claw-back provisions, authorising the executive branch of the Government to assume almost absolute power in times of crisis. Among the draconian powers allowed under this part of the Constitution is the power of preventive detention, the right to detain individuals without trial. Hor questions the

continued validity and utility of the dreaded Internal Security Act, passed by the Malayan Parliament at the close of the undeclared war known as the Malayan Emergency (1948–60). He considers how the Act has been used throughout the period under consideration and the possible problems these instances present. The role of the courts in the judicial review of national security and the impact of the seminal case of *Chng Suan Tze v Minister for Home Affairs*, which he regrets, led to a hardening of Parliamentary stance against judicial review.

The final two essays are my 'Writing the Constitution' and Li-ann Thio's 'In Search of the Constitution'. My essay provides a detailed survey of the literature on Singapore's Constitution that has been generated over the last 40 years and offers suggestions for future writings to fill in gaps that remain. In her wide-ranging concluding chapter, Thio sweeps through the 40-year period with her thoughtful analysis of almost all the changes, arguing that the evolutionary process has indeed spawned a revolutionary constitution. She concludes by arguing while a 40-year-old constitution should indeed be celebrated – since so many post-colonial constitutions do not even last half as long – we have paid a high price for the state's preference for law, order and stability. This has, in the long run, led to a positivist outlook on the part of politicians and to a lesser extent, the courts, and has led to a 'contraction of rights'. It is now time, Thio ends, for a new generation to evolve their own constitution which might well reverse the trend we have seen in the last 40 years, where '[e]fficiency, order and the common good have generally triumphed over rights claims'.

1 The passage of a generation

Revisiting the report of the 1966 Constitutional Commission

Li-ann Thio

Introduction

Singapore did not have a deliberate 'constitutional moment' in the post-colonial era; it did not, like India, convene a Constituent Assembly to draft a constitution given by 'We the People' to 'Ourselves'.[1] Neither did local political parties undergo protracted negotiations with the departing British colonial powers, characteristic of the experience of many countries with Westminster-based constitutions such as Malaysia. In its genesis, the Singapore Constitution was not a product of mature deliberation or a broad-based popular, consultative process.

This is unsurprising, given the traumatic nature of our exodus from the Federation of Malaysia,[2] producing an accidental nation that acquired sovereignty 'without violent revolution'.[3] The document(s) which constituted the new state did not emerge *ex nihilo*; the pragmatic decision was taken to retain the existing Singapore State Constitution, designed to operate within a larger federation, and to renovate it with amendments consequential to attaining statehood.[4]

The Malaysian Parliament transferred all legislative and executive powers formerly wielded by the Federal government to the new Singapore government under the Constitution and Malaysia (Singapore Amendment) Act.[5] Thereafter, the Singapore Parliament on 22 December 1965 passed the Constitution of Singapore (Amendment) Act[6] retrospectively applied to 9 August 1965, and the Republic of Singapore Independence Act (RSIA)

1 Preamble, Constitution of the Union of India (1950).
2 Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement* (Singapore: Times Academic Press, 1998).
3 PM Lee Kuan Yew, discussing how Singapore acquired control over Western European bases: 24 SPR 14 Dec 1965, col 91.
4 *PP v Taw Cheng Kong* [1998] 2 SLR 410, at p 420C to 421B.
5 Act No 53 of 1965.
6 Act No 8 of 1965.

of 1965.[7] Under the RSIA, then Prime Minister (PM) Lee Kuan Yew issued a Proclamation declaring Singapore 'shall forever be a sovereign democratic and independent nation, founded upon the principles of liberty and justice and ever seeking the welfare and happiness of her people in a more just and equal society'. Former Chief Minister David Marshall said Singapore had 'the untidiest and most confusing constitution that any country has started life with', inaccessible to laymen, prophesying 'it will be a rich harvest of headaches for lawyers and judges'.[8]

While there were no plans to draft a new constitution *tabula rasa,* it was considered imperative to re-order the existing one and to specifically address the problem of racial and religious minorities, including the Indians and Malays, within a Chinese-dominated city state. This was a problem common to Third World constitutionalism[9] and a matter explicitly entrusted to the Constitutional Commission for consideration. In the 1960s, Singapore was perceived as a potential 'Asian Cuba', raising the destabilising spectre of Chinese chauvinism and communism. Shortly after secession, PM Lee on 12 August 1965 declared he wanted 'built-in safeguards' for minorities to ensure that 'any elected Government' had to continue the policy of the People's Action Party (PAP) government 'to raise the economic and educational levels of the Malays', to 'honour and respect minority rights'.[10]

The government opted for a legal solution to perpetuate its multiracial policy, indicating an early faith in constitutionalism. PM Lee asked Chief Justice Wee Chong Jin, who was attending a judges' conference in Sydney, if 'he could get a group of Commonwealth Chief Justices together with our own legal luminaries' to recommend 'a constitution which will ensure that democratic practices prevail',[11] to guard against any Communist abuse of the democratic processes to install an 'undemocratic state'.[12] Furthermore, to pacify minorities, all Singaporeans would be treated equally regardless of race and this would 'be guaranteed with constitutional processes to establish those rights'.[13] PM Lee stated in Parliament on 14 December 1965

7 Act No 9 of 1965.

8 David Marshall, 'Singapore's Untidy Constitution', Letters, *The Straits Times* (Singapore), 21 Dec 1965.

9 Yash Ghai, 'The Theory of the State in the Third World and the Problematics of Constitutionalism' in *Constitutionalism and Democracy: Transitions in the Contemporary World* Greenberg *et al*. eds, (Oxford University Press, 1993) at pp 186–96.

10 Transcript of the Proceedings when Singapore and Malaysian PAP Leaders met followed by a Press Conference, Cabinet Office, City Hall, 12 August 1965, available at Speech-Text Archival and Retrieval System: http://stars.nhb.gov.sg/

11 Transcript, ibid.

12 Summary, Speech by PM Lee Kuan Yew in Parliament, 14 Dec 1965, Moving the Motion of Thanks to the Yang Di Pertuan Negara for His Address: http://stars.nhb.gov.sg/

13 Transcript, supra, note 10.

that constitutional safeguards would be added to protect the interests of those who by 'accident of history' found themselves members of minority groups. He announced the convening of a Constitutional Commission to hear the views of minority communities, noting their recommendations could be 'sufficiently wide' to protect individuals against discrimination as well as ensure the consideration of their views in 'formulating policies' affecting 'their collective interests'.[14]

On 22 December 1965, a Ministerial Statement set out the Commission's fourfold terms of reference:

a) to receive and consider representations on how the rights of the racial, linguistic and religious minorities can be adequately safeguarded in the Constitution;
b) to consider what provisions should be made to ensure that no legislation, which by its practical application is considered likely to be discriminatory against members of any racial, linguistic or religious group, should be enacted before adequate opportunities have been given for representation from parties likely to be aggrieved;
c) to consider what remedies should be provided for any citizen or group of citizens who claim that he or they have been discriminated against by any act or decision of the government or the administration or any statutory board or public body constituted by law and to recommend the machinery for the redress of any complaints;
d) to consider how such provisions can be entrenched in the Constitution.

The Wee Report was completed within a year and the authors of this 'exquisite document'[15] consciously exceeded these terms, justifying their foray into matters such as the Judiciary and Public Service Commission (PSC) by asserting these were 'intimately connected' with the recommendations as a whole.[16] *The Straits Times* (Singapore) observed the Commission demonstrated 'courage and sense' and 'was virtually praised by the Government for doing so'.[17]

Aside from being a 'valuable and far-sighted historic document',[18] the Wee Report provides a fascinating insight into three main issues shaping the republican Constitution of a young nation. The first concern was to shape a constitutional order after the British inheritance of parliamentary democracy. The second related to the minorities question and how to

14 Supra, note 12.
15 Selvadurai, 25 SPR, 16 March 1967, col 3129, at 1345.
16 Report of the Constitutional Commission 1966 [Singapore: Government Printer, 1966], at p 26, paras 82–6 (Wee Report).
17 'Council of State', *The Straits Times* (Singapore), 27 Mar 1967.
18 Ho Cheng Choon, 25 SPR 14 Mar 1967, col 1258.

assuage their fears of discriminatory treatment by the majority, to avoid 'racial communalism and religious bigotry'.[19] Lastly, the perceived utility of having a written constitution to foster constitutionalism and the rule of law through establishing oversight institutions, entrenching rights and enforcement processes. The basic prescription was to nurture a democratic, 'multiracial secular society', as this ideal was a 'dire necessity' for state survivability in an age of nationalism.[20]

This chapter revisits the principles and philosophy of constitutional government informing the Wee Report and examines to what extent they remain embedded in the evolving constitutional experiment driven by the government over the first 40 years of nationhood. We start by considering how the Constitutional Commission carried out its tasks, its primary recommendations and their philosophical basis, and the official reasons for their acceptance or rejection. We highlight the extent to which the concerns of a developing nation influenced statecraft. Notably, it was appreciated that a written constitution, in an age where parliamentary supremacy remained the dominant mindset, could be used to reflect constitutional values by varying the method of constitutional entrenchment with the importance of the relevant provisions. This was nevertheless tempered with the realist appreciation that constitutional entrenchment *per se*, of democratic processes for example, neither automatically produced a democratic order nor guaranteed constitutionalism.[21] The requisite constitutional culture was needed. We then consider the evolution of parliamentary democracy in terms of new institutional structures and processes, within a dominant one-party state. This is followed by an examination of the approach taken towards constitutional experimentation in relation to erecting mechanisms of accountability and rights as limits on state power. We consider the initial reticence towards novel constitutional institutions which was superseded by a subsequent full-blooded embrace of constitutional experimentation in certain areas and a persisting anti-institutionalist preference for more informal methods of engaging society and state relations. Finally, we reflect on the strain of constitutional pragmatism evident in the development of the Singapore Constitution and its latter-day move away from Westminster moorings towards constitutional autochthony or 'indigenisation'. We consider the inter-relation between forms of good government and governance, the virtue of formal safeguards and the limits of the constitutional project.

19 Wee Report, supra, note 16, at p 7, para 33.

20 EW Barker, Ministerial Statement, 24 SPR 22 Dec 1965, col 429.

21 Lee Kuan Yew observed that since 1957, the Malaysian constitution had undergone some 250 amendments; thus it was 'illusory' to believe that a two-thirds parliamentary majority amendment procedure would render constitutional provisions 'sacrosanct': 24 SPR 14 Dec 1965, col 430.

Convening a Constitutional Commission: Setting the context

The Constitutional Commission and its report

The Wee Commission was convened to renovate the existing government system to meet pressing needs. These primarily related to managing communalism to avoid 'another Sri Lanka here' and to contain the communist threat, sustained by the work of the *Barisan Socialis*, a 'most devilish thing' in practice.[22]

The Commission was chaired by Chief Justice (CJ) Wee Chong Jin, with the Speaker AP Rajah as deputy Chairman, and was composed of eleven 'eminent legal persons',[23] mainly litigators from various ethnic and religious communities.[24] The Government wanted legally qualified persons to be involved as they would 'know what is feasible and practical of constitutional guarantee'.[25] The public was given a month to submit written memoranda which would be kept confidential by request and to submit oral evidence.[26]

The first meeting was held on 13 January 1966 in the Chief Justice's Chambers. The public submitted some 40 memoranda. Ten public hearings were held, commencing in March 1966, eliciting feedback from various religious associations and private individuals.

Commissioner Abisheganaden recalls that some of the groups were 'very slanted, pro their own community' and that their submissions were 'very trivial and very opinionated'.[27] AP Rajah recalls that representations were made to the effect that 'there should be constitutional protection that the Sikhs should not cut their hair'.[28] PM Lee commented that the Commission had afforded 'a patient and an extremely polite hearing to all manner of propositions'.[29]

The Commissioners met 'for 6 months on and off' during office hours, giving their time 'free of charge'.[30] The Commissioners studied the constitutional texts of some 40 different British colonies and dominions and newly independent nations, as well as non-Commonwealth

22 Interview with Geoffrey Abisheganaden, 2 Nov 2006, Private Residence, Cavanaugh Court, Singapore (Interview).
23 EW Barker, 25 SPR 21 Dec 1966, col 1051.
24 These were CFJ Ess, MJ Namazie, CC Tan, SHD Elias, Syed Esa bin Syed Hassan Almenoar, G Abisheganaden, G. Starforth Hill, Abdul Manaf Ghows and Kirpal Singh.
25 Wee Report, supra, note 16 at p 1.
26 'Minority rights: A call for memos' *The Straits Times* (Singapore), 14 Jan 1966, p, 53.
27 Interview, supra, note 22.
28 Acc 887, Rajah, Arumugam Ponnu (Justice), Oral History Centre, National Archives of Singapore (5 Mar 1988).
29 Lee Kuan Yew, 25 SPR, 15 Mar 1967, col 1276, at 1284.
30 Interview, supra, note 22.

constitutions like China's. Their deliberations were directed by Wee CJ who was 'very fair' and 'did not impose his will on us'. Care was taken to avoid basing their discussions on their 'pet philosophies' in keeping to 'what the public told us; it was not our own thinking, our own fanciful legalistic rule of law ideas'. The Indian and American constitutions were considered, but the latter in particular was deemed 'not a good model to follow', given the notorious racism extant in the American system in the 1960s. Although inspiration was drawn from various clauses in the Indian Constitution, many of its provisions 'did not suit our setting'.[31]

As it was meant to be a local process, there were no outside consultations and the Commissioners were sworn to secrecy with respect to Commission discussions. Mr. Abisganaden recalled that the proceedings were conducted entirely in English and that the participants were mostly English-educated. After eight months, the process which was 'supposed to show the public that the government was caring about the system of justice, law and order, which was democratic',[32] was concluded. Wee CJ drafted the Report of the Constitutional Commission[33] (Wee Report), which was presented to President Yusof Ishak on 27 August 1966.

Parliament first debated the Report on 21 December 1966 and resumed this from 14–17 March 1967. The House endorsed the government's views, although the government 'allowed its own rank and file complete freedom of discussion'[34] given the absence of public discussion and scant press coverage.[35] The unanimous adoption of the Report, authored by the multiracial slate of Commissioners, considerably enhanced its value.[36]

Overview of recommendations

(A) POLITICAL PHILOSOPHY AND PRINCIPLES

Underlying any constitutional order is a political philosophy or legal principles upon which cornerstone the constitutional edifice rests. Despite the contemporary official rhetoric of pragmatism and realism, the Constitution does contain foundational principles. This the Wee Commission identified,

31 Interview, ibid.
32 Interview, ibid.
33 Command Paper 29 of 1966.
34 'Council of State', *The Straits Times* (Singapore), 27 Mar 1967.
35 A Straits Times editorial observed the entire process failed 'to stir any considerable public debate'. 'Watchdog Council', *The Straits Times* (Singapore), 12 Apr 1969, p 12.
36 EW Barker, 25 SPR 21 Dec 1966, col 1051, at 1058. MP Suradi noted that the Report was 'a very significant document in the annals of Singapore' particularly since even the presence of the UMNO Secretary-General did not preclude a unanimous report: 25 SPR, 16 Mar 1967 col 1329, at 1395. In contrast, there was a dissenting opinion on special Malay rights attached to the 1957 Reid Constitutional Commission report for Malaysia, which was considered 'politically quite disastrous': Outward Telegram,

in quasi-religious terms, as the people's 'faith' in the democratic system, their 'belief and trust in the rule of law'[37] and their 'spirit of racial tolerance and understanding'.[38] This is the 'Spirit' behind the 'Law' and imparting constitutional status to such principles is a method of reflecting and communicating fundamental values to the polity, what Berman calls the 'legal emotions, legal passions' constituting 'the religious dimension of law'.[39]

In identifying certain fundamentals of the Singapore polity, the Commission was guided by PM Lee's admonition that 'the anti-thesis of multiracialism and the anti-thesis of secularism' held 'perils of enormous magnitude' for the peoples of South-East Asia and could invite Big Power ideological struggle. To avoid the 'fissiparous effects'[40] of a society based on exclusivity of race, language or religion, the Commission endorsed the view that Society should be fashioned on the basis of a multiracial, secular state where none could say '*Satu Bangsa, Satu Bahasa, Satu Ugama*' (one race, language, religion). This imperative transcended 'an idealistic desire to create a just new world'[41] and was characterised by the Commission as a 'nonracial approach' facilitative of 'the growth of a united, multiracial, free and democratic nation' where all citizens had 'equal rights and equal opportunities'.[42]

The resulting Constitution does not contain any preamble or explicit constitutional principles, despite Law Minister EW Barker's statement that 'We will have another entrenched clause to safeguard democracy. We don't want any totalitarian regime to take over'.[43] Unlike more recent South-East Asian constitutions, the Singapore Constitution lacks any statement of commitment to democracy.[44] Nevertheless, from the Report, the principle of secularity, multiracialism and democracy are clearly espoused as fundamental to the constitutional order. The courts have recognised principles including the separation of powers,[45] rule of law[46] and implicitly affirmed some notion of democracy.[47]

from the Secretary of State for the Colonies, sent 30 Jan 1957 to HE Ambassador, Rome (Public Record Office, CO 1030/519).

37 See Li-ann Thio, 'Lex Rex or Rex Lex – Competing Conceptions of the Rule of Law in Singapore' (2002–03) 20 UCLA Pac. Basin L.J. 1.

38 Wee Report, supra, note 16, para 74.

39 Harold J Berman, 'Law and Logos' (1994) 44 DePaul Law Review 143, at p 159.

40 Supra, note 12.

41 Transcript, supra, note 10.

42 Wee Report, supra, note 16, para 10.

43 'A team of experts to draft S'pore Charter', *The Straits Times* (Singapore), 11 Sept 1965.

44 E.g. Section 6(c), Constitution of Timor Leste; Chapter I Section 2, 1997 Thai Constitution; Art 11 Section 1, Constitution of Philippines (1987).

45 *Cheong Seok Leng v Public Prosecutor* [1988] SLR 565, at p 575D.

46 *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132, at p 156B.

47 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582, at p 632; *Chee Soon Juan v PP* [2003] 2 SLR 445 at pp 450–1.

In dealing with minorities, the option of having judicially enforceable group rights was rejected in favour of the principle that 'No one citizen has or ought to have less or more rights than another citizen.'[48] The focus on equal citizenship was assimilationist in orientation, presuming the submergence of ethno-cultural differences under a common civic identity, after the Swiss vision of citizenship which is based on a spiritual community of ideas rather than a materialistic bond based on blood or language. Indeed, the Swiss model has been lauded as a 'model of freedom and democracy . . . [where] people of different races and tongues can work together'.[49] Malay MP Suradi noted that incorporating the Commission's recommendations into the Constitution would create 'a model Constitution',[50] indicating that Singapore was guided 'by the system practised in Switzerland' and able to secure 'unity among diverse peoples and diverse religions'.[51] In managing religious and racial diversity, the Constitution did recognise distinct group identity, particularly the special status of the Malays as the indigenous people[52] and some measure of autonomy in relation to religious and customary laws,[53] further obliging the government to 'care for the interests of the racial and religious minorities in Singapore'.[54]

(B) INSTITUTIONS

The institutions proposed were conceptualised as additions to the existing system of parliamentary democracy within a unicameral state. The proposal for a non-elective, advisory 'Council of State' was adopted, with substantive modifications, in the form of the Presidential Council (later the Presidential Council on Minority Rights or PCMR). While accepting in principle the virtue behind the idea of having an Ombudsman to investigate maladministration, this proposal has never materialised.

Constitutional supremacy and entrenchment procedures

In 1965, the Singapore Constitution was made an uncontrolled one[55] whereby the Constitution could be altered by a simple parliamentary majority vote,[56] which is no different than amending ordinary statutes. This

48 Wee Report, supra, note 16, at p 5, para 22.
49 De Eckhardt, (Hungary), League of Nations Official Journal Special Supplement 130, at pp 69–70.
50 25 SPR 16 Mar 1967, col 1329, at 1398.
51 Rajaratnam, 25 SPR, 16 Mar 1967, col 1329, at 1399.
52 Art 152(2), Constitution.
53 Art 153, Constitution.
54 Art 152(1), Constitution.
55 *McCawley v The King* (1920) 28 CLR 106, at pp 114–15.
56 Art 90 which required that constitutional amendment bills be supported by a two-thirds parliamentary majority was repealed by the *1965* Constitution Amendment Act: see 24 SPR, 22 Dec 1965, col 430.

implied that Parliament, rather than the Constitution, was supreme.[57] The Commission recommended including a constitutional supremacy clause, today enshrined in Article 4, to avoid any doubt as to its status as the supreme law of the land.[58]

The Commission proposed three different modes of entrenchment, instructively specifying the application of the most onerous procedures to the most important constitutional provisions:[59]

(a) *Constitutional Amendment Bill to Declare its nature*: applies to all constitutional provisions;
(b) *Support of two-thirds parliamentary majority*: Public Service Commission, Judicial and Legal Service Commission, Council of State, Attorney-General, Ombudsman, Remuneration of Speaker, Citizenship;
(c) *Support of two-thirds of electors at a national referendum and a two-thirds parliamentary majority*: All fundamental rights (including proposed new rights); Judiciary; Legislature; Parliament; General Elections; Minorities and Special Position of the Malays; Constitutional amendment procedure.

The Commissioners were not politically naïve utopians, recognising the efficacy of amendment procedures depended on the size of the parliamentary majority the ruling party commanded.[60] Eventually in 1972, only matters pertaining to the sovereignty of Singapore were deeply entrenched in requiring a national referendum vote.[61] Subsequently, the amendment procedure was itself modified by new Articles 5(2A) and 5(A), incorporating a role for populist votes through a referendum and the exercise of presidential discretion.

Rights and processes

The Wee Commission considered the fundamental rights of citizens and individuals. It noted the absence of a bill of rights was an 'accident of history', as the existing written Constitution was designed for a constituent state within a Federation. With a view 'to preserve the common destiny of the peoples of Singapore and Malaysia',[62] a modified version of the Malaysian bill of rights was largely preserved.

57 Notably, PM Lee stated that eventually 'what will be the supreme law will be the Republic of Singapore Constitution after it has been brought up to date', with the intent to embody it in 'one simple document'. 24 SPR, 22 Dec 1965, col 430, at 446.
58 Wee Report, supra, note 16, para 74.
59 Wee Report, ibid., pp 23–6, para 73–81.
60 Wee Report, ibid., para 77.
61 32 SPR, 3 Nov 1972, cols 307ff.
62 Wee Report, supra, note 16, para 14.

The Wee Commission recommended including three new articles not found in the Malaysian one, which the government considered 'acceptable in principle' and would be 'incorporated in some form in the new Constitution to be drawn up', but this did not eventuate.[63] The rights related to the prohibition against torture, the right to vote and for a judicial remedy to enforce rights. In making its recommendations, the Commission considered both international documents like the Universal Declaration on Human Rights as well as foreign constitutional texts, such as that of Guyana, part of which was appended to the Wee Report.

Early days: A constitution for a new republic and developing state

In the twenty-first century, where Singapore ministers are amongst the highest paid in the world,[64] it is almost quaint to recall the concern with costs attending the discussion of proposed constitutional institutions. The proposed Council of State was called 'a luxury Singapore can ill-afford'[65] and MPs in debating the Report feared 'our Republic, with its limited resources of incomes, cannot afford the luxury of a two-House system'[66] entailing annual costs in allowances of 'more than $100,000 every year'.[67]

From the outset, the shaping of the Singapore Constitution was determined by the imperative of economic development through maintaining a stable social order attractive to foreign investment and trade. Central to this was maintaining religious and racial harmony within a plural society with its Malay minority. In this, Singapore departed from Malaysian practice. Notably, the youth of the republic undergirded some of the reasons for the choices made in constitutional design, within the context of a politically semi-authoritarian state, armed with colonial legacies like preventive detention laws.

Political dominance, political immaturity and a tentative faith towards institutions and constitutional experimentation

The need to craft a Constitution able to address a developing country's needs and the perceived political immaturity of its citizens motivated various recommendations and influenced the rejection of others.

63 EW Barker, 25 SPR 21 Dec 1966, col 1053.
64 Civil Service Salary Revisions, 83 SPR, 11 May 2007.
65 Ho See Beng, 25 SPR, 17 Mar 1967, col 1389, at 1393.
66 Ng Yeow Chong suggested the payment of only a nominal honorarium to members of the proposed Council of State: 25 SPR, 15 Mar 1967, col 1276, at 1414.
67 Ho Cheng Choon was concerned about additional expenditure: if 21 Councilors were paid $500 per month in allowances, this amounted to more than $100,000 a year 25 SPR, 14 Mar 1967 col 1258, at 1261. Today, ministerial salaries are well over 2 million SGD/year.

There was a clear sense in the 'barely one year old' republic that its citizens possessed 'little experience of general elections'.[68] The recommended inclusion of a constitutional right to vote stemmed from the Commission's belief that Singapore citizens had not 'grown up to cherish as an inalienable right' the principle of government by popular consent, expressed through 'periodic and general elections by universal and equal suffrage and held by secret vote'.[69] They had only the experience of two general elections in 1959 and 1963. The fear was that a 'significant proportion' of Singaporeans would not be sufficiently alert to any inroads a future government might make to the 'democratic system of general elections'.[70] Thus, a constitutional right to vote could help 'constitute' a democratic ethos.

In rejecting the proposal for a parliamentary ombudsman, Law Minister EW Barker noted that parliamentary democracy in Singapore 'is still in its infancy' and that citizens had not fully developed 'civic sense and awareness of their legal rights and obligations'; to take 'effective root', parliamentary democracy had to be 'nurtured'. MPs urged that before introducing a new institution like an Ombudsman 'into a developing country', care had to be taken to ensure it fitted with the social circumstances of a heterogeneous community.[71] This alluded to the fear that an Ombudsman might not represent all races equally and concern too that it might detract from the role of Members of Parliaments (MPs) as channels for grievance articulation.[72] Barker asserted that if the People were dissatisfied with the Government, 'their remedy is at the polls'.[73]

Nonetheless, the government supported the principle of having an institutional check against maladministration, but without the power to criticise legislative policy, and which office was accountable to Parliament but independent of the Executive.[74] As the Ombudsman was then a novelty in England and only four years old in New Zealand, it was considered inopportune to have one until the results of this experiment in other Commonwealth jurisdictions were known.[75]

The scheme could be reviewed after 'political knowledge advances',[76] indicating a modicum of openness towards establishing institutional checks to curtail public power abuses.

This reveals a certain degree of caution towards constitutional experimentation, eliciting *The Straits Times* (Singapore)' critique that the

68 Wee Report, supra, note 16, p 11, para 43.
69 Ibid.
70 Ibid.
71 Selvadurai, 25 SPR, 15 Mar 1967, col 1276, at 1343.
72 EW Barker, 25 SPR, 17 Mar 1967, col 1389, at 1427.
73 EW Barker, ibid., col 1430.
74 Wee Report, supra, note 16, para 17.
75 EW Barker, 25 SPR, 17 Mar 1967, col 1389, at 1428.
76 P. Govindaswamy, 25 SPR, 15 Mar 1967, col 1276, at 1377.

PAP government was not normally alarmed by novelty, which was its strength. Indeed the scheme was opportune insofar as 'any step to strengthen parliamentary control'[77] was welcome, given the 'further defect' of there being 'no effective Opposition in Parliament' for 'practical purposes'.[78]

There were in fact early departures from the British parliamentary model to suit the political experience; PM Lee in 1965 declared his intent to 'mould our constitution in accordance with our needs'.[79] This included deleting those Malaysian constitutional provisions requiring the holding of by-elections 'within three months of the vacancy occurring', with PM Lee opining that 'the Constitution would have worked worse if we had this three-month requirement'.[80] In 1970, PM Lee invited the British Foreign Commonwealth Office to 'polish' up the messy Singapore Constitution; as he reviewed the 'first-rate job' it dawned on him that 'the experts just had no idea why we had made certain basic alterations' such as enacting anti-hopping laws, which was criticised as departing from British practice where a MP could retain his parliamentary seat after leaving his political party.[81] PM Lee was determined not to allow 'a constitutional perfectionist' to alter what he thought was 'an unusual mote'.[82]

Where it suited the PAP government, it adopted modified if weakened versions of proposed institutions which did not undermine the paradigm of the strong state or politically dominant government. For example, the Council of State as a multiracial watchdog body designed to scrutinise potentially discriminatory legislation was adopted and named the Presidential Council. EW Barker traced its origins to the 1958 Kenyan constitution;[83] upon independence, Kenya removed this institution for fear it would perpetuate racial discrimination and undermine ministerial responsibility. Nevertheless, Barker considered this 'a promising innovation' in Singapore to ensure harmonious social relations; being advisory in nature,

77 'The Peoples Champion', *The Straits Times* (Singapore), 4 Jan 1967.

78 Wee Report, supra, note 16, p 19, para 61.

79 Lee Kuan Yew, 24 SPR 22 Dec 1965, col 430.

80 Lee Kuan Yew, 44 SPR 25 July 1984, col 1789, at 1832. Subsequently, by-elections have not been held despite vacancies on grounds of expediency.

81 In 1961, the PAP lost 3 of its 43 Assemblymen and in mid-1961, 13 PAP assemblymen crossed the floor to join the Barisan Socialis, leaving the PAP with 27 assemblymen and a bare parliamentary majority. PM Lee never forgot the 'awful price' he paid prior to introducing anti-hopping laws: 44 SPR 25 July 1984, col 1819.

82 Lee Kuan Yew, 44 SPR 25 July 1984, col 1789, at 1818–19.

83 Conversely, Gerald de Cruz (1969) 1 Sing LR 20–5 argued that its historical origins were 'entirely local', stemming from the proposal for a Council of Races to scrutinise laws to prevent discrimination on the grounds of race, religion and sex in the proposed People's Constitution for Malaya (including Singapore) put forward in 1947 by Pan-Malayan Council of Joint Action and Pusat Tenaga Raayat: *The Straits Times* (Singapore), 28 May 1969.

it could not significantly impede the legislative agenda, leaving 'the legislative primacy of Parliament unaffected'.[84] This was favoured over proposals to have a Committee of minority representatives chosen directly by minority groups to represent minorities in the elected chamber of Parliament or to elect or nominate minorities to sit in an Upper House.[85]

However, proposals which could weaken a 'strong state' by diluting political dominance and impairing the effective implementation of policies were rejected. This included an electoral system based on proportional representation and the coalition government it often brings forth, for fear of provoking communal politics and eliciting a 'weak government'.[86] The government preference was to maintain an electoral system which produced 'decisive majorities'. The function of elections was 'not to "mirror" the views of the electorate but rather to provide a strong single-party government'.[87] Thus, the proposal of UMNO Singapore to base elections not on constituencies but to allow electors to vote for the party that would best suit their interests was rejected. The reasoning was this scheme would make by-elections unnecessary and ensure 'fairness to the minority groups' by guaranteeing 'the unity of minority groups'.[88] This proposal, which would abolish electoral boundaries and eradicate the probability of one-party Government, was also supported by a five-member group claiming to represent the Singapore Indian community.[89] The intent was to make it possible for many parties to be elected to Parliament, providing an Opposition. The party securing the most votes would be allocated seats in proportion to the number of seats won. The memorandum signed by these five organisations stated 'We are loath to ask for representation of minorities in Parliament' and rejected the idea of nominating MPs to represent minority interests.[90]

The economic development imperative

Constitutional rights limit state power. Bearing in mind the imperative of maintaining a 'strong state', the government in 1965 specifically excluded the Article 13 property rights clause of the Malaysian Constitution from operating in Singapore. This was to avoid judicial challenges to the

84 EW Barker, 25 SPR, 17 March 1967, col 1389, at 1431–2.
85 Wee Report, supra, note 16, p 13, para 46.
86 Lee Kuan Yew, 44 SPR 24 July 1984, col 1721, at 1735; this sentiment was reiterated in 1996 by Goh Chok Tong, 66 SPR, 28 Oct 1996, col 755, at 823.
87 Chandra Das, 44 SPR 25 July 1984, col 1789, at 1798.
88 'Umno wants test in N-language for citizenship rule', *The Straits Times* (Singapore), 5 Mar 1966, p 61.
89 'That Umno elections proposal gets backing' *The Straits Times* (Singapore), 12 Mar 1966.
90 Ibid.

adequacy of compensation awarded for compulsorily acquired land. Article 13 would impede government schemes for swift urban renewal and rural development and was 'unsuitable to a developing country'.[91] The government rejected the Wee Commission proposal for a property clause requiring compensation on 'just terms',[92] to strike a 'just and fair balance' between private ownership and public interest.[93] PM Lee noted that Article 13 was based on the equivalent Indian constitutional provision, which obstructed land reform and had to be amended.[94]

PM Lee speculated that the Commissioners would have imbibed the central tenet of the sanctity of property from their English legal training.[95] He highlighted the 'special situation' of land in Singapore, arguing that if considerations of private property had dominated, 'representative government in Singapore today would not have been possible'.[96] It would have been economically prohibitive for the government to acquire and develop land, hence the de-constitutionalisation of the question of property by authorising acquisition on the basis of legislatively stipulated compensation.[97] Any questions arising from acquisition would be channelled instead to a Land Appeals Board, excluding a judicial role.[98]

In response to a letter written by JB Jeyaretnam arguing that the absence of a property clause reduced 'the right of private property to the benevolence of the Government in power'[99], the government argued that to allow a 'more just and equal society' to emerge, the property rights of a privileged few had to give way to the 'living rights of the many'. Otherwise, the government would not have been able to acquire fire sites at lower compensation rates, allowing its redevelopment which provided housing in modern flats to 10,000 families.[100] Thus, individual rights were to be subordinated to communitarian and economic concerns to facilitate effective government action.

The government maintains that this 'economics first' policy is the basis of Singapore's success, securing social and political stability integral to economic take-off through limiting political freedoms.

91 Ahmad bin Mohd Ibrahim, State Advocate-General, 'The New Constitution for Singapore', *The Straits Times* (Singapore) Letters, 22 Dec 1965.
92 EW Barker, 25 SPR 21 Dec 1966, col 1051, at 1054.
93 Wee Report, supra, note 16, p 11, para 42.
94 Ahmad Ibrahim, 'Property Rights in Singapore', Letter, *The Straits Times* (Singapore), 13 Dec 1965; SPR 22 Dec 1965, col 430.
95 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1295.
96 Ibid.
97 Ibid., at col 1296.
98 EW Barker, 25 SPR 21 Dec 1966, col 1051, at 1054.
99 JB Jeyaretnam, Letter, *The Straits Times* (Singapore), 8 Jan 1966.
100 Yaacob bin Mohamed, Minister of State, Prime Minister's Office, 'To safeguard the rights of the many', *The Straits Times* (Singapore), 8 Jan 1966.

Social stability: Religion and the secular state

Another aspect of social stability revolved around a conscious management of the delicate matters of racial and religious diversity. Unlike Malaysia, Singapore does not have an official religion. As PM Lee noted, 'whereas we would have sought one solution for the whole, now there are two experiments being carried out in these two halves'.[101]

The Wee Commission described Singapore as a 'democratic secular state'[102] although the Constitution does not explicitly identify the nature of the Religion-State relation. This has subsequently been affirmed by ministerial statements that Singapore is 'secular but not atheistic'[103] and judicial statements that Singapore practised a form of 'accommodative secularism'.[104] Cardinal to this is the non-preferential treatment by the state of any religion, which is the basis for rejecting an anti-propagation clause after the Malaysian religious liberty model in relation to Muslims. LP Rodrigo, speaking for the Law Alumni of the Universities in Malaysia (Singapore section) stated that such a restriction on religious freedom was inconsistent 'with the spirit of equality which should prevail' in the fundamental liberties chapter.[105]

The Singapore Constitution does not define 'Malay', the complexities of which arose during Commission discussions. The Commission chose not to define the races, languages or religious minorities in Singapore, in hopes of the 'eventual realisation' of a 'united, multiracial multicultural society' under a 'democratic system of government'.[106] It rejected proposals by a Malay political organisation to import Article 160 of the Malaysian Constitution which defines 'Malay' as 'a person who professes the Muslim religion, habitually speaks the Malay language and conforms to Malay custom'. This conflates race and religion. The UMNO Singapore delegation explained the importance of having a universal definition of 'Malay' since, for example, only Malay children enjoyed free secondary education in Singapore and each school defined Malay differently. The delegation agreed that 'Malay' should be tied down to possession of citizenship, asserting that 'Malay' was not to be understood exclusively in ethnic terms. For example, Inche Ahmad, the Chairman of UMNO Singapore stated that it

101 Transcript, supra, note 10.

102 Wee Report, supra, note 16, para 37.

103 'Government is secular, not atheistic: BG Yeo', *The Straits Times* (Singapore), 8 Oct 1992, at p 3. See para 5, Maintenance of Religious Harmony white paper (Cmd. 21 of 1989).

104 *Nappalli v ITE* [1999] 2 SLR 569, at para 28 ('the protection of freedom of religion under our Constitution is premised on removing restrictions to one's choice of religious belief'); Para 18, Maintenance of Religious Harmony white paper, ibid. See Thio Li-ann, 'Secularism, the Singapore way' *The Straits Times* (Singapore) Review, 30 Oct 2007, at p 25.

105 'The right to choose one's religion – by a padre' *The Straits Times* (Singapore), 9 Mar 1966.

106 Wee Report, supra, note 16, para 13.

was very difficult for the Malay community to accept a non-Muslim as a Malay, proposing that such persons should not enjoy the special rights of Malays under Article 89(2). He said the Malay community was prepared to extend privileges to non-ethnic Malays like an Indian or European who spoke Malay, practised Malay customs and professed Islam – which was contrary to the Article 98(2) characterisation of 'Malay' as the indigenous people.[107]

On this point, representations were made by private individuals, including a Malay Christian priest, Adam Ibrahim, who considered it possible to practise Malay traditions and customs without being Muslim.[108]

The Commission rejected the proposed UMNO definition on two counts as being both under- and over-inclusive. Firstly, the criterion was not tied to ethnicity and therefore over-inclusive in including ethnically non-Malays within the 'Malay' category.[109] Secondly, non-Muslim Malays or those choosing 'to renounce Islam (admittedly very few)' would be denied the benefit of the 'special position'.[110] Implicitly, Singapore supports a voluntarist conception of religious identity, as the Constitution contains no ascription of racial and/or religious identity.[111]

The separation of religion and state was considered appropriate to ensure 'the safeguards for political rights and democratic values must be secular, not religious institutions'.[112] In eschewing 'obscurantism', PM Lee declared Singapore was 'not a theocratic state'[113] and that multi-religiosity problems would be solved 'on the basis of a secular, scientific, modern State'[114] as having a uni-cultural state and a plural society in an era of 'competing nationalisms' in post-colonial Asia would lead 'to chaos and perdition'.[115] He admonished religious groups not 'to seek temporal power in order to enforce its values on the others'.[116] The issue of not mixing 'religion' and 'politics', which are not subject to easy definition, remains a continuing concern.

107 'How other races can also be Malays: UMNO', *The Straits Times* (Singapore), 4 Mar 1966, p 59.

108 He stated his personal belief that there were not more than 10 Malays in Singapore who had become Christian, knowing about 4–5 personally: 'The right to choose one's religion – by a padre' *The Straits Times* (Singapore), 9 Mar 1966.

109 Wee Report, supra, note 16, p 9, para 35.

110 Ibid.

111 Where this is an issue, as in the composition of the Group Representation Constituency, the determination of ethnicity is a mix of personal and community perception: Art 39A(4).

112 Supra, note 103, at para 21.

113 Lee Kuan Yew, Speech, Transcript, Sri Temasek, 8 Oct 1965: http://stars.nhb.gov.sg/.

114 Lee Kuan Yew, ibid.

115 Tay Boon Too, 25 SPR, 17 Mar 1967, col 1389, at 1403.

116 Transcript, Speech, Prime Minister, Presentation Ceremony; Buddhist Temple, St Michael's Road, 6 Jan 1966: http://stars.nhb.gov.sg/.

Social stability: The minorities question

In handling the minorities question, the Wee Commission assumed that the best way to safeguard rights of 'racial, linguistic and religious minorities' was to protect the fundamental rights of all individuals,[117] applying the equality clause,[118] rather than special group rights. The Constitution does recognise the special status of Malays as indigenous peoples and imposes a government duty of care towards racial and religious minorities.[119]

The Commission rejected proposals from UMNO Singapore to constitutionally entrench temporary special rights for Malays in the fields of education, commerce and industry and political representation, which would terminate after economic parity was reached with the other communities.[120] UMNO Singapore urged that a harmonious multiracial society was impossible 'if one of the important members of the multiracial society lagged behind from every sphere of prosperity;'[121] Malays were 'lagging very far behind' in the 'economic field' as 'the economy of Singapore is in the hands of one race'.[122] Section 89(2) could only be successfully implemented by encouraging Malays through 'monetary or other help in commerce and industry'.

The government's preferred approach was not to institutionalise affirmative action while recognising minorities could best emerge from their backwardness through 'education and economic thrust'.[123] It acknowledged that if an individual was discriminated against for a flat, scholarship, job, social welfare because of race, language or religion, 'he can go to court' and if proved, 'the court will have to enforce the Constitution and ensure minority rights'.[124] However, the promised 'entrenched and enforceable' clauses were cast as individual, not corporate rights.

117 Wee Report, supra, note 16, paras 11–12; JB Jeyaretnam, 'The minorities and individuals' *The Straits Times* (Singapore), 24 Dec 1965 writing 'a more pressing problem than rights of minorities was the right of the individual' – if this was safeguarded, 'the rights of minorities would automatically follow'.

118 Notably, the Commission recommended that equality in law as well as in impact should be safeguarded. Proposed art 8B(1) stated 'no law shall make any provision that is discriminatory either of itself or in its effect . . .' Wee Report, supra, note 16, paras 32–3.

119 Art 152(1).

120 'Privileges not for ever', says UMNO Chairman', *The Straits Times* (Singapore), 11 Mar 1966, at p 67.

121 Quoting from the UMNO Memorandum submitted to the Wee Commission: Constitutional Commission: Third Day, 'How other races can also be Malays: UMNO'. *The Straits Times* (Singapore), 4 Mar 1966.

122 'Umno wants test in N-language for citizenship rule', *The Straits Times* (Singapore), 5 Mar 1966, p 61.

123 Lee Kuan Yew, Transcript, Speech, Sree Narayana Mission, 12 Sept 1965: http://stars.nhb.gov.sg/

124 Ibid.

The Commission distinguished between the 'protection' and 'promotion' of minorities, with Chief Justice Wee stating that the former did not fall within the Commission's terms of reference.[125] This was in response to a representation by various Tamil organisations urging the promotion of minority interests by positively providing employment opportunities and education to encourage the 'growth of the weaker sections of our society'.[126] What was being requested was to aid minorities 'seeking opportunities to help ourselves'. The basic Commission prescription was for a 'non-racial'[127] approach towards government as all individuals regardless of race 'are still citizens'.[128]

This resonated with government policy that success is achieved when 'a minority no longer is conscious of the fact that it is a minority'.[129] Foreign Minister Rajaratnam distinguished between claims by a minority for rights 'because they are afraid of the majority' denying them equal rights, and the claim for 'more rights than the others' or 'unequal rights in a democracy'.[130] Rajaratnam considered it 'futile, impractical and dangerous' for minorities to seek security in minority rights 'additional to those enjoyed by the majority',[131] advocating a constitution 'based on the principle of equal rights'.[132] As the Commission espoused this view, Rajaratnam observed this was why it 'dismissed minority rights in a few paragraphs' and concentrated on individual rights as 'the real safeguards for the minorities'.[133] PM Lee considered the Commission's 'unanimous conclusion' that the rights of all citizens must be protected 'regardless of race, language or religion' as its 'biggest single contribution' to 'multiracial understanding' and tolerance within a plural society.[134] The problem was how to ensure racial minorities, as perpetual numerical minorities, could play a part in managing society, given that their route to political influence may not be open 'on the basis of one man one vote'.[135]

While eschewing a group rights oriented approach, minority concerns did receive constitutional expression through designing institutions to

125 'No amendments without consent urges Tamil Minority', *The Straits Times* (Singapore), 6 Mar 1966, at p 63.
126 Ibid.
127 Wee Report, supra, note 16, p 3, para 10.
128 Supra, note 125.
129 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1299.
130 S. Rajaratnam, 25 SPR, 16 Mar 1967, col 1329, at 1356.
131 Rajaratnam, ibid., at col 1356.
132 Rajaratnam, ibid., at col 1358.
133 Rajaratnam, ibid., at col 1359. A *Straits Times* editorial supported this approach, noting it 'impractical' and 'dangerous' to give minorities 'favoured treatment'. 'Watchdog Council, 12 Apr 1969, at p 12.
134 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1284.
135 Lee Kuan Yew, ibid., at cols 1285, 1287–8.

conduct race-sensitive legislative scrutiny in the form of a Council of State and to give potentially aggrieved parties 'adequate opportunities to make representations'.[136] Proposals potentially intensifying communal politics,[137] such as mandatory minority parliamentary representation, a proportional representation system[138] or for separate electoral rolls involving 'the complicated task of defining the various minority groups',[139] were rejected.[140]

The Commission also rejected a suggestion to constitute an advisory board composed of members from specified racial groups to advise the President on proposed legislation harmful to minority interests. Such membership would not be 'sound' in erecting a 'perpetual barrier, invisible but no less real' between majorities and minorities, resulting in 'permanent intercommunal and inter-sectional dissension'.[141] Practically, if all racial groups demanded a representative on such a body, this would produce 'an unwieldy and impractical body'.[142] If denied a representative, a sense of unfair treatment and inequity could fester. Proposals based on explicit racial criteria in composing institutions were rejected, such as the proposal to appoint minority representatives to the PSC to prevent minority interests from being overlooked.[143] In subsequent years, this method was employed to formalise the practice of multiracial politics, which had been 'espoused by every responsible political party from the very beginnings of party politics in Singapore',[144] through the Group Representation Constituency (GRC) scheme, introduced in 1988.[145] Rajaratnam deemed 'the emergence and consolidation of multiracial parties'[146] the best guarantee against communalism.

Legal approaches alone were not considered sufficient to handle the minorities' problem. Minorities were urged to seek 'political and economic solutions to reinforce whatever may be written into the constitution'.[147]

136 Wee Report, supra, note 16, p 13, para 46.
137 Wee Report, ibid., p 13, para 48.
138 Lee Kuan Yew, 44 SPR, 24 July 1984, col 1721, at 1725 ('Proportional Representation has no place because . . . it will only spawn political parties on racial, linguistic and religious lines . . .'). A *Straits Times* editorial, 'Minority Rights', 16 Mar 1996 noted that 'no minority rights have been written into the Constitution, except for the permitted use of four languages in the legislature'.
139 Wee Report, supra, note 16, p 14, para 49.
140 Wee Report, ibid., p 13, para 47.
141 Wee Report, ibid., p 14, para 50.
142 Ibid.
143 Wee Report, ibid., p 27, para 85.
144 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1284.
145 See Thio Li-ann, 'The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian' Democracy' (2002) 6 Sing JICL 181 at pp 216–31.
146 Rajaratnam, supra, note 130, at 1370.
147 Rajaratnam, ibid., at 1362.

The 'psychological aspect' of the 'so-called minority problem' could only be addressed if minorities stopped thinking of themselves as or politically acting as minorities.[148] Indeed, PM Lee admitted the PCMR's chief virtue was providing 'deep psychological assurance' that all groups had access to top institutions of power, which 'acts more by the fears it makes unnecessary' than by remedying actual evil.[149] While advocating constitutional safeguards, there was a clear realisation of the limits of law in cultivating an ethos of ethnic and religious tolerance.

Evolving conceptions of parliamentary democracy

An initial faith in Westminster democracy

At the inception of nationhood, the political leadership declared a faith in democracy as a safeguard against the communists who had rejected the path of 'the constitutional struggle of winning power by popular elections'.[150] In September 1965, PM Lee underscored the importance of maintaining a government commanding majority support 'to ensure that the Communists can never get the support of the majority in free and secret elections'.[151]

The Wee Report recommended three primary principles to give flesh to the practice of parliamentary democracy. The associated parliamentary debates offer fascinating insights into what the essential elements of Westminster parliamentary democracy of the Singapore variety were considered to be.

The importance of being elected on a general franchise

Firstly, the principle of elective representative government was the animating philosophy behind the recommendations. The Commissioners espoused a model of democracy which propounded that the peoples' representatives should be directly elected into the legislative branch. This is distinct from the colonial era legislative assembly which composed both elected and nominated members, undercutting the precept of government by popular consent. Thus, preserving 'untouched' a unicameral Parliament where all MPs were popularly elected in regular secret elections[152] was considered basic to a sound democratic order.

148 Rajaratnam, ibid., at 1363.
149 PM Lee Kuan Yew 25 SPR, 15 Mar 1967, col 1276, at 1291.
150 Transcript, supra, note 13.
151 Prime Minister, Speech to Senior Civil Servants, Victoria Theatre, 30 Sept 1965: http://stars.nhb.gov.sg/
152 Wee Report, supra, note 16, p 15, para 54.

Furthermore, the 'one-man one vote' principle was integral to the conception of parliamentary democracy and majority rule which made it impossible 'to go against the grain of the whole of your community in policies which do not win their acceptance'.[153] PM Lee underscored the necessity of carrying the majority of the people – 'Never mind all the jibes about one-party government and dictatorship'.[154] However, to prevent the tyranny of the majority, the Law Minister in 1965 stated that the constitution would be drafted to ensure 'a place in the sun' for all as Singapore was neither a Chinese or Malay city so '. . . what we want is the principle of one man one vote'.[155]

Consequently, the Commission rejected the idea of minority communities selecting their MPs rather than on general franchise, as their presence in an elective chamber would dilute democracy. It advocated that 'the practice of parliamentary democracy' should enjoy 'the fullest scope unhindered by non-elected representatives'. The underlying theory of representation was that MPs represented their own constituencies and the nation as well. It was considered 'disastrously retrograde'[156] to have parliamentarians nominated by racial groups.

As a marker of 'real progress' towards self-government, the British considered a legislative assembly 'should be primarily an elected body'.[157] The 1954 Rendel Constitutional Commission report contemplated the phasing out of the Nominated Unofficial Member system but during the 'transition period' it should continue to allow 'adequate opportunity for the representation and defence of the views of any significant minority groups'; it assumed that the need for this would wane with the evolution towards 'a single homogenous community' and that reservations towards accepting a representative on a nonracial basis would decrease.[158]

It recommended terminating the functional representation allocated to the various chambers of commerce. The original rationale behind guaranteeing trading interests legislative representative was the centrality of trade to Singapore's existence. The Rendel Commission noted the 'general practice in other countries possessing parliamentary institutions' that all special interests should 'rely on an ordinary electoral system' for protection. Special functional representation was thought to enhance communal divisions and would politicise hitherto non-political groups.[159]

153 Lee Kuan Yew, 25 SPR, 15 Mar 1967, col 1276, at 1303.
154 Ibid.
155 Quoting Law Minister EW Barker, 'Australia, NZ, India to help Singapore' *The Straits Times* (Singapore), 8 Sept 1965.
156 Wee Report, supra, note 16, p 14, para 49.
157 Report of the Constitutional Commission Singapore 1954, para 26; Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore* Appendix C, at p 1000, 2nd edn (Asia: Butterworths, 2007) (hereafter, 'Tan and Thio').
158 Ibid., paras 38–9; Tan and Thio, *id*., Appendix C, at pp 1002–3.
159 Ibid., paras 31–7, Tan and Thio, *id*., Appendix C, at pp 1001–2.

Parliament, legislative supremacy and popular consent

The concern with maintaining an elective Parliament informed the discussion concerning changes to its composition by creating a Council of State. This proposed legislative review body, staffed by non-elected officers, would undermine 'the whole thesis of representative government'[160] since the views of a group of people not representing the majority of any particular section of community were being clothed with 'some authority'. However, safeguards could ensure against the peddling of 'sectional or functional interest'.[161]

In considering how such a Council of State might approximate the Upper House in a bicameral parliamentary system, the Commission preferred the Council be a purely advisory body[162] which gave 'serious and weighty advice' in public without power to control legislation.[163] The Law Minister underscored this, perhaps to assuage concerns that having appointees in a parliament-associated body would dilute democracy and be a 'derogation of the supremacy of Parliament'[164] as it could only delay, not veto a bill; its chief power lay in publicising a discriminatory bill, exposing the government to public 'odium' for 'enforcing majority rule to the disadvantage of a minority, although this is a normal democratic practice'.[165]

Thus, the Council was not 'a supra-Parliamentary body' overseeing Parliament as only Courts could interpret legislation and 'only the electorate' can effect changes in legislative policy.[166] Rejecting the Commission recommendation for public hearings, PM Lee said the 'heat and dust' of politics dissuaded men of intellectual qualities from entering the uncongenial realm of politics. The Council of State would allow men to take the 'middle course' of privately advising caution as opposed to outright denouncement of policies.[167]

The lack of a viable alternative government: 'The Parliamentary Gap'

The workings of the Westminster parliamentary system is predicated on the prospect of an alternative government replacing the incumbent as the primary political check, which underwrites a responsive, representative government as a product of the 'one man one vote' system. In past British

160 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1288.
161 Ibid., col 1289.
162 Wee Report, supra, note 16, p 15, para 54.
163 Ibid.
164 EW Barker, 29 SPR 12 June 1969, col 60, at 62.
165 EW Barker, ibid., at 63.
166 EW Barker, 30 SPR, 2 Sept 1970, col 195, at 197.
167 Lee Kuan Yew, 25 SPR 15 Mar 1967, cols 1276, at 1284, 1289.

practice at least, the system has been effectively bipartisan where at least two viable political parties compete for the reigns of government control.

Given that the People's Action Party (PAP) controlled 49 of 51 parliamentary seats, the Report evidenced concerns that some institution should be tasked with discharging the functions of an absent parliamentary opposition, in terms of legislative scrutiny and policy debate. PM Lee noted in 1965 that with the Opposition boycott of Parliament, the PAP government shouldered the 'added responsibility' of not only asserting its views but also expressing 'all the conceivable opposing points of view which we have considered before we have decided to over-rule them . . .' to discharge 'the duties of the Opposition'. Lee noted that PAP Backbenchers would act as constructive critics, as an open society required that certain policies and programmes be tested 'in the open argument'.[168] PAP Backbencher Ng Kah Thing opined that the lack of 'effective or responsible Opposition' in Parliament 'reflects the people's confidence in the government' to legislate 'honestly, fairly and reasonably in the public interest'.[169]

To provide for the contingency of no parliamentary opposition, the Commission proposed that the Council of State, composed of 'mature' citizens attaining 'eminence' or 'responsible positions' in their respective walks of life, could offer 'constructive and well-informed criticism'.[170] There was some ambiguity in the suggestion that the Council could 'play an effective and vital part in the affairs of the nation in many ways',[171] and whether this was confined to minority issues. However, the wisdom of conferring such function on the Council was questioned because institutions are designed to operate in the long-term and 'nobody can guarantee that there will never be an Opposition in this House'.[172] While noting the government could not be 'insensitive to the circumstances' surrounding the framing of 'the new Republic's constitution', where only the ruling party was represented in Parliament, it was not its business 'to create a respectable political opposition'.[173]

Eventually, the construction of the Presidential Council precluded this institutional trajectory. By 1969, the view that democracy was not destroyed for lack of parliamentary opposition began to be espoused as 'we cannot molly-coddle an Opposition into existence'.[174] In 1973, the restricted ambit of the newly 're-styled' 'Presidential Council for Minority Rights' was clarified.[175]

168 Lee Kuan Yew, 24 SPR 14 Dec 1965, cols 91, at 95, 107–8.
169 24 SPR 14 Mar 1967, cols 1276, at 1281.
170 Wee Report, supra, note 16, para 16.
171 Ibid.
172 Ho Cheng Choon, 14 Mar 1967, 25 SPR, col 1258, at 1261.
173 'The Citizen's Rights, *The Straits Times* (Singapore) Editorial, 28 Dec 1966 at p 28.
174 Wong Lin Ken, 29 SPR 12 June 1969, col 60, at 67.
175 32 SPR 16 Feb 1973, cols 405ff.

The role of the electorate and populist appeals

The realist appreciation of the utility and limits of a Constitution is evident from the Report and parliamentary debates. The Wee Report located the survival of 'parliamentary democracy based upon representative government' in the ability of Singaporeans to choose their representatives at general elections 'wisely and well'.[176] This appeal to populism permeates PM Lee's observation that the only long-run protection against 'a bad elected government' was not the Constitution but 'a highly sophisticated and educated electorate'.[177] The need to trust the electorate manifests in the view 'an educated and enlightened electorate'[178] was the sole cure for communalism, in responding to the claim that the Council of State evinced 'a basic distrust of democratically elected representatives of the people'.[179]

The shift towards autochthony

As the communist threat waned in the 1990s, the justification in developing an autochthonous political system began to assume the cast not of nationbuilding but of cultural particularities.[180] Political stability through strong state control was and is prioritised as integral to achieving developmentalist objectives and now, economic flourishing in an era of globalisation.

In 1967, the PAP controlled 49 out of 51 parliamentary seats; the absence of an effective parliamentary opposition was considered a 'transient phase' in the nation's political development and not a sound factual assumption upon which to construct constitutional institutions. This motivated criticism against one of the Wee Report's recommendations that a Council of State could constructively criticise parliamentary measures 'especially where there is no responsible or effective Opposition in Parliament'.[181] While such recommendation would have 'lasting effects', the situation might change with the next General Elections, should the opposition be returned to power. If so, the Council of State might usurp the functions of a parliamentary Opposition, rendering it ineffective, the very thing the Commission 'assiduously seeks to overcome'.[182]

176 Wee Report, supra, note 16, para 77.
177 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1297. A *Straits Times* editorial, 'The Citizen's Rights, 28 Dec 1966, at p 28 considered that: 'A constitutional right to elect a government is not, of course, a final guarantee of democratic practice. The constitution confers rights; it is for the citizens to exercise this.'
178 Tang See Chim, 25 SPR, 15 Mar 1967 col 1276, at 1313.
179 Tang See Chim, ibid.
180 See generally Thio, supra, note 145.
181 Tang See Chim 17 Mar 1967, 25 SPR col 1276, at 1309.
182 Tang See Chim, ibid., at col 1310.

After the PAP monopoly of parliamentary seats was breached in 1981,[183] a distinct sea-change in the mentality of those empowered to amend the Constitution was evident. Rather than awaiting the return of a viable parliamentary opposition, this 'parliamentary gap' was to be filled. The premise grounding constitutional design was that a dominant party state had become a permanent feature of the political landscape. Indeed, after the 2006 General Elections, the PAP controls 82 of 84 elective seats, continuing its hegemonic dominant party rule.

Explicit justifications for constitutional change was the need to 'evolve our own system' which could not be a 'plain simple Photostat of the British parliamentary system . . .'[184] In particular, PM Goh Chok Tong did not think 'adversarial politics is good for Singapore'; his faith was in 'consensus democracy',[185] clearing the way for a consensualist rather than contentious form of democracy as a Singapore particularism.[186]

In 1984, PM Lee spoke of the frailty of the one-man-one-vote system, stating there was 'no guarantee' it could continue to work in Singapore. Its premise resided in a British decision to ensure orderly decolonisation and the need to 'have an elected legislature to which they could hand over authority'.[187]

Significant constitutional experimentation, primarily engineered by Lee Kuan Yew[188] substantially altered the composition of Parliament and the electoral system and thereby, the practice of Singapore parliamentary democracy. Notably the category of non-elective legislative members was introduced in 1984 (Non-Constituency MP or NCMP) and 1990 (Nominated MP or NMP). Under the GRC scheme, constituencies were reconfigured to be contested on the basis of teams, of which one member had to belong to a stipulated minority community. While the rationale was to correct the under-representation of political and racial minorities in Parliament, the scheme was criticised as watering down various democratic principles. These changes departed from the Wee Commission conviction that parliamentary representatives be elected rather than selected to represent particular constituencies, whether racially or functionally defined.

Principle of one man one vote?

Introduced in 1988, the GRC scheme stemmed from the view that the Westminster model of one-man-one-vote, one-constituency member 'does

183 JB Jeyaretnam won the Anson by-election in 1981 for the Worker's Party.
184 56 SPR 3 Jan 1991, col 717, at 746.
185 56 SPR 3 Jan 1991, col 717, at 851.
186 Eugene Yap, 44 SPR, 24 July 1984, col 1721, at 1785.
187 Lee Kuan Yew, 44 SPR, 25 July 1984, col 1789, at 1806.
188 See Kevin YL Tan, 'The Legalists: Kenny Byrne and Eddie Barker' in *Lee's Lieutenants: Singapore's Old Guard*, KYL Tan and PE Lam eds (Routledge 1999), at 89.

not by itself protect the interests of the minority communities'.[189] Sri Lanka was raised as a cautionary tale of a failed system unable to stop the Sinhalese majority from oppressing the Tamil minorities. In constitutional design, it was meant to be a 'precautionary'[190] step to ensure a multiracial Parliament.

While voters technically retained one vote, the weight of this vote was varied. The GRC scheme co-existed with the retention of 9 single member constituencies while the size of GRC teams ranged from 4 to 6 members, expanded from the prototypical 3 person team. Thus, depending on which constituency one lives in, one's vote has the potential to help send 1, 4, 5 or 6 candidates to Parliament. Clearly, the disparity in individual voting power raises Article 12 related equal protection concerns which is constitutionally immunised from judicial challenge by dint of a 'notwithstanding clause'.[191] This justification was that the scheme sought to ensure the representation of minority communities in Parliament, though the process of selection does not involve separate race-based electoral rolls, nor does it empower a minority community to directly select a candidate. One might argue that the 'package deal' approach of voting for a team rather than individual candidates somewhat dilutes voter choice. Furthermore, its enlargement from 3 to more team members was based on non-constitutional rationales[192] not serving the express objective of racial representation.

Un-elected representatives as an ersatz opposition?

The task of constructing alternatives to an elected parliamentary opposition began in earnest in 1984 when the NCMP scheme was introduced[193] with diminished voting powers.[194] It was not thought to 'disturb the main framework of the Constitution'[195] in giving Singaporeans 'a fair and firm government with at least three Opposition MPs'.[196] Other than ensuring

189 Goh Chok Tong, 50 SPR 12 Jan 1988 col 344, at 345.

190 Goh Chok Tong, ibid., at 346.

191 Art 39(3).

192 In 1990, GRCs were enlarged from 3 to 4 members 'to provide for flexibility in dealing with a GRC whose population is growing rapidly'. Goh Chok Tong, 56 SPR 4 Oct 1990 col 459, at 466. In 1996, GRCs were increased to a maximal size of six for the express purpose of facilitating the establishment of Community Development Councils (CDCs) under which communities would have more powers of self-management and given more responsibility and resources to carry out self-help projects and assistance to the needy. It was argued that CDCs needed a critical mass of residents to be effective: Goh Chok Tong, 66 SPR, 28 Oct 1996, col 755, at 756–7.

193 Art 39(1)(b).

194 Art 39(2), Singapore Constitution, precludes an NCMP from voting on constitutional amendment bills, Supply and Money bills and votes of no confidence in the Government.

195 Lee Kuan Yew, 44 SPR 24 July 1984, col 1721, at 1734.

196 Lee Kuan Yew, ibid., at col 1735.

the perpetual parliamentary representation of a minimum number of Opposition MPs who had failed to get directly elected, the avowed rationale was to demonstrate 'the limits of what a constitutional Opposition can do'[197] beyond electioneering and stirring up 'sound and fury'[198] and to sate the desire of a younger generation for 'the excitement of political combat'.[199]

The NCMP scheme was described as 'an experiment to heighten our political scene', an 'innovative device' not tried out elsewhere and 'an additional appendage that we can live with'.[200] While introducing some degree of political pluralism, critics considered the motive was to perpetuate PAP hegemony by providing an ersatz Opposition to satisfy the public demand for dissenting views in Parliament. Furthermore, the scheme becomes redundant if more than three Oppositions MPs are directly elected into Parliament.[201]

The original rationale for the NMP scheme disparaged the inadequate contributions of opposition MPs who did not 'adequately express significant alternative views held outside this Chamber'.[202] It was characterised as 'an extension of the NCMP scheme' designed to meet 'changing expectations'[203] by accommodating constructive criticism. By implementing a 'more consensual style of government', Singaporeans would enjoy 'more opportunities for political participation'.[204]

However, unlike NCMPs who do contest elections and are seen as adversarial critics, the NMP scheme was designed to provide the House with non-government MPs who would offer constructive dissent and focus on 'the substance of the debate rather than form and rhetoric'.[205] The intent was that NMPs would render policy debate 'more thorough' and Parliament more representative by broadening the range of political views expressed and to correct the under-representation of women in Parliament.[206] By representative, the designers had in mind that NMPs would speak for those who felt their interests were not 'adequately represented' by the ruling or Opposition party.[207] Having these 'three distinct groups of MPs'[208] would meet the 'special needs' of Singapore.[209] Parliament, acting as an 'electoral

197 Ibid., col 1726.
198 Ibid., col 1725.
199 Ibid., cols 1736, 1726.
200 Chandra Das, 44 SPR 25 July 1984, col 1789, at 1799.
201 Section 52, Parliamentary Elections Act (Cap 218).
202 Goh Chok Tong, 54 SPR 29 Nov 1989, col 695, at 698.
203 Goh Chok Tong, ibid., col 705.
204 Goh Chok Tong, ibid., col 698.
205 Ibid.
206 Ibid., at col 699. Several female PAP MPs expressed displeasure: Aline Wong, col 743.
207 Goh Chok Tong, ibid., col 703.
208 Goh Chok Tong, ibid., col 702.
209 Goh Chok Tong, ibid., col 704.

college' of sorts, would nominate a number of 'politically non-partisan' Singaporeans.[210] Thus was born the strange creature in the form of an apolitical parliamentarian, to a divided chorus of praise and dismay.

Proponents argued that NMPs would enhance parliamentary debate by providing 'a more objective view on the correctness and soundness of Government policy' which would 'provide a stabiliser in our democratic system'.[211] The scheme was conceived of as not 'radically' altering electoral processes or changing the basic unicameral structure of the legislature, compared to proportional representation or having an Upper House.

However, detractors considered the NMP scheme a 'fundamental change' to the Constitution which 'takes us back to colonial times',[212] as having 'appointees in the Legislature' was a 'major step backwards'.[213] PAP MP Tan Cheng Bock expressly referred to the Wee Report recommendation that a sound democratic system was based on an elected legislature,[214] lamenting that the NMP scheme constituted 'a dilution of the one-man-one-vote parliamentary system'.[215] Opposition MP Chiam See Tong[216] asserted that 'The essence of true democracy is representation' and that the Parliamentary system was 'essentially a contentious one'; thus, the NMP scheme was lambasted for sneaking in 'elements of Confucian type proceedings in Parliament by consensus', which served only to perpetuate one party rule[217] and to 'extend . . . non-democracy'.[218] NMPs who could vote on most policies constituted 'a case of power without accountability';[219] insulated from 'the rough and tumble of real life politics', they could say 'the most irresponsible things' without accountability.[220] Apologists tried to broaden the 'English notion of accountability to one's constituents' to include a sense of responsibility for what one says, to oneself and whoever is affected, though this is hardly a democratic principle.[221]

In a reversal of principle that NMPs should reflect 'independent and non-partisan views', the scheme was modified in 1997 when the selection process was altered to invite certain functional groups to make nominations. This reverts to colonial era practices of selecting nominated members from functional constituencies. NMPs as nominees of functional groups might

210 Goh Chok Tong, ibid., col 696.
211 Lim Boon Heng, 54 SPR 29 Nov 1989, col 695, at 730.
212 Lee Siew Choh, 54 SPR 29 Nov 1989, col 695, at 748.
213 Chandra Das, 54 SPR 29 Nov 1989, col 695, at 718.
214 Tan Cheng Bock, 54 SPR 29 Nov 1989, col 695, at 725.
215 Tan Cheng Book, ibid.
216 Chiam See Tong, 54 SPR 29 Nov 1989, col 695, at 735.
217 Chiam See Tong, ibid., at cols 737–8.
218 Lee Siew Choh, 54 SPR 29 Nov 1989, col 695, at 750.
219 Aline Wong, 54 SPR 1989, col 695, at 741.
220 Tan Cheng Bock, 54 SPR 29 Nov 1989, col 695, at 725.
221 Davinder Singh, 54 SPR 29 Nov 1989, col 695, at 789.

be more apt to lobby for sectional interests rather than engage national issues, that is, they would be 'non-partisan only in name but partisan in heart and spirit', causing a 'fractious Parliament'.[222] By institutionalising functional representation, the scheme could be 'a back door entry for religious, racial and communal politics'.[223] The rejoinder what that the Special Select Committee in consultation with MPs could sieve out such people ('That was why Tang Liang Hong was not selected.')[224] Furthermore, an NMP who expressed extremist views could just be thrown out, 'No big deal!'[225]

Distrusting the electorate?

A mounting distrust that the electorate may make wrong choices at the ballot box apparently fuelled the rationale for reshaping certain institutions. Such voting would harm the 'strong state' paradigm, encapsulated in PM Lee's consideration that Singapore enjoyed its 'golden years' between 1965–81 when the PAP held all parliamentary seats and undistracted, could accomplish rapid economic and social progress.[226] In the 1980s, with a declining share of votes, government leaders paternalistically stated that Opposition-held wards would no longer enjoy the services of the PAP branch machinery as 'the voters have to grow up and live with their choices'.[227]

The evolving GRC scheme was modified beyond its original rationale of entrenching multiracialism in Parliament. By allying GRCs with town councils (TCs), which gave voters a larger say in running their estates, and community development councils (CDCs),[228] designed to promote community management of various social welfare schemes devolved from the government, the government's paternalistic distrust of the electorate was evident.[229] PM Goh said that since more was at stake, voters would be 'more likely to scrutinise the candidates, their characters and programmes carefully' since their voting 'will affect them in many more matters within the constituency'.[230] The 1997 amendment enlarging GRC team sizes to a

222 Tan Cheng Bock, 67 SPR, 31 July 1997, col 1497, at 1503.
223 Tan Cheng Bock, ibid., at col 1505.
224 Wong Kan Seng, 67 SPR, 31 July 1997, col 1497, at 1509.
225 Wong Kan Seng, ibid., at 1510.
226 Lee Kuan Yew, 44 SPR, 24 July 1984, col 1721, at 1724.
227 Lee Kuan Yew, ibid., at 1732.
228 Goh Chok Tong said of the GRC and CDC scheme that it was meant 'to encourage team concept, to encourage cohesion in our communities and to encourage team work in governing and in constituencies.' 66 SPR, 28 Oct 1996, col 755, at 810.
229 Steven J. Hood, 'The Myth of Asian Democracy' (1998) 38 Asian Survey 853 at p 860.
230 Goh Chok Tong, 66 SPR, 28 Oct 1996, col 755, at 757.

six member maximum placed a 'premium' on a 'strong anchor man' to lead the team; these anchor men would form the nucleus of Cabinet ministers and thus 'the party which wins the largest number of GRCs is more likely to be able to put together a team of competent Ministers to govern the country'.[231] Not only would voters have to vote for a team able to handle their local affairs, the election 'will become more like a national election' because voters would be conscious of voting 'for part of the core leadership team of the winning party'.[232] The government considered this would strengthen the political system because democracy was about 'exercising the choice of voting for, rather than voting against, something'.[233] This would 'stabilise' the system by requiring voters to cast positive, not protest, votes.

Amending the electoral system may be considered an attempt to legislate voter responsibility and provide some immunity from what has been termed 'freakish elections'. The urge to avoid a 'freak election result'[234] (which appears to mean either a weak government or one where the PAP is not returned with a governing majority) also underscores the stringent pre-qualifying criteria for presidential elections and the filtering of candidates by the Presidential Elections Committee.[235] Indeed, the very institution of the elected presidency was geared towards modulating the result of freak elections.[236] PM Goh uniquely defined democracy as 'not the right to stand for election' but giving the electorate 'the right to choose good candidates to Parliament'.[237] Furthermore, he candidly admitted in 2006 that the GRC scheme not only promoted multiracialism but helped the PAP to 'recruit younger and capable candidates with the potential to become Ministers. Without some assurance of a good chance of winning at least their first

231 Ibid., at 757.
232 Ibid., at 758.
233 Ibid., at 758.
234 Ibid., at 758.
235 Art 18. Goh Chok Tong stated: 'We cannot chance a freak election result in Presidential elections. It defeats the very purpose of having an Elected President if a freak result is possible. Pre-qualifying all Presidential candidates removes the nightmare of freak Presidential election results because the contest would be between qualified people. Whoever is chosen can do the job.' 56 SPR, 3 Jan 1991, col 717, at 719. Opposition MP Lee Siew Choh argued that this 'closed-doorism' violated basic democratic tenets and was 'a form of discrimination' in favour of a small elite against the vast majority of Singaporeans: 56 SPR 3 Jan 1991, col 717, at 733. See Li-ann Thio, '(S)electing the President of Singapore: Diluting democracy?' (2007) 5 (3) ICON 526–43.
236 On the fear of the Opposition promising welfare programmes to the electorate and expending reserves on free housing, health and education, 'we have proposed the scheme of an Elected President, just in case we end up with a freak election result' to serve as a 'preventive measure' so the 'the country cannot be bankrupted or ruined forever'. Goh Chok Tong, 56 SPR 5 Oct 1990, col 509, at 567.
237 56 SPR 3 Jan 1991, col 717, at 746.

elections, many able and successful Singaporeans may not risk their careers to join politics. Why should they when they are on the way up in the Civil Service, the SAF, and in the professions of the corporate world?' He added that the GRC itself did not guarantee electoral victory, which depended on whether a Minister 'won the people's trust and the government has delivered good results for the people'. Thus, the GRC scheme facilitated the political objective of PAP renewal.[238]

This form of managed democracy with Singapore traits was in his view conducive to political stability. This reinforces the prevailing PAP vision of parliamentary democracy ordered along the lines of a dominant party state with a small opposition, supplemented by an ersatz opposition, which can offer alternative views without posing a real threat to the political status quo.

A faith in institutions

The Wee Commission in recommending new institutions like the Council of State and Ombudsman demonstrated a faith in institutions, as checks against discriminatory legislation and to hold the administrative branch accountable. In it response, the government was not wedded to precedent, nor did it fully embrace a shift to revolutionary autochthony in institutional development. For example, the government rejected the proposal that superior court judges be appointed by a judicial body, 'to safeguard against political appointments' or the perception thereof, [239] as it was considered too incestuous to insulate judges from political influence.

Reticence towards novel institutions?

In proposing an Ombudsman, the Wee Commission[240] contemplated the establishment of a constitutional office to deal with faults in administration (including discrimination on racial, linguistic or religious grounds) but without power to criticise policy.[241] The Commission discussed the practice of various states, including Sweden, Denmark, Norway and New Zealand, England and Guyana; a Commission member had done some field-work in visiting the offices of the Danish and Norwegian Ombudsman so as to study the system 'in considerable detail'.[242]

Despite the existence of redressal machinery such as courts or special tribunals, the Commission pointed out that only the 'stout-hearted' could

238 Remarks, Goh Chok Tong, South East CDC Members Appointment Ceremony, 26 June 2006, available at http://www.cdc.org.sg.
239 Wee Report, supra, note 16, p 26, para 83.
240 Wee Report, ibid., pp 18–22.
241 Wee Report, ibid., para 17.
242 Wee Report, ibid., p 19, para 63.

persist in invoking procedures which could be 'cumbersome, slow and expensive'.[243] While not wanting to derogate from 'the ultimate sovereignty of Parliament' the Commission considered that the Ombudsman could fill in 'any existing gaps' where existing procedures for making complaints of maladministration did not provide a sufficient remedy.[244] This would supplement ministerial responsibility which is integral to our system of parliamentary democracy,[245] through providing an 'independent' rather than in-house check, 'with access to all relevant information'.[246] Armed with non-coercive, investigatory powers, it would serve a function that the 'question and answer' approach of checks like parliamentary questions and adjournment debates could not perform. If a government department declined to act on an identified instance of maladministration, the Ombudsman, acting independently of the executive, could make a report to Parliament which could then act.[247] As a parliamentary officer, the Commission suggested the Ombudsman be elected by Parliament for a fixed term and be barred from holding political party membership.[248] By issuing an annual report to Parliament, some degree of public scrutiny of administrative action would be provided.

The government agreed in principle with the utility of having some form of redress against maladministration, but adopted a 'wait and see'[249] approach[250] as the novel institution was 'still in its experimental stage' in certain Commonwealth countries. The proposal was not entirely 'written off' but there was concern that allowing an Ombudsman to scrutinise the decision, for example of a HDB executive in flat allocation, would 'slow up the process of decision-making'.[251]

However, even after the experiences of other states was available, subsequent calls to have an Ombudsman to deal with an efficient civil service which was perceived as inflexible and sometimes unfair, were rejected on the basis that sufficient feedback channels existed, such as the Feedback Unit or through MPs, or in worse cases, the Corrupt Practices Investigation Bureau (CPIB).[252] However, these alternatives are deficient insofar as they are not formal channels; the CPIB only deals with corruption cases rather than maladministration. As MP K Shanmugam pointed out[253] the existing

243 Wee Report, ibid., p 18, para 61.
244 Wee Report, ibid., p 20, para 65.
245 Wee Report, ibid., p 19 para 63.
246 Wee Report, ibid., p 18. para 61.
247 Wee Report, ibid., p 22, para 71.
248 Wee Report, ibid., p 20, para 66.
249 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 128.
250 EW Barker 25 SPR, 15 Mar 1967, col 1051, at 1056.
251 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at col 1284, at 1292.
252 'Not necessary to have an ombudsman: Cdre Teo' *The Straits Times* (Singapore), 11 Mar 1994, at p 26.
253 62 SPR 10 Mar 1994, cols 802–3.

channels largely relied 'on the system itself to act correctly', with very few cases brought to an MP's attention. He urged 'an intermediate institution' able to provide a quick remedy, leaving a ministerial appeal for extreme cases. Continued calls for an Ombudsman to enhance government accountability and to require civil servants to give reasoned decisions have not found favour.[254]

Creating weak institutions?

However, it is not entirely accurate to say that there has been a consistent reticence towards experimental institutions. The government rejected the advice of some MPs to place the proposed 'Presidential Council' on five year probation before constitutionally embodying it, 'to prove its practicality'.[255]

The Commission recommended that potential members be 'able, mature and respected citizens' not holding political party membership at the time of their appointments.[256] If the institution was colour-blind, Council members would not feel bound to speak only for one community. To strengthen the sense of distance between the Council and Cabinet, it proposed that the President should appoint Council members, after consulting with the Prime Minister. This would add to the powers of a ceremonial head of state, given the general norm in a Westminster modelled system that the President acts on the Cabinet's advice.[257]

However, the government wanted to include Cabinet Members and stipulated office-holders like the Chief Justice and Attorney General in its composition. This is tantamount to requiring the drafters of discriminatory legislation to check themselves, i.e. the preference for 'self-regulation' rather than supervisory oversight. It goes against the principle of de-politicisation, which advocates an apolitical Council.

The government disagreed with the Commission's vision of a Council of State as a depoliticised institution conducting public meetings, as it considered that private meetings while removing transparency were 'more in keeping with its purely advisory capacity', and would facilitate 'frank and constructive' discussions.[258] It discounted concerns that public hearings would help engender public confidence in the Council's independence from

254 'Prof Koh renews call for ombudsman', *The Straits Times* (Singapore), 12 Sept 2001 at p H7; see Zuraidah Ibrahim, 'Torn between two instincts: More or less govt?' *The Straits Times* (Singapore), 29 Nov 2003; Chua Mui Hoong, 'Consensus out, contention in as relationships change' *The Straits Times* (Singapore) Insight, 14 June 2003.

255 Ng Yeow Chong, 25 SPR, 17 Mar 1967, col 1389, at 1415.

256 Wee Report, supra, note 16, p 14, para 51; p 17 para 59 (iv).

257 Wee Report, ibid., p 17, para 59.

258 EW Barker, 25 SPR 21 Dec 1966, col 1051, at 1055.

the executive.[259] The government also rejected the Commission's call to allow the Council to render its advice after the First Reading of a bill and after the relevant Minister makes his opening speech at Second Reading (rather than after the Third Reading) to enable it to provide meaningful input into the process.[260]

Thus, the final incarnation of the Council ended up having weak powers which have been well documented elsewhere and to date, has never issued an adverse report.[261] Thus, the government displayed an incipient willingness to adopt new institutions, which were however, weak in nature.

From reticence to receptivity: Embracing experimentation in search of effective checks?

Promises v guarantees

The government after 1984 appeared to embrace experimentation wholeheartedly, as a means of instituting good practices and to create institutional checks against a parliamentary executive wielding untrammeled power.

The GRC scheme sought to institutionalise the PAP practice of multiracial politics by requiring the fielding of minority candidates in GRC teams; this renders the political costs of appealing to communal sentiment prohibitive. However, the subsequent enlargement of GRC team sizes from 3 to 4 and then to 6, for reasons unrelated to securing racial representation, created the problem that fewer minority candidates would be fielded, as there would be fewer but larger GRC teams. The government promised it would field more than 2 minority candidates per team.[262] However, it is unsatisfactory to let the level of minority representation rest on the basis of promises given rather than legal requirement. Should the PAP lose a GRC where more than one minority MP was fielded, an opposition team is not obliged to follow suit, leading to a net decline of minority MPs. This objection was waved away in asserting the GRC scheme sought to provide a 'theoretical minimum' rather than fixed quota of minority representatives.[263]

Ambivalence to the past and precedent

Despite active experimentation with constitutional design, there is still some selective resort to past precedent, as when the Constitution was amended

259 Wee Report, supra, note 16, p 15, paras 51–2.
260 Wee Report, ibid., p 16, paras 55.
261 S.M. Thio, 'The Presidential Council', (1969) 1 Sing LR 2; DS Marshall, 'The Presidential Council', (1969) 1 Sing LR 9.
262 Goh Chok Tong, 66 SPR, 28 Oct 1996, col 755, at 758.
263 Ibid., at col 813: if there were 6 GRCs, the minimum would be 6 minority representatives.

to create a Constitutional Tribunal able to issue advisory opinions. This was seen as a 'lacuna' in the system since the Malaysian constitution had such a provision.[264] Following Malaysian precedent, Article 100 allows the President, acting on Cabinet's advice, to refer constitutional questions to the Tribunal. The proposal to allow the President the discretion to directly refer such questions to the Tribunal was rejected.[265] The official reason was that the EP was a reactive institution without powers of initiation. Furthermore, it was argued, public disagreement between the President and Cabinet would pressurise the latter to refer the case to the Tribunal.[266]

The implication was that only the Cabinet can make a constitutional reference. Given the scheme of presidential oversight inaugurated in 1991, it would have been more consistent had presidential powers been expanded to include an independent power of referral. Furthermore, the justification in following Malaysian precedent which had 'worked for them' making it 'safe for us to follow them'[267] is not compelling given the innovative nature of the presidential check and its realignment of checks and balances.

The re-making of the Constitution is guided ultimately by pragmatism. In other instances, the government is quite happy to create constitutional institutions which would cause concern elsewhere. For example, when the institution of Judicial Commissioners (judges appointed on limited terms) was adopted, there was no preoccupation about judicial independence and security of tenure. Rather, it was celebrated as a 'laudable move', an apt method of tapping the expertise of outstanding lawyers who would otherwise decline Bench appointments and could thus contribute to 'dispensing justice and developing Singapore's legal jurisprudence'.[268]

The principle of de-politicisation and mechanisms of political review

The Wee Commission appreciated the principle of de-politicisation as a facet of the separation of powers. It recommended a politically neutral Ombudsman who, 'unlike the MPS and the Press' could call for department files and get full facts.[269] It also wanted PCMR members to bear no political affiliations, though the government considered[270] that men with political experience had a role in reviewing discriminatory legislation.

264 Lee Hsien Loong, 63 SPR 25 Aug 1994, col 417, at 428.
265 Walter Woon, 63 SPR 25 Aug 1994, col 417, at 437.
266 Lee Hsien Loong, 63 SPR 25 Aug 1994, col 417, at 455.
267 Lee Hsien Loong, ibid., at 454.
268 Ho Peng Kee, 61 SPR, 14 Apr 1993, col 88, at 91.
269 Tang See Chim, 25 SPR, 15 Mar 1967, col 1276, at 1315.
270 EW Barker, 17 Mar 1967, 25 SPR col 1389, at 1433.

The interaction of political checks and apolitical checks in relation to the appointment of key civil servants is evident in the inter-relationship between the Elected President (EP) and the non-elected Council of Presidential Advisors (CPA). While the EP office was a 'political one',[271] it was not politically partisan as candidates had to disavow all formal political affiliations. The test of non-elected bodies is whether these are considered 'workable' rather than any articulated constitutional theory. In 1996, the CPA was enlarged from 5 to 6 members, to enhance their stature and to enable it to make 'a balanced and objective assessment' of the suitability of a nominee over whose appointment the EP had a veto. If the CPA agreed with the Government's nominee which the EP vetoed, the executive would have a 'stronger basis' for seeking to override the EP's decision.[272]

This principle of having apolitical bodies operate within the constitutional scheme of checks and balances is also evident in other non-elected institutions such as the Advisory Body which has a role reviewing preventive detention cases under the Internal Security Act (ISA).[273] Opposition MPs pointed out the Advisory Board 'is seen by the public not to be independent' and there was no effective remedy 'if the government made a wrong decision'.[274] In lieu of judicial review, which was substantially limited by dint of a 1989 constitutional amendment,[275] the EP as a political check was weaved into the ISA system. However, the EP's power to withhold concurrence to a detention order does not kick in unless the non-elected Advisory Board recommends release which the relevant minister rejects. In other words, the EP is not that muscular a check and certainly pales in comparison to the potential power of judicial review.[276] Notably, the Wee Commission had recommended, following a Guyana precedent[277] which it appendixed to its report, a constitutional right to a judicial remedy through

271 56 SPR 3 Jan 1991, col 717, at 750.

272 PM Goh Chok Tong, 66 SPR 28 Oct 1996, col 755, at 766–7.

273 Cap 143.

274 Chiam See Tong, 52 SPR 25 Jan 1989, cols 463, at 486.

275 S Jayakumar, 52 SPR 25 Jan 1989, col 463.

276 In moving the bill, Law Minister Jayakumar stated that Singapore courts should not follow the developments led by interventionist courts. In Britain local judges had to cater to 'our history and local conditions', particularly on security issues. S Jayakumar, 52 SPR 25 Jan 1989, cols 463, at 471.

277 This provides that if any person alleges the violation of fundamental liberties, then 'without prejudice to any other action with respect to the same matter which is lawfully available, that person . . . may apply to the High Court for redress. Clause 2 provided that the High Court should have original jurisdiction (a) to hear and determine any application made by any person . . . and (b) to determine any question arising in the case of any person which is referred to it. Art 19(2) attached a proviso that the High Court was not to exercise its powers 'if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.' Annex to Wee Report, supra, note 16.

which to enforce Part IV liberties. Such a right could conceivably render judicial ouster clauses unconstitutional.

Power without accountability: Developing local particularities

When the controversial NMP scheme was introduced, critics like MP Aline Wong argued that Singapore should 'just maintain our own principles' as precedents concerning nominated legislators could always be selectively cited.[278] To meet reservations, the government included a sunset clause so that each session of Parliament could decide whether it wished to have NMPs,[279] hoping to make the scheme more palatable and to induce MPs to 'give the NMP scheme a try'.[280]

By 1997, the government pronounced that the NMP scheme 'is now well accepted' by practically all MPs and 'has proven its usefulness and worth'. Again, this was not a matter of chance but deliberate choice of 'those individuals who can make a useful contribution'.[281]

In not being detained by purist democratic notions, the driving rationale for constructing novel institutions is 'to evolve a Singapore-style of democracy' which was 'workable for us', suited to 'our circumstances' and 'practicable and efficient'.[282]

The State giveth, the State taketh away

The PAP government has taken full advantage of their parliamentary majority and the resulting flexibility of the constitution to fine-tune or substantially amend new constitutional institutions.

In 1970, the Constitution was amended to exempt bills relating to the defence or security of Singapore from prior consideration by the Presidential Council.[283] This issue arose when the Enlistment Bill was considered, the concern being that the breadth of ministerial discretion in leaving a person out of the armed forces, if he had pro-communist tendencies for example, could give rise to claims of discriminatory treatment.[284] After scaling down these powers on grounds of state security, Council member David Marshall stepped down because he believed the Council was 'a façade without substance' and there were 'clear indication that Government is not interested

278 54 SPR col 695, at 741.
279 Goh Chok Tong, 55 SPR, 29 Mar 1990, col 1013, at 1014.
280 Goh Chok Tong, ibid., at 1017.
281 Wong Kan Seng, 67 SPR, 31 July 1997, col 1497.
282 56 SPR 3 Jan 1991, col 717, at 745.
283 'Legislation on Defence and Security to bypass 'Watchdog' Body', *The Straits Times* (Singapore), 3 Sept 1990.
284 EW Barker, 30 SPR 2 Sept 1970, col 195, at 196.

in dialogue' with responsible non-party persons 'deeply committed to the welfare of the people of Singapore'. Marshall criticised the weak powers, pro-establishment composition and *in camera* proceedings of the Council which was 'a very much watered down version' of what the Wee Commission recommended.[285]

So too, the powers of the elected presidency have been progressively reduced by constitutional amendments, facilitated by the non-entrenchment of the special amendment procedure associated with the EP scheme, stemming from the desire to continue refining the powers of this complex institution.[286]

When the EP was discussed in October 1990[287] it was presented as a 'fundamental modification to our parliamentary system of government', whose chief purpose was to provide a safeguard mechanism to check potential abuses of power by conferring personal discretionary 'blocking' powers on the President over two specified areas specified areas (past reserves and key public service appointments).[288] The EP scheme was described as 'an innovation tailored to meet the unique circumstances of Singapore',[289] altering the basic rule that the President acts on the advice of Cabinet. In 1994, Article 151D of the Constitution was amended to remove defence spending bills from the presidential veto on grounds of security.[290] The latest amendment in 2004 allows the transfer of certain funds to be exempt from presidential scrutiny, provided the relevant Minister gives a certain undertaking.[291]

The critique is that new constitutional mechanisms of accountability are weak institutional checks, at least in the present political context. Proposals for institutions which could conceivably genuinely limit government powers, such as an independent elections commission[292] or a constitutional court[293]

285 'Marshall: Why I resigned from the Council', *The Straits Times* (Singapore), 24 Nov 1970.
286 Lee Hsien Loong, 63 SPR 25 Aug 1994, col 417, at 418.
287 56 SPR, 4 Oct 1990, col 459, at 460.
288 Ministerial Statement, DPM Goh Chok Tong, *Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Service* (White Paper), 51 SPR 29 July 1988, col 478. The presidential veto was later enlarged, as an afterthought, in relation to ISA detention orders and restraining orders under the Maintenance of Religious Harmony Act. DPM Goh Chok Tong, 56 SPR 4 Oct 1990 col 459, at 464.
289 Goh Chok Tong, 56 SPR, 3 Jan 1991 col 717.
290 Thio Li-ann, 'Working out the Presidency: The Rites of Passage', (1995) Sing JLS 509 at pp 515–29.
291 Derrick Paulo, 'Reserves and loophole fears', *Today*, 3 June 2004; for an overview on the evolution of the elected presidency, see Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian' [2007] Sing JLS 290, at p 291.
292 'Should S'pore Have an Independent Elections Agency?', *The Straits Times* (Singapore), 22 Dec 2001 at pp H10–11.
293 'Setting up of Permanent Constitutional Court' 70 SPR, 4 Aug 1999, col 1977ff.

have been rejected. Opposition politicians have argued that the Westminster model had sufficient checks if these were but allowed to operate:

> All that the Government needs to do is to adhere strictly to the norms of parliamentary democracy, stop its suppression of the Opposition, allow it to have reasonable access to TV, radio and the press as in other countries, curb the arbitrary powers of its Ministers and allow the Court to be the final arbiter in disputes and appeals in political cases. These measures would serve as a better safeguard than a one-man Elected President.[294]

Conclusion: From mud flat to modern city to metropolis[295]

The world of the 1966 Commission differed remarkably from ours in the twenty-first Century, some 40 years after Singapore's 'reluctant withdrawal'[296] from Malaysia. Singapore has graduated from a Third to a First World country, for *homo economicus* though perhaps not for *homo politicus*. Some things, like the political dominance of the PAP government, remain constant.

In terms of constitutional design, any initial reticence or need to follow foreign precedent has given way to bold experimentalism and a particularist constitutional trajectory. In institutional terms, this includes a non-elected parliamentary opposition and other supervisory institutions not currently able to substantively limit the parliamentary executive. One might say that the still-evolving constitutional experiment in Singapore exemplifies a form of 'constitutional pragmatism' insofar as it is not wedded to concepts and generalities but is preoccupied with factual consequences.

In a letter to the *Straits Times* (Singapore) published on 22 November 1965, David Marshall wrote 'The Constitution of a nation affects the lives of each of its citizens and future generations yet unborn'.[297] When Singapore was part of Malaysia, PM Lee Kuan Yew displayed faith in constitutions by calling the Malaysian one a 'sacred document' which allowed him to pursue 'a Malaysian Malaysia'. In presenting the PAP as 'a loyal constructive opposition ... in accordance with this Constitution', he declared 'We have a vested interest in constitutionalism', and would 'honour' the

294 Lee Siew Choh, 56 SPR 4 Oct 1990, col 459, at 491.

295 'Over 100 years ago, this was a mud-flat, swamp. Today, this is a modern city. Ten years from now, this will be a metropolis. Never Fear'. PM Lee Kuan Yew, Speech, 12 Sept 1965, supra, note 123.

296 Prime Minister, Speech to Senior Civil Servants, Victoria Theatre, 30 Sept 1965: http://stars.nhb.gov.sg/

297 David Marshall, 'Debating Singapore's Constitution', *The Straits Times* (Singapore), 22 Nov 1965 (calling for the publication of the proposed constitution for public debate).

Constitution in the belief that 'it can provide a solution to the problems of a multiracial society in Malaysia'. He pledged loyalty to the Malaysian Constitution, distinguishing loyalty to Malaysia from loyalty to the Alliance Government.[298]

While recognising the virtues of a written constitution which establishes institutional competences and entrenches fundamental liberties, the Wee Commission was aware that a written constitution *per se* did not in itself guarantee a successful and stable state. Foreign Minister Rajaratnam in debating the Report considered that even if special minority rights were written into a Constitution, this would not guarantee their observance as a Constitution was a 'formal document' which 'can be modified, changed overnight, manipulated or scrapped altogether'. What mattered was 'the spirit of the thing' as democratic constitutions did not guarantee democratic government, while countries without a written constitution enjoyed democratic government. This shows the importance of ethos over text,[299] or what Rajaratnam called the 'political temper and ideals of the community' and ruling government, which he considered the best safeguard for a democratic constitution – 'not a piece of paper'.[300] There was no guarantee that a constitution, however 'ingeniously devised by the wisest men on earth' could 'survive the turbulent realities of politics'. The common mantra is that all depends on 'the people who participate in politics',[301] the wisdom of electors in selecting the wisest representatives and their commitment to multiracialism. Without the requisite 'foundations' relating to a people's state of economic, social and cultural development, the colonial transfer of political 'superstructures' would fail, as it had done in many Third World countries.[302]

Geoffrey Abisgenadan described the Report as 'definitely idealistic but tried to be realistic'.[303] In relation to these foundations, the Commission considered that the multiracial people of Singapore had a certain 'faith' in three factors, that is, in a democratic system of government, the rule of law and an ethos of racial and religious tolerance.[304]

Particularism remains a dominant motif in the justification of the constitutional order and is certainly more heightened now than in the 1960s,

298 Lee Kuan Yew, Speech, Federal Parliament 27 May 1965, Motion of Thanks to Yang di Pertuan Agong for His Speech: http://stars.nhb.gov.sg/.

299 Rajaratnam, 25 SPR, 16 Mar 1967, col 1329, at 1361.

300 Rajaratnam, ibid., col 1362.

301 Wong Lin Ken, 29 SPR 12 June 1969, col 60, at 67.

302 Lee Kuan Yew, 44 SPR 25 July 1984, col 1789, at 1816–17.

303 Interview with Geoffrey Abisheganaden, supra, note 22. He noted the 'general influence of Christian thinking into the Constitution' in relation to such ideas as the rule of law and Singapore government's refusal to change the law on capital punishment, which drew from Judeo-Christian thinking of an eye for an eye, a tooth for a tooth.

304 Wee Report, supra, note 16, p 23, para 74.

where the universality of certain principles like the rule of law, democracy and the inalienability of certain rights, like the right to vote, resonated in the Wee Report. Today, the predominant view is that the unthinking importation of institutions from other countries and 'grafting them into the local political system can end up doing more harm than good', as Western style liberal democracy was 'not a magic formula for success'. As PM Lee Hsien Loong put it:

> In Asia, Western style democracy has not always delivered stable, legitimate and effective government. The reasons are many. Many Asian countries lack a long history of shared nationhood. Some have populations which vote on racial or religious lines. Others lack firmly established democratic institutions and a tradition of civilian rule.[305]

Thus, a successful political system was contingent on the culture and history of a society, although the rule of law, ensuring accountability to stakeholders and providing a voice for the people, were affirmed as 'critical aspects of good government'.[306] With economic success, government legitimacy came to rest not only on formal political legitimation through elections, but on performance legitimacy, the 'more rigorous test of practical success', rather than 'abstract theories'.[307] If a system brought practical benefits to standards of living, one would be 'most unwise to listen to medicine men and bomoh politicans' about principles of democratic opposition.[308]

As proof positive that the Constitution had worked as evidenced by the maturing of communities in their ability to meet in Parliament and talk in English, and in referencing how some Commission proposals on minority rights were accepted and some rejected, PM Lee noted:

> The alternative was downhill, like Guyana. They have got all the fine fundamental rights written into their Constitution. What kind of lives do their people live? Can you take out a writ against the Minister . . . and say, 'Where is my job, my home, my hospitals for my children, my wife, my future.[309]

305 Speech, PM Lee Hsien Loong, 7th Asian-European Editors' Forum, 6 Oct 2006, Singapore Government Press Release.

306 Ibid.

307 Foreign Minister Wong Kan Seng, Statement, World Conference on Human Rights, Vienna, 16 June 1993, Release No: 20/JUN/09–1/93/06/16, Singapore Government Press Release, reproduced in [1993] Sing JLS 605–10.

308 Lee Kuan Yew, 44 SPR, 25 July 1984, col 1789, at 1827.

309 Lee Kuan Yew, Debate on the President's Address, 1 March 1985, p 69.

On the basis of success was the project of the developmentalist state justified. Proposals anathema to the political philosophy of a strong state or which carried the 'perils of communal politics'[310] have consistently been rejected since 1966. The discovered wisdom of nation-building was that in a developing country, excessive emphasis on individual rights could hinder the economic growth and political stability essential to advancing human dignity. The strong state model has been sustained insofar as most constitutionally and legally established institutions lack powerful checking powers; neither does Singapore have a strong rights culture.

Unapologetic for engineering an electoral system under which 'the opposition parties have consistently failed to win more than a handful of seats', the government had made 'alternative arrangements'[311] to ensure the expression of a wide spectrum of views in Parliament through non-elected MPs, favouring the model of political consultation without robust contestation. The bottom line is that through periodic elections, the government is held to account. However, unlike the political landscape faced at the time the Commission was convened, when people seemed tired of voting,[312] the current system is such that the PAP government has, until the 2006 General Elections, been returned to power on nomination day, due to the fact that opposition parties have not contested all available seats; voting in General Elections, and presidential elections, has been an exercise of popular sovereignty few Singaporeans have regularly experienced.

Since Independence, the evolution of the Singapore Constitution has evidenced a syncretic faith in constitutionalism and good government, in tandem with the importance of having good men and good governance, predicated upon Asian particularities. In particular, Lee Kuan Yew opined that 'had the mix in Singapore been different, had it been 75% Indians, 15% Malays and the rest Chinese, it would not have worked'. This is because he thought Indians believed in oppositional politics while the practical Chinese considered 'contention for the sake of contention leads to disaster'.[313]

Nonetheless, while eschewing a faith in legal perfectionism, the resort to the Constitution to erect checks against a fallible government is evident in the rationale for the elected presidency, the brainchild of Lee but whose

310 Lee Kuan Yew, 25 SPR 15 Mar 1967, col 1276, at 1284.

311 Ibid.

312 EW Barker noted that after one referendum, the 1963 General Elections and by-elections held after Barisan Socialis MPs resigned from Parliament 'I feel that our people are a little tired and probably prefer to be left alone, at least for several years.' EW Barker, 25 SPR, 17 Mar 1967, col 1389, at 1440. Ho Cheng Choon also noted that despite General Elections being scheduled once every five years, 'even then the electorate had grumbled about being required to vote at the elections, especially the by-elections'. 25 SPR 15 Mar 1967, col 1276, at 1278.

313 Lee Kuan Yew, supra, note 309, at col 70.

details were thrashed out by his successors' cabinet.[314] It was designed as a precautionary measure as PM Goh feared that 'one term of bad government is enough to bankrupt the country'. He urged that 'while honest men are still in charge' it was prudent to institute a system of checks and balances rather than hoping for 'good government' as it would be a 'fatal naïvety' to do so just because there had not been bad government in the past 31 years.

The faith in man has waned and shifted towards distrust in man and a faith in institutions. PM Goh noted 'the marvelous workings of our parliamentary system' owed more to the 'integrity and quality of the people working it' rather than the merits of the system.[315] Thus, 40 years after the convening of the Constitutional Commission, the two themes of good government and good governance, of whether a 'government of angels'[316] can be legislated into existence or whether law merely restrains a 'government of knaves', continue to shape constitutional discourse and practice.

314 Goh Chok Tong, supra, note 288, at col 463.

315 56 SPR 4 Oct 1990, col 459, at 462.

316 James Madison, *The Federalist No. 51,* Jacob E. Cooke ed., (Connecticut: Wesleyan University Press, 1961), at p 347.

2 State and institution building through the Singapore Constitution 1965–2005

Kevin YL Tan

Introduction

Among other things, constitutions attempt to institutionalise a conception of state and governance. Constitutions and the institutions they establish step in when men falter. After all, constitutions and the laws they embody are expected to last longer than the lifetimes of men. This is why the drafting of a new constitution is often considered a prerequisite rite of passage for newly-independent states. Unfortunately, many new states fail to maintain the constitutional orders they establish at their founding. More often than not, constitutions are either tossed out of the window with each regime change or legislated into obscurity. This is because governments of new states that are struggling to establish order and legitimacy feel unduly constrained by constitutional checks and balances which do not allow them sufficient elbow room to govern with authority. This problem was succinctly highlighted by Huntington as follows:

> In framing a government which is to be administered by men over men', Madison warned in *The Federalist*, No 51, 'the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself'. In many modernizing countries governments are still unable to perform the first function, much less the second. The primary problem is not liberty but the creation of a legitimate public order. Men may, of course, have order without liberty, but they cannot have liberty without order. Authority has to exist before it can be limited, and it is authority that is in scarce supply in these modernizing countries where government is at the mercy of alienated intellectuals, rambunctious colonels, and rioting students.[1]

1 Samuel P Huntington, *Political Order in Changing Societies* (New Haven: Yale University Press, 1968), at p 8.

The business of constitutions is to curb power, not enhance it. In the words of Hungarian constitutional law scholar András Sajó, constitutionalism 'is the restriction of state power in the preservation of public peace'.[2] But states that cannot accrue sufficient power and authority to govern are weak and ultimately fail. This is what happened to so many constitutional orders in the former British colonies. Departing colonial masters have all too often concentrated almost wholly on the second of Huntington's functions – the need to get a government to control itself through the constitution – rather than on the first. The worldwide influence of the American Constitution has also contributed to this particular understanding of constitutionalism. As Fukuyama, quoting Lipset posits:

> American institutions are deliberately designed to weaken or limit the exercise of state power. The United States was born in a revolution against state authority, and the resulting antistatist political culture was expressed in constraints on state power like constitutional government with clear-cut protections for individual rights, the separation of powers, federalism, and so forth.[3]

Most constitutions of the former British Empire – including Singapore's – are legal documents establishing a form of government akin to that of the metropolis with the usual separation of powers between the three branches of government. Typically, fundamental liberties will also be included in some form of bill of rights. All these provisions are meant to ensure that individual rights are protected and governments obey the law.

Singapore has, in the past 40-odd years, remade its Constitution in significant ways. This chapter looks at the development of Singapore's constitutional institutions over the past 40 years and argues that the relative longevity of its Constitution is an achievement attributable to two reasons. The first is that Singapore's unabashedly pragmatic government and people do not view the state as a leviathan to be feared and chained. Law and order are paramount and to maintain this, a price has to be paid. This view is so prevalent that it has even been adopted by the Court of Appeal.[4] Second, with each succeeding constitutional change, the Singapore Government

2 András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest: Central European University Press, 1999), at p 9.

3 See Francis Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (London: Profile Books, 2004) at pp 7–8. Fukuyama was summarising an argument made by Seymour Martin Lipset in his *American Exceptionalism: A Double-Edged Sword* (New York: WW Norton, 1995).

4 In *Chan Hiang Leng Colin and Ors v PP* [1994] 3 SLR 662, at p 684F-G, Yong CJ held 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'.

has strengthened state authority rather than diluted it. The Constitution is thus not an instrument of limitation, but a charter of state power and authority which does not threaten the existence of the state nor fetter the Government's ability to govern.

Prelude to 1965[5]

The creation of an independent Singapore – on a tiny island with no natural resources; a Chinese dominated state in a Malay-Muslim world – is a political and historical accident. This shows in the way its constitution was haphazardly cobbled together when it had independence thrust upon its shoulders on 9 August 1965.[6] From 1819 to 1963, it was part of Britain. During this period, the first real change in Singapore's constitutional order came with the appointment of the Rendel Constitutional Commission in 1953. The Commission was charged with 'a comprehensive review of the constitution of the Colony of Singapore, including the relationship between the Government and the City Council, and to make such recommendations for changes as are deemed desirable at the present time'.[7] Most of the Commission's recommendations were accepted by the Government and implemented through the passage of the 1955 Order-in-Council.[8] For the first time, the elected members of the new Legislative Assembly had a numerical majority over the colonial appointees and nominees. This new Constitution was to have been reviewed in 1961, after five years of operation, but events in Singapore conspired to force the pace of progress towards self-government. This culminated in the 1958 Order-in-Council under which Britain granted Singapore self-governing status.[9]

While this document has long been superceded, it is timely to revisit some of its underlying precepts to understand the evolution of Singapore's constitutional structure. Two main points that were embodied in the preamble of this document set the agenda for much of Singapore's constitutional development for the next four decades. The first is that 'internal security' would be of the utmost importance,[10] and second, that

5 For a historical treatment of the development of Singapore's Constitution, see Kevin YL Tan, 'A Short Legal and Constitutional History of Singapore' in Kevin YL Tan ed., *Essays in Singapore Legal History* (Singapore: Marshall-Cavendish Academic, 2005), at 27–72.

6 I have discussed this problem in detail in Kevin YL Tan, 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to Date' (1989) 1 S. Ac. L.J. 28.

7 See Letter from Governor Sir John Nicoll to Sir George Rendel, as reproduced in the Annex to Report of the Constitutional Commission, Singapore, 1954.

8 Statutory Instruments, 1955, No 187.

9 See O Hood Philips, 'The Constitution of the State of Singapore' [1960] *Public Law* 50.

10 The relevant portion of the preamble reads: 'And whereas it was further agreed that, while the maintenance of law and order in Singapore, and the prevention of subversion

the Government had a responsibility towards racial and religious minorities and to the Malays.[11] These two imperatives provided the template into which many constitutional developments could be shoehorned.

Singapore obtained its independence from Britain by joining the Federation of Malaya and the former British territories of Sabah and Sarawak to form the Federation of Malaysia in 1963. As a state within a federation, Singapore operated its unique state constitution under the overarching purview of the Federation of Malaysia Constitution. Singapore spent two tumultuous years in the Federation.

When Singapore left the Federation on 9 August 1965,[12] efforts were afoot to craft a brand new constitution. Prime Minister Lee Kuan Yew promised Singaporeans that a new constitution would be drafted. Lee was very clear who he wanted to help Singapore draft this new constitution.[13] By early September that year, his Law Minister, EW Barker secured promises from Australia and New Zealand to help Singapore in drafting the new constitution[14] while Chief Justice Wee Chong Jin, back from the Commonwealth Law Conference in Sydney, indicated that the Chief Justices of Australia, New Zealand and India were willing to help out in the constitution drafting.[15]

Despite many promises that the new constitution was ready and would be put before Parliament and the people, no such document was publicly available.[16] Instead, the temporary Constitution adopted by Parliament on

would, under the said Constitution, be the responsibility of the Government of Singapore, nevertheless, since the internal security and external defence of Singapore are inter-related, all matters relating to the internal security of Singapore would be matters of interest and concern not only to the Government of Singapore, but also to the Government of the United Kingdom; and accordingly, that the said Constitution should make provision for an Internal Security Council.'

11 The relevant part of the Preamble reads: 'And whereas it was further agreed at the said conference, and it is hereby expressly affirmed, that it shall be the responsibility of the Government of Singapore constantly to care for the interests of racial and religious minorities in Singapore, and in particular that it shall be the deliberate and conscious policy of the government of Singapore at all times to recognize the special position of the Malays, who are the indigenous people of the Island and are in most need of assistance, and accordingly, that it shall be the responsibility of the government of Singapore to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.'

12 See Independence of Singapore Agreement, 1965, GN No 1824 of 9th Aug 1965.

13 As early as 12 Aug 1965, Lee indicated that he wanted Indian Chief Justice PB Gajendragadkar, and Australian Chief Justice Garfield Barwick on this team. See *The Straits Times* (Singapore), 13 Aug 1965, at p 1.

14 See *The Straits Times* (Singapore), 8 Sep 1965.

15 See *The Straits Times* (Singapore), 5 Sep 1965.

16 See 'A Team of Experts to Draft Singapore Charter' *The Straits Times* (Singapore) 11 Sep 1965; 'Singapore's Constitution for Parliament soon' *The Straits Times* (Singapore) 4 Oct 1965; 'Singapore Constitution' *The Straits Times* (Singapore), 16 Dec 1967; 'Draft Constitution to be out soon' *The Straits Times* (Singapore) 16 May 1968.

22 December 1965 remained the only operational constitution Singapore has had since independence. This document was, in the words of former Chief Minister David Marshall, the 'untidiest and most confusing constitution that any country has started life with'.[17] It was actually a conglomeration of three separate documents: The Constitution of the State of Singapore 1963, the Republic of Singapore Independence Act 1965,[18] and portions of the Malaysian Federal Constitution imported through the Republic of Singapore Independence Act.[19]

Setting the tone

Racial harmony and minority interests

On independence, the office of the head of state, the Yang di-Pertuan Negara was transformed into that of the President. In 1959, when the first Yang di-Pertuan Negara was nominated and elected by the Legislative Assembly, it had been decided that a Malay head of state would best serve multiracial Singapore. The semiotic representation of the state's concern for the special position of the Malays as Singapore's indigenous people through the election of Yusof bin Ishak as Singapore's first head of state was not lost on the populace at large.

There is nothing in the Constitution requiring the first head of state to be a Malay, nor is there any requirement that this post be rotated among the various races making up the Singapore polity. Even so, this was what transpired in the ensuing years. When Yusof Ishak died in 1970, his successor was an Eurasian doctor, Benjamin Henry Sheares, and when Sheares died in 1981, he was succeeded by CV Devan Nair, a Malayali Indian. It was not until 1985, when Nair resigned from office, that Singapore had a Chinese president – Wee Kim Wee.

Why should we concern ourselves with these developments if they neither sprung from any constitutional requirement nor did they effect any constitutional change. The reason is simple: The People's Action Party (PAP) Government was determined to ensure that the racial and religious minorities in Singapore would never feel oppressed or marginalised in a Chinese-dominated country. Everyone, 'regardless of race, language or religion'[20] had the ability to rise to the nation's highest office. A precedent

17 See 'Singapore's Untidy Constitution' *The Straits Times* (Singapore), 21 Dec 1965.

18 Act 9 of 1965.

19 Most of the imported provisions pertain to the fundamental liberties provisions which are federal matters and were missing in the State constitution.

20 The Singapore Pledge reads:

> We the citizens of Singapore
> Pledge ourselves as one united people

had been set a decade before. In the aftermath of the 1955 general election – Singapore's first popular election – David Saul Marshall, a Sephardic Jew became Singapore's first Chief Minister.

A responsive and flexible constitution

Singapore's Parliament recognised the importance of having a responsive constitution and to this end, enacted the Constitution of Singapore Amendment Act.[21] This legislation[22] amended the constitutional amendment procedure in the Singapore State Constitution from its original two-thirds majority to a simple majority. This constitutional change was precipitated by the concern of the incumbent People's Action Party (PAP) that it might not be able to secure a two-thirds majority in Parliament in the next elections – which were eventually held in 1968 – and did not wish to be fettered in any way in the interim. So long as they commanded a majority in the House, they could do what they deemed necessary. This singular move set the tone for the next four decades. To the PAP, the Constitution is meant to control bad government and restrict them from harming the people. However, it should never be an impediment to be used against a good government who bore the weight of the people's aspirations and destiny.

The easing of the amendment process made for a very flexible constitution, which was necessary for the passing of wide-ranging legislation to effect the economy and political development of the country. The economic and social imperatives were the main concerns of the post-independence government and they are manifested in the manner in which the Constitution was from time to time amended.

From the outset, the Singapore Government was preoccupied with two constitutional issues. The first related to the constitutional right to property which Singaporeans enjoyed when Singapore was part of the Federation of Malaysia.[23] This right had to be jettisoned to allow the Government to pass the Land Acquisition Act to empower the state to acquire land for public projects 'at economic cost'.[24] The second was the need to entrench the multiracial nature of the new state and to provide protection for the minority races within the document.[25] The first objective was achieved by

> Regardless of race, language or religion
> To build a democratic society
> Based on justice and equality
> So as to achieve happiness, prosperity and progress for our nation.

21 Act No 8 of 1965.
22 The Act was passed on 22 Dec 1965 and made retrospective to 9 Aug 1965.
23 See Art 13, Federation of Malaysia Constitution 1957.
24 See *The Straits Times* (Singapore), 17 June 1965.
25 See *The Straits Times* (Singapore), 13 Aug 1965, at p 1.

simply amending the Constitution. In this case, the Republic of Singapore Independence Act – which 'imported' the fundamental liberties provisions of the Malaysian Constitution, simply omitted the right to property. The question of entrenching minority rights protection was rather more complex and to this end, a Constitution Commission headed by Chief Justice Wee Chong Jin was convened.[26]

Flexibility vs entrenchment: The Wee Chong Jin Commission Report

The Constitutional Commission, popularly referred to as the Wee Chong Jin Commission was set up in December 1965 and charged with the responsibility of seeing how minority interests could be safeguarded.[27] The Commission's terms of reference[28] were limited to:

(a) Receive and consider representations on how the rights of the racial, linguistic and religious minorities can be adequately safeguarded in the Constitution;
(b) Consider what provisions should be made to ensure that no legislation which by its practical application is considered likely to be discriminatory, against members of any racial, linguistic or religious group, should be enacted before adequate opportunities have been given for representation from parties likely to be aggrieved;
(c) Consider what remedies should be provided for any citizen or group of citizens who claim that he or they have been discriminated against by any act or decision of the government or the administration of any statutory board or public body constituted by law and to recommend the machinery for the redress of any complaints; and
(d) Consider how such provisions can be entrenched in the Constitution.

The Commission issued its Report in 1966 and made a number of important recommendations, some of which were outside the ambit of its terms of reference.[29] The work of this Commission is extremely important, for it

26 The work and impact of this Commission has been reviewed in this volume by Thio Li-ann in her 'The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission' in Chapter 1 of this volume.
27 Members of the Commission were: Wee Chong Jin CJ (Chairman), AP Rajah (Vice-Chairman), CFJ Ess, MJ Namazie, CC Tan, SHD Elias, Syed Esa bin Syed Hassan Almenoar, G Abisheganaden, Graham Starforth Hill, Abdul Manaf Ghows, Kirpal Singh and S Narayanaswamy (Secretary).
28 See Singapore Parliamentary Debates Official Report, 22 Dec 1965, at cols 429–30.
29 See *Report of the Constitutional Commission 1966* (Singapore: Government Printer, 1966) reproduced as Appendix D in Kevin YL Tan and Thio Li-ann, *Tan, Yeo and Lee's Constitutional Law in Malaysia and Singapore*, 2nd edn (Singapore: Butterworths, 1997).

represented Singapore's first self-conscious effort in constitution-making and institution-building. The fact that Parliament either rejected or ignored most of the Commission's recommendations is also important in highlighting the contested concepts of constitutionalism that existed during the early years of Singapore's state formation and nationalism. This contest is nowhere more clearly seen than in the Commission's recommendations regarding constitutional entrenchment.

Entrenchment

The building of constitutional order and state institutions begins with their identification or creation, and culminates in their entrenchment in the constitution. To this end, the Wee Chong Jin Commission postulated three methods of constitutional amendment. The first and 'weakest' method required two-third majority vote in Parliament[30] and applied to every single constitutional provision.[31] In addition, the amendment must declare itself to be a constitutional amendment and not carry any other provision. The second method requires the consent of two-thirds of *all* members of Parliament.[32] This constitutional amendment procedure was to apply to provisions relating to: the Public Service Commission;[33] the Judicial and Legal Service Commission;[34] the proposed Council of State;[35] the terms of office and functions and powers of the Attorney-General;[36] the proposed Ombudsman;[37] the remuneration of the Speaker;[38] and citizenship.[39]

The third and most onerous method requires the amendment to be passed by two-thirds majority by *all* members in Parliament and two-thirds majority at a national referendum.[40] This third method was meant to safeguard 'certain fundamental provisions in the Constitution' which the Commission considered 'so vital if the multi-racial, multi-cultural, multi-lingual and multi-religious peoples of Singapore are to continue to live in mutual peace and harmony, and in an equal, just and democratic society'.[41] These provisions relate to: fundamental rights and freedoms;[42] appointment,

30 Ibid., at para 76.
31 Ibid., at para 79.
32 Ibid., at para 77.
33 Ibid., at para 80(a).
34 Ibid., at para 80(b).
35 Ibid., at para 80(c).
36 Ibid., at para 80(d).
37 Ibid., at para 80(e).
38 Ibid., at para 80(f).
39 Ibid., at para 80(g).
40 Ibid., at para 78.
41 Ibid.
42 Ibid., at para 81(a).

tenure, remuneration and removal of the Judiciary;[43] appointment, tenure and filling of vacancies of appointed Ministers;[44] prorogation and dissolution of Parliament;[45] general elections;[46] minorities and the special position of the Malays in Singapore;[47] and the constitutional amendment procedures.[48]

Two issues arise in connection with these particular proposals. The first concerns the methods of entrenchment. Back in 1966, Parliament did not implement these methods of entrenchment. As mentioned earlier, Parliament had in fact amended the constitutional amendment process a year earlier to make it easier – and not harder – for the legislature to effect constitutional changes. It was not until 1979 that the two-thirds majority requirement was restored. The second method of entrenchment proposed by the Wee Commission – requiring constitutional amendments to be passed by two-thirds majority of *all* members of Parliament – was never accepted or implemented. The PAP Government seemed particularly nervous about adopting the third method of entrenchment – through a two-thirds vote at a national referendum – even though it used the national referendum very successfully in the 'Battle for Merger' in 1962.[49] This may have stemmed from its wariness of the fickle electorate and its concern not to be bound by constitutional shackles. The referendum procedure was, however, introduced into the Constitution in 1972. By this amendment, any change to the sovereignty provisions under Part III of the Constitution must be passed by two-thirds majority in Parliament and two-thirds majority at a national referendum.

This brings us to the second issue – the *subject-matter* of entrenchment. As we have seen, all the provisions under the Constitution were amendable by a simple majority between 1965 and 1979. With the restoration of the two-thirds majority requirement in 1979, all provisions were similarly subject to this special majority requirement.

None of the provisions identified for special protection by the Commission received any special treatment; at least not until 1972. That year, in the wake of suggestions by opposition politicians that Singapore should rejoin Malaysia, Parliament passed a constitutional amendment to protect Singapore's sovereign status by precluding any surrender or transfer of

43 Ibid., at para 81(b).
44 Ibid., at paras 81(c) and 81(d).
45 Ibid., at para 81(e).
46 Ibid., at para 81(f).
47 Ibid., at para 81(g).
48 Ibid., at para 81(h).
49 The 'Battle for Merger' refers to the fight between the PAP and its political opponents to convince the Singapore electorate of the merits of joining the Federation of Malaysia. See Lee Kuan Yew, *The Battle for Merger* (Singapore: Government Printing Office, 1962).

sovereignty by way of merger, federation or otherwise, unless two-thirds of the electorate supported such a change during a national referendum. The amendment also prohibits, under the same terms, the relinquishing of control over the Singapore Police Force and the Singapore Armed Forces.

In 1991, when amendments were made to transform the office of the President into an elected one,[50] certain provisions relating to the new office of the elected President were similarly entrenched when the old Article 5 was amended by adding a new sub-section 2A.[51] This means that provisions relating to the elected presidency cannot be amended unless it receives the concurrence of the incumbent President; otherwise the matter would have to be determined at a national referendum called for this purpose.[52]

It is quite understandable for any state to safeguard its sovereignty and the 1972 amendment can be accepted without comment. However, it is disturbing that the office of the elected President is more tightly entrenched than most other provisions under the Constitution, including the parliamentary system of government and the judiciary.

What can we surmise from these developments? Quite clearly, the institutions considered most important for entrenchment by the Wee Commission were clearly not the same as those which Singapore's political leaders deemed necessary for enhanced protection. There was a clear disjuncture between the outlook of the legal luminaries in the Commission and the battle-hardened politicians of the PAP. While the lawyers sought a constitution that would limit state power, the politicians sought one that would strengthen state power. The removal of the constitutional right to property gave the Government almost unfettered powers to acquire large tracts of land at sub-market prices for housing and industrial development. The Wee Commission's proposed restriction on state power, giving the plebiscite the final say in core constitutional issues, was roundly rejected by the Government. Such legal fetters should not limit a duly-elected government's ability to act quickly and decisively. In the end, the politicians

50 On the elected presidency, see Kevin YL Tan, 'The Elected Presidency in Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991' [1991] Sing JLS 179–94; Kevin YL Tan, 'The Presidential Executive System in Singapore: Problems and Prospects' in Graham Hassell and Cheryl Saunders, eds, *The Powers and Functions of Executive Government: Studies from the Asia Pacific Region*) (Melbourne: Centre for Comparative Constitutional Studies, The University of Melbourne, 1994) 37–53; and Valentine Winslow, 'Electing The President: The Presidential Elections Act 1991' [1991] Sing JLS 476–81.

51 Art 5(2A) requires that '. . . a Bill seeking to amend this clause, Arts 17 to 22, 22A to 22O, 35, 65, 66, 69, 70, 93A, 94, 95, 105, 107, 110B, 151 or any provision in Part IV or XI shall not be passed by Parliament unless it has been supported at a national referendum by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act'.

52 As we go to press, Art 5(2A) remains in abeyance. It was passed in 1991 but has not been brought into force since.

won and the lawyers lost. Constitution-making was dictated by state and political imperatives rather than rule of law principles and democratic ideals. This was particularly evident after 1984, but more of that later.

Council of State (Presidential Council for Minority Rights)[53]

One of the Wee Commission's most interesting proposals – and one which found favour with the Government – was the creation of a new body called the Council of State whose main function would be to 'consider all proposed legislation, except all Supply Bills or a Bill presented on a Certificate of Urgency, and to report thereon to Parliament'. The Council would be a purely advisory body and would not be part of the legislature. It would offer Parliament 'serious and weighty advice' on impending legislation and their effects on racial, linguistic, religious or cultural minorities.[54]

Following a brief debate in Parliament, a Parliamentary Select Committee studied these proposals and submitted its Report to Parliament on 9 December 1969. The Constitution (Amendment) Act 1969 was passed. Unfortunately, the Government rejected some recommendations of the Select Committee including the suggestion to exclude politicians and hold its meetings in public. Under the 1969 provisions, the Presidential Council comprised a Chairman, 10 Permanent Members and 10 non-permanent members appointed by the President on the advice of the Cabinet. Its general function was 'to consider and report on such matters affecting persons of any racial or religious communities in Singapore as may be referred to the Council by Government', while its particular function was 'to draw attention to any Bill or to any subsidiary legislation if that Bill or subsidiary legislation is in the opinion of the Council a differentiating measure or otherwise inconsistent with the fundamental liberties of the subject'. Quite clearly, the Government had no intention of being overruled by an unelected body – no matter how noble – and thus limited the Council's charter to an advisory one.

The Ombudsman proposal

The Commission raised one other key proposal which was rejected by the Singapore Government – the proposal to create the office of an Ombudsman or Parliamentary Commissioner for Administration to ensure

53 On the Presidential Council, see S Jayakumar, 'Singapore's Presidential Council – An Advisory Organ for Parliament on Human Rights' (1971) 5 IV (2–3) Human Rights Journal 477–92; Thio Su Mien, 'The Presidential Council' (1969) 1 Sing LR 2; David S Marshall, 'The Presidential Council' (1969) 1 Sing LR 9; Francis Khoo, 'The Presidential Council' (1969) 1 Sing LR 14; and Gerald de Cruz, 'The Presidential Council' (1969) 1 Sing LR 20.

54 Ibid., at paras 51–4.

> . . . that civil servants carry out their administrative duties according to law so that citizens may feel that, apart from the ministerial responsibility for the acts of civil servants which is a feature of our parliamentary system in Singapore, there is also an independent check on the acts and decisions of civil servants.[55]

The Government's rejection of the Ombudsman proposal is again symptomatic of the state's reluctance to be held accountable in any way other than by the ballot box. The need to foster a strong, reliable and loyal civil service was uppermost in the Government's mind. This objective would have been much harder to achieve if the civil service was constantly harassed or called to account for their actions through the office of the Ombudsman. An independent Ombudsman – as envisaged by the Commission – would be empowered to call upon the various government ministries to account for their shortcomings.

This could well prove embarrassing for any government, especially when the principle of ministerial responsibility has long been a convention of the parliamentary system of government. Any slur on the work of a ministry may translate into an aspersion on an individual minister and this may in turn weaken the Government's power, prestige and legitimacy. The PAP Government has its own vision of what ministerial responsibility entails. On 27 February 2008, Mas Selamat Kastari, a leader of the outlawed Jemaah Islamiah escaped from the Whitley Detention Centre where he was being detained under the Internal Security Act. After Home Affairs Minister and Deputy PM Wong Kan Seng gave an account of the security lapses allowing Mas Selamat to escape to Parliament on 22 April 2008, opposition MP Low Thia Kiang intimated that Wong should have resigned since he was the minister responsible for the debacle. To this insinuation, PM Lee Hsien Loong stated:

> The Minister is ultimately accountable for the policies and operations of his Ministry. But this does not mean that if a lapse occurs down the line somewhere, every level in the chain of command, up to and including the Minister, should automatically be punished or removed. Based on the facts, we have to decide who fell short in performing his duties, and what is the appropriate disciplinary action for each officer involved. We also have to follow due process, giving officers the chance to defend themselves. Otherwise we will demoralise the organisation and discourage officers from taking initiatives or responsibility, for fear of being punished for making mistakes.
>
> This same principle of responsibility and accountability also applies to Ministers. It is the Prime Minister's duty to decide how each Minister

55 Ibid., at para 63.

has performed in his portfolio. Hence when a lapse happens, I will ask the same questions of the Minister – how is he involved in the matter? Has he been incompetent or negligent? Most serious of all, is there a question of integrity? If so, he has to go, even if the actual incident is minor. I will also ask: is the Minister able to put things right, or does the situation call for a new pair of hands, not encumbered by what went before, to take charge and make a fresh start? Of course, the Prime Minister himself is accountable too, to Parliament and ultimately to the electorate.

However, we should not encourage a culture where officials and Ministers resign routinely whenever something goes wrong on their watch, regardless of whether or not they are actually to blame. That would be the easy way out. It may temporarily appease an angry public, but it will not fundamentally solve the problem.

The basic issue is whether the person is culpable. If so, we must act against him, no matter how senior his position. But if he is not at fault, then we must have the moral courage to state so, and support him. This way, everybody within the organisation can be confident that when something goes wrong, they will not be sacrificed for political expediency.[56]

Strengthening state institutions

The key institutions of state were inherited from the British – a Westminster parliamentary style of government with an executive drawn from the legislature, and an independent judiciary. Right up to 1979, most changes that were made to these key institutions were made in respect of the judiciary. This was because of the complications that arose following separation from Malaysia.

Regularising the court system

Following Singapore's merger with the Federation of Malaysia, her judicial structure was altered. The 1955 Courts Ordinance – the last Ordinance to refer back to the jurisdiction of the English High Court – was replaced by the Courts of Judicature Act 1964.[57] Under this Act, the Supreme Court of the Colony of Singapore was replaced by the High Court of Malaysia

56 84 SPR, 22 Apr 2008, available at <http://www.parliament.gov.sg/reports/public/hansard/full/20080422/20080422_HR.html> (accessed 12 May 2008).

57 Malaysian Act 7 of 1964, reprinted as Act 6 of 1966 in the Singapore Reprints Supplement (Acts). Most of its provisions came into effect in Singapore on 16 March 1964. See Mohan Gopal, 'The Original Civil Jurisdiction of the Singapore High Court: Some Issues' [1983] 2 MLJ lxiv at p lxv.

in Singapore. Under this new system, the Singapore branch of the Malaysian High Court was part of the larger national system of courts that included its two sister High Courts of Malaya and Borneo. At the top of the hierarchy was the Federal Court.

When Singapore became independent in 1965, no changes were made to the judicial system, thus leaving Singapore in a rather anomalous situation of being an independent state with its judicial system still tied to that of the Federation of Malaysia, since the 1963 Constitution of the State of Singapore made no provision for a separate judiciary, that being a federal matter. The Singapore High Court thus remained part of the Federal Court structure until 1969 when the Constitution (Amendment) Act 1969[58] was passed alongside the Supreme Court of Judicature Act.[59] These changes were enacted to 'set out logically the consequences that flow from Singapore becoming independent'.[60] The amending legislation also constituted the Judicial Committee of Her Britannic Majesty's Privy Council as Singapore's final court of appeal.[61] Under this new Act, the jurisdiction of the Supreme Court was prescribed under sections 15 to 17 and ceased to refer back to the English High Court's jurisdiction.[62]

Judicial manpower

Shortly after the passage of the Supreme Court of Judicature Act, the Government highlighted the problem of overload of the courts and the lack of suitable and willing candidates who could be appointed to the Supreme Court bench. To solve this immediate problem, an amendment was made to Article 94 of the Constitution in 1971 to permit the appointment of what might be called 'supernumerary judges'. The idea of appointing retired judges to the bench is not a new one. Under the 1958 Constitution, Murray Buttrose J, Singapore's last expatriate judge was re-appointed to the bench after he reached his retirement age of 60,[63] serving as supernumerary judge until he retired at the age of 66 in 1968.

Under this new provision, the Government could re-appoint judges of the Supreme Court who reached the constitutional retirement age of 65 on a contractual basis.[64] Judges were typically given contracts for between 1 and 3 years at a time, with some extended well beyond a decade past their

58 Act No 19 of 1969.
59 Act No 24 of 1969.
60 See Singapore Parliamentary Debates Official Report, 12 June 1969, cols 74–5.
61 Act No 19 of 1969.
62 See sections 15–17A of the current Supreme Court of Judicature Act (Cap 322).
63 Under the old Constitution, the terms of office of judges was determined by ordinary law and the retirement age was 60. See Art 92(1)(a) Singapore (Constitution) Order in Council, 1958.
64 Act No 16 of 1971.

retirement age.[65] However, this measure did not provide a permanent solution. There was still an urgent need to increase the manpower of Singapore's higher judiciary, given the increase in caseload. Furthermore, there is no fixed number of Supreme Court judges that can be appointed under the Constitution. In 1979, a further amendment to the Constitution was passed to create the position of the Judicial Commissioner.[66] Under the new Article 94(4), a Judicial Commissioner may be appointed by the President 'acting in his discretion, concurs with the advice of the Prime Minister', for 'such period or periods as the President thinks fit'.

The logic behind this new position was that it would allow top practitioners who take up such appointments to return to their lucrative practices after serving their terms.[67] Appointments to the post of Judicial Commissioner, like those of supernumerary judges, are for between 6 months and 3 years, and is often viewed as a prelude to a full judgeship. Under Article 94(5), a Judicial Commissioner may be appointed 'to hear and determine a specified case only'. In 1993, then Chief Justice Yong Pung How announced that he would appoint Judicial Commissioners for very short terms and to hear long cases which would otherwise disrupt normal court hearing schedules.[68] This did not occur during Yong CJ's term of office and at the time of writing, no Judicial Commissioner has been appointed to hear specific cases on a 'one-off' basis.

The next important change was only tangentially connected with the Constitution. Under Article 98(6) of the Constitution, 'Parliament shall by law provide for the remuneration of the Judges of the Supreme Court and the remuneration so provided shall be charged on the Consolidated Fund'. Security of remuneration is further protected by Article 98(8) which provides that a Judge's 'remuneration and other terms of office (including pension rights) ... shall not be altered to his disadvantage after his appointment'. What the Constitution does not explicitly provide is the salary scale for judges which, up to the early 1990s, lagged far behind those

65 Independent Singapore's first Chief Justice, Wee Chong Jin retired at the age of 74. His successor Yong Pung How retired at age 80, while the current Chief Justice Chan Sek Keong is already past 70 at the time of writing. Other judges of the Supreme Court who were re-appointed after retirement are as follows (with their retirement age in parenthesis): Frederic Arthur Chua (78); Choor Singh (70); Dennis D'Cotta (71); AP Rajah (79); TS Sinnathuray (68); and LP Thean (70).

66 Art 94(4).

67 The reality was that few Judicial Commissioners actually returned to their practices after serving on the bench as most of them were elevated to full judgeships. Those who returned to private practice since the scheme began in 1979 were (with their years as JCs in parenthesis): Joseph Grimberg (2.5); Tan Teow Yeow (2); Goh Phai Cheng (3); KS Rajah (3); Christopher Lau Loke Sam (4); CR Rajah (3); and Sundaresh Menon (1).

68 See 'Will more JCs be appointed?' *Business Times*, 23 Mar 1995, at p 9.

of the top practitioners at the Bar. This made elevation to the Bench a financially unattractive proposition for most lawyers and most of them politely turned down calls to service. As Chief Justice Yong Pung How recalled:

> The problem however, was that judicial salaries at that time were extremely low. Many leading practitioners declined when approached to serve on the High Court bench. We had to raise judicial salaries to make the bench a more viable alternative for those who were identified as being of the right competence and temperament for appointment.[69]

In 1994, the Government issued a *White Paper on Competitive Salaries for Competent and Honest Government*.[70] This White Paper established two private sector benchmarks to peg the salaries of government ministers and senior civil servants. This benchmark was thoroughly revised in 2000, and is now based on the salaries of top earners from six professions – bankers, lawyers, accountants, engineers, MNC employees, and local manufacturers. In the wake of this White Paper, Parliament passed the Judges Remuneration Act[71] which mandated large increases in the salaries of judges. In 1994, the annual pensionable salary of the Chief Justice was S$347,400; a Judge of Appeal was S$253,200; and every other Judge of the Supreme Court was S$234,600.[72] Under the new salary scales, the salary of judges of the Supreme Court is pegged to 'Staff Grade 1 (MR4)' which is two-thirds of the salary of the 24th highest earner among a group comprising the top eight earners from each the six professions mentioned above. Under the latest 2008 revisions, salaries pegged to Grade 1 (MR4) carry an income of S$1,940,000 per annum.

Cutting apron strings

In 1989, after almost 25 years of independence, Parliament amended the Constitution to restrict appeals to the Privy Council in the United Kingdom. Under this amendment, appeals could only be filed with the Privy Council if both parties to the litigation agreed prior to their Court of Appeal hearing (in civil cases) or where the death penalty was involved and there was no unanimity amongst the judges in the Court of Criminal Appeal. In 1993, Singapore abolished all appeals to the Privy Council, and a constitutional amendment was passed to constitute a permanent Court of Appeal and to create a new class of judges known as Justices of Appeal who would rank

69 Yong Pung How CJ, Speech at the Opening of the Legal Year 2006.
70 (Cmd 13 of 1994).
71 Cap 147.
72 Judges' Remuneration (Annual Pensionable Salary) Order (Cap 147, Order 1).

above normal puisne judges and sit on appeals in the new court.[73] The Court of Appeal is presided over by the Chief Justice as the Court's President. The office of the Vice-President of the Court of Appeal was only filled in 2008 with the appointment of Chao Hick Tin JA to the post.

In September 1994, a new Article 100 was inserted into the Constitution to establish a Special Tribunal consisting of not less than three Judges of the Supreme Court. The President of the Republic may refer to this tribunal 'for its opinion any question as to the effect of any provision' of the Constitution. The tribunal is under a duty to 'consider and answer the question so referred as soon as may be and in any case not more than 60 days after the date of such reference'.[74] Any dissenting opinions of any judge must accordingly be reflected in the opinion rendered to the President although the majority decision shall be considered the opinion of the tribunal and shall be pronounced in open court. The opinion is not subject to question in any court.[75]

This latest amendment was significant not only for the creation of a new judicial body, but also because it foretold the engagement of this new institution with a prickly issue relating to the elected President's powers. In moving the amendment, then Deputy Prime Minister Lee Hsien Loong pointed out that unlike in Malaysia, the 'Singapore Constitution does not have any provisions for referring questions of interpretation of the Constitution to the Courts for an advisory ruling'.[76] Lee explained that having such a tribunal will be useful in resolving interpretation of the complex provisions of the Elected Presidency scheme, and that an issue with respect to the interpretation of Article 22H relating to the President's veto powers had already arisen.

This Special Tribunal determined its first reference in early 1995 in *Constitutional Reference No 1 of 1995*.[77] In this reference, the special tribunal, comprising members of the Court of Appeal (Yong Pung How CJ, LP Thean and M Karthigesu JJA) were asked to consider whether the failure to bring Article 5(2A) into operation gave the President the power under Article 22H to withhold his assent to any Bill seeking to amend any

73 For a comment on this amendment see Kevin Tan and Thio Li-ann, 'Singapore' in (1993) *Asia-Pacific Constitutional Law Yearbook* 191, at pp 203–7. An in-depth commentary is found in Tan Yock Lin, 'Legislation Comment: Supreme Court of Judicature (Amendment) Act 1993' [1993] Sing JLS 557.

74 See new Art 100(2).

75 See new Arts 100(3) and 100(4).

76 See Singapore Parliamentary Debates Official Report, 25 Aug 1994, col 428.

77 See *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201. For an excellent account of events leading up to this reference, see Thio Li-ann, 'Working Out the Presidency: The Rites of Passage' [1995] Sing JLS 509; for a rebuttal to Thio, see Chan Sek Keong, 'Working Out the Presidency: No Passage of Rites – In Defence of the Opinion of the Constitutional Tribunal' [1996] Sing JLS 1.

of the provisions referred to in Article 5(2A), especially a bill seeking to amend Article 22H itself. The Tribunal held that although Article 5(2A) was not in force, Parliament intended it to be part of the law of the land, and the President did not have the power under Article 22H to withhold his assent to any Bill seeking to amend Article 22H.

Attempts to strengthen Singapore's judicial institutions have largely been successful, with Singapore's courts getting high marks for its efficiency and the quality of its judgments.[78] However, the judiciary has its fair share of critics as well. Many critics have challenged its reputation for impartiality in politically-charged cases.[79] Even in instances when the courts have attempted to check the discretionary power of the executive, Parliament has moved swiftly to reverse the trend. Following the arrests of 22 persons involved in an alleged Marxist conspiracy in 1987, a number of habeas corpus cases were filed in the courts. Of these, the most significant was *Chng Suan Tze and Ors v Minister for Home Affairs, Singapore*[80] where the Court of Appeal held that the discretion of the Minister was subject to judicial scrutiny and review. This decision overruled the long-standing rule of non-justiciability established by the High Court in *Lee Mau Seng v Minister for Home Affairs*.[81] Parliament moved quickly to nullify the impact of the Court of Appeal's decision. It passed an amendment to the Internal Security Act and inserted a new section 8B which provides that 'the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister . . . shall be the same as was applicable and declared in Singapore on 13 July 1971'. Furthermore, the amendment provides that there shall be no judicial review of any decision of the President or the Minister under the Act 'save in regard to any question relating to compliance with any procedural requirement of this Act'.[82]

78 See Karen Blöchlinger, '*Primus Inter Pares:* Is the Singapore Judiciary First Among Equals?' (2000) 9(3) *Pacific Rim Law and Policy Journal* 591–618. See also reports issued by the Hongkong-based Political and Economic Risk Consultancy (PERC) has consistently rated Singapore's judicial system among the top three in Asia since 2004.

79 See for example, Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' (2001) 28(4) *Journal of Law and Society* 490–519; Nancy Batterman and Eric Schwarz, *Silencing All Critics: Human Rights Violations in Singapore* (New York: Asia Watch, 1989); Beatrice S Frank *et al.*, *The Decline of the Rule of Law in Singapore and Malaysia: A Report of the Committee of Human Rights of the Association of the Bar of the City of New York* (New York: The Association, 1990); and BS Frank, JC Markowitz, RB McKay and K Roth 'The Decline of the Rule of Law in Malaysia and Singapore' (1991) 46(1) *The Record* 5–63; Francis T Seow, *Beyond Suspicion? The Singapore Judiciary* (New Haven: Yale Southeast Asian Studies, 2006); and Chris Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Melbourne: Scribe Publications, 2003).

80 [1989] 1 MLJ 69.

81 [1971] 2 MLJ 137.

82 Section 8B(2), Internal Security Act (Cap 143).

This change is significant in demonstrating the executive's discomfort over any branch of government pronouncing on its powers. No court, no matter how politically-savvy should have the power to thwart the executive in their power under the Constitution, especially not in this age of the 'War against Terror'.

The executive

The transformation of Singapore's presidency into an elected office must rank as one of the most substantive constitutional changes in its short history.[83] At the National Day Rally in 1984, then Prime Minister Lee Kuan Yew mooted the idea of creating an elected presidency.[84] While the significance of this suggestion only manifested itself some eight years down the road, it was the start of a string of debates and discussions on the need to protect Singapore's past reserves.

The *1988 White Paper*[85] stated quite clearly that in designing a new institution to safeguard Singapore's reserves and the integrity of the civil service, certain considerations were deemed vital.[86] First, the parliamentary system of government should be preserved so that the Prime Minister and his cabinet will retain the initiative in governance. Second, the new institution must enable quick action and allow the relevant authorities to act swiftly. Several alternatives were considered and found to be unsuitable, including, 'creating an upper legislative body, reposing the power of the veto in the Presidential Council for Minority Rights or some other body analogous to the Federal Reserve Board, or requiring decisions on financial assets to be subject to the approval of the electorate in a referendum'.[87]

After much debate, the Constitution was amended in 1991 to provide for a popularly elected Head of State. The objective behind this amendment was to institutionally safeguard Singapore's massive foreign reserves and the integrity of its civil service from a profligate and populist government. The popularly elected President would, it was envisaged, hold the 'second key' to the reserves and have a veto power on the appointment of top civil servants. At the same time, the amendments gave the elected President power to withhold assent over the continued preventive detention of prisoners and the issuing of restraining orders against extremist religious proselytes.

83 The most thorough treatment of the subject of the elected presidency is Kevin YL Tan and Lam Peng Er (eds), *Managing Political Change in Singapore: The Elected Presidency* (London: Routledge, 1997).

84 See Prime Minister's National Day Rally Speech, *The Straits Times* (Singapore), 10 Aug 1988, at p 1.

85 See Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services, (Cmd 10 of 1988).

86 Ibid., para 18(a)-(e), at pp 4–5.

87 Ibid., para 18, at pp 3–4.

To aid the President in these responsibilities, the Constitution prescribes the establishment of the Advisory Board[88] and the Presidential Council for Religious Harmony,[89] respectively. It is noteworthy that these institutions are not all creatures of the Constitution and its members are appointed rather than elected. The nomination and selection process is thus a state prerogative and not subject to the pressures or vicissitudes of the popular vote.

Notable features of the new office are, first, the provisions relating to the elected Presidency cannot be amended without the President's concurrence unless it is supported at a referendum by two-thirds majority. Second, the qualifications for candidacy are extremely stringent[90] with a three-man Presidential Elections Committee determining who is or is not eligible to run for President. Third, the Constitution requires any candidate wishing to run for the office to be non-partisan in that he or she cannot be a member of any political party. Finally, under the Presidential Elections Act,[91] if there was only one candidate for the elections, there would be no need for formal elections and that candidate would be deemed elected as President.

In 1993, President Wee Kim Wee retired after serving eight years as President. The first ever Presidential elections were held on 29 August 1993.

88 This is established under Art 151(2) of the Constitution.

89 This is established under section 3 of the Maintenance of Religious Harmony Act (Cap 167A).

90 Under Art 19 of the Constitution, a candidate for the post of President must be aged 45 and above; not be a member of any political party on the date of nomination for election; have his name appear on the current register of electors; be a resident of Singapore at the time of nomination; and have been a resident for period amounting in aggregate of not less than 10 years; and not subject to any disqualification under Article 45. In addition, he or she must satisfy the Presidential Elections Committee (PEC) that 'he is a person of integrity, good character and reputation', and has for a period of not less than 3 years, held office in one of numerous capacities laid down under Art 19(2)(g). Specifically, these offices are: Minister; Chief Justice; Speaker; Attorney-General; Chairman of the Public Service Commission; Auditor-General; Permanent Secretary; chairman or chief executive officer of one of the statutory boards referred to in Art 22A read with Schedule 5 (viz Board of Commissioners of Currency, Singapore, Central Provident Fund Board, Housing and Development Board, Jurong Town Corporation, Monetary Authority of Singapore, and the Post Office Savings Bank of Singapore); chairman of the board of directors or chief executive officer of a company incorporated or registered under the Companies Act with a paid-up capital of at least $100 million or its equivalent in foreign currency; or 'in any other similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, in the opinion of the Presidential Elections Committee, has given him such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of the President'.

91 Cap 240A.

Ong Teng Cheong, Deputy Prime Minister, Chairman of the People's Action Party and long-time trade union leader and politician resigned his party post and parliamentary seat to contest the elections. Nominated MP Chia Shi Teck offered to contest Ong if no other candidate came forward as he felt that the default election procedure would fail to produce a legitimate President. A few days after Ong announced his candidacy, retired banker and former Accountant-General Chua Kim Yeow announced that he would contest Ong. After a brief, low-keyed campaign by both candidates, Ong Teng Cheong was elected Singapore's first elected President.

In 1994 two amendments were made to the Elected Presidency scheme. The first inserted a new Article 111A which empowered the Elected President to 'designate as a significant grade', certain appointments in the Administrative Service and the Administrative (Foreign Service) Scheme of Service.[92] The new article also provided that appointment to this 'significant grade' shall be made by the President, acting on the advice of the Prime Minister.

The second amendment was much longer.[93] It amended many of the technical provisions relating to the method of accounting used to determine whether assets had indeed been drawn down, thus attracting presidential scrutiny. Significantly, the changes provide that even if the President agrees to allow the Government to draw down upon its reserves, he must publish the rationale of his action in the *Gazette*. Another important part of this amendment was the inclusion of a new Article 100 which established a Special Tribunal consisting of not less than three Judges of the Supreme Court to render opinions on constitutional issues. This tribunal has been discussed above. The amendment which created the greatest uproar in Parliament was the inclusion of a new Article 151A which effectively makes the presidential veto ineffective in respect of 'any defence and security measure'.[94]

In October 1996, the elected presidency provisions were amended yet again.[95] A number of the amendments resulted from the complications considered in Constitutional Reference No 1 of 1995. Essentially, the changes involved the amendment procedures in Article 5 of the Constitution, and the President's veto powers under Article 22. Of particular significance was the 'deeming provision' under the new Article 5A(6) which provides that the President will be deemed to have assented to a Bill upon the expiration of 30 days after the Bill has been presented to him for his assent if he does nothing.

92 Act 15 of 1994.
93 Act 17 of 1994.
94 Art 151A(1). See Thio Li-ann and Kevin YL Tan, 'Singapore' [1994] Asia-Pacific Constitutional Yearbook 207 at pp 210–11.
95 Act 41 of 1996.

Other significant changes involved the appointment of members to the Council of Presidential Advisors. New articles were added to Article 22, 22A and 22C – which concern the President's power to veto appointment of public officers, members of statutory boards and directors of government companies – to provide that where the 'President, contrary to the recommendation of the Council of Presidential Advisors, refuses to make an appointment or refuses to revoke an appointment . . . Parliament may, by resolution passed by not less than two-thirds' majority overrule the decision of the President'.

Since then, Parliament has seen fit to whittle down the President's powers of scrutiny even further. This was quite easily done since Article 5(2A), which entrenches the President's powers tightly, has not been brought into force since its passage in 1991.[96] In terms of institution building, the elected Presidency is an aberration. The initial motivation for this massive set of amendments – which incidentally enlarged the Constitution by half – was the PAP's nightmare that Singaporeans would vote in a non-PAP government that was profligate and spendthrift. In such a situation, the ruling party felt that it was necessary to find a means to check on such a government, to prevent them from filling the ranks of the civil service with cronies and hangers-on and to stop them from raiding Singapore's coffers for personal gain or to buy popularity. This explains why the Government was so adamant about entrenching the powers of the elected President so tightly in the Constitution. It also explains why the Government has, to date, refused to bring the all-important Article 5(2A) into force. Clearly, the PAP's fear of being unseated from power has evaporated somewhat over the years, and it is now saddled with an institution with no support structure or stability in its constitutional role.[97]

Changes to the parliamentary system[98]

Of all the institutions under Singapore's Constitution, the Legislature has undergone the most dramatic transformation. In 1965, Singapore opted to continue operating the unicameral Westminster style parliamentary system which it inherited from the British in 1958. Elections were to be held at

96 See Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian' [2007] Sing JLS 290–322.

97 The lack of a proper administrative infrastructure to support this new institution was amply demonstrated when the first elected President, Ong Teng Cheong revealed to the world in a televised news conference on 16 Jul 1999 that he did not have sufficient staff and expertise to assist him in his task of determining and protecting Singapore's past reserves. See '"I Had a Job to Do" Whether the government liked it or not, says ex-president Ong', *Asiaweek* 10 Mar 2004.

98 See generally, Thio Li-ann, 'The Post Colonial Constitutional Evolution of the Singapore Legislature' [1993] Sing JLS 80.

least once every five years, and the single-plurality (first past the post) system of elections was retained. A major turning point came in 1981 with the loss of Anson constituency to JB Jeyaretnam of the Workers' Party. In most polities, the loss of a single seat to the opposition barely merits a column of newspaper space, but it made headlines in Singapore because the ruling PAP occupied every single seat in Parliament from 1965 to 1981. This was in no small way aided by the fact that the leading opposition party, the Barisan Sosialis decided to take their struggles into the streets and to abandon Parliament in the late 1960s.[99]

Jeyaretnam's victory transformed Singapore parliamentary politics. His sharp and sometimes irreverent (and some might add irrelevant) questions in Parliament proved irritating to a government used to shadow-boxing against its own backbenchers. To quell demands for more opposition members in Parliament, a constitutional amendment was passed in 1984 to 'ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the government'.[100] Under this constitutional innovation, the six best 'losers' in the general elections (on the basis of percentage votes cast) would be invited to sit in Parliament as Non-Constituency Members of Parliament (NCMPs). NCMPs have all rights and privileges as normal MPs but cannot vote on bills to amend the Constitution, Supply or Money Bills or on a motion of no confidence in the Government. In the 1984 general elections, two opposition members were directly elected to Parliament and it was decided that only one NCMP seat would be offered. There were no takers for this offer.

Parliament passed one of the most important constitutional amendments just prior to the 1988 general elections. This amendment introduced the Group Representation Constituency or GRC. This unique scheme clustered three single-member constituencies into a single GRC, and each GRC had to include at least one candidate from a minority race, i.e. Malay or Indian or other (non-Chinese) race. The idea stemmed from the Government's observation that there was a 'voting trend which showed young voters preferring candidates who were best suited to their own needs without being sufficiently aware of the need to return a racially balanced slate of candidates'.[101] To complicate matters, a further function was layered onto the GRCs. Each GRC would also constitute a Town Council with responsibility for the day-to-day management of the GRC's municipal affairs.

99 The Barisan Sosialis or Socialist Front was a breakaway faction of PAP formed in Aug 1961 by Lim Chin Siong and Lee Siew Choh. In 1966, all its MPs resigned their seats in protest over Singapore's 'phony independence'. They also boycotted the 1968 general elections, and were unable to make a comeback thereafter. In 1988, it merged with WP to strengthen the opposition.

100 Art 39(1)(b).

101 Deputy PM Goh Chok Tong, *Singapore Parliamentary Debates Official Report*, 11 Jan 1988, col 178.

Once again, we see the element of racial representation being grafted into the Constitution, something the PAP Government had been concerned with from the earliest years of statehood. The big fear was that Singaporeans could wake up one morning and find Parliament comprising only Chinese faces. This would be very damaging to inter-race relations and minority representation. Hitherto, the PAP had relied on its dominance of Parliament and the political firmament to ensure that sufficient seats were allocated to members of the minority races in every electoral contest. However, this system of minority representation can only work so long as the PAP continues to dominate. In the event that it loses the confidence of the electorate, there is no constitutional guarantee that minority races would be represented in Parliament.

The PAP chose not to adopt either of the two well-known methods of minority representation – proportional representation voting, or the creation of an upper house with blocked seats for the minority members. Indeed, more than 20 years earlier, the Wee Chong Jin Commission considered both proportional representation and the creation of an upper house. Specifically, three proposals were considered: (a) a Committee of Representatives from the minorities that would elect three persons from amongst its members to represent the minorities in the elected chamber in Parliament;[102] (b) a system of proportional representation;[103] and (c) the creation of an Upper House in Parliament to include members elected or nominated to represent the racial, linguistic and religious minorities in Singapore.[104] The first proposal was rejected as the Commission felt that the elected chamber 'should not be diluted by the presence' of any unelected member as it would be an inappropriate and retrogressive step.[105] The second proposal was also rejected because such a system would intensify 'party politics along racial lines' and ultimately 'perpetuate and accentuate racial differences thereby making increasingly difficult if not impossible the achievement of a single homogeneous community out of the many races that form the population of the Republic'.[106] The third proposal was rejected as being 'disastrously retrograde' as 'the proper place for party politicians is in the elected chamber and politicians who wish to have a seat in Parliament should achieve this end by taking part in elections'.[107]

Instead, it chose an innovative team-MP scheme which conflated the twin functions of minority representation and municipal town management.

102 Report of the Constitutional Commission 1966 (Singapore: Government Printers, 1966), para 46(1).
103 Ibid., para 46(2).
104 Ibid., para 46(3).
105 Ibid., para 47.
106 Ibid., para 48.
107 Ibid., para 49.

The fact that the number of members in each GRC was enlarged just before a general election also makes it that much more difficult for opposition parties to find appropriate team members to contest the PAP in their wards. In 1991, a constitutional amendment was passed to increase the number of MPs in a GRC from three to four. The reason offered was that as the populations grew in these constituencies, the workload for MPs grew correspondingly and it would need more MPs to help shoulder the burden. Shortly after this amendment was made, Prime Minister Goh Chok Tong called for early General Elections. Although the PAP traditionally called for elections after about four years in office, this particular Parliament had been in session for only three years.

Parliament was dissolved again on 16 December 1996 in preparation for general elections on 3 January 1997. Under the new re-grouping of GRCs, made possible by the latest constitutional amendment, Singapore was divided into 15 GRCs of between four to six members each and nine single-seat wards. All the single-seat wards were contested. Only six GRCs were contested. The ruling People's Action Party was returned to government on Nomination Day and won all of the 82 seats except two single-member seats in Hougang and Potong Pasir wards. Of greater significance was the fact that prior to the 1997 general elections, yet another amendment was made to Article 39A of the Constitution which dealt with the number of candidates in a GRC. While previously the maximum number of members in each GRC was four, this was extended to a maximum of six. The maximum number of MPs in a GRC has not been increased since 1996 although the number of GRCs designated to have five or six MPs have increased over the years.

In 1990, the Constitution was amended to introduce yet another class of Member of Parliament – the Nominated Member of Parliament (NMP). The idea behind this amendment was that the Government felt that there should be alternative views on policies to those espoused by the political parties represented in Parliament and that this would best be achieved by nominating non-political persons to serve as Nominated Members of Parliament. The first two Nominated MPs, Dr Maurice Choo and Mr Leong Chee Whye were sworn into office. Originally, the maximum number of NMPs allowed under the Constitution was six, but this was increased by a constitutional amendment in 1997 to nine.

The last time Singapore had nominated members in the legislature was in the colonial era when the Governor was empowered to nominate trustworthy natives to the Legislative Council. Typically, these nominees were prominent business personalities or community leaders. Subsequently, nominees to the Legislative Council represented particular interest groups such as the Chinese Chamber of Commerce or the Malay community or European businesses.

Since 1990, Singapore's NMP scheme seems to have developed along the colonial lines rejected outright by the Wee Chong Jin Commission.

Increasingly, individual NMPs are seen as representatives of discrete groups within the community, such as women, youth, the trade unions, intelligentsia, those born after Singapore became independent (known as post-1965 generation) and even the business sector. Some NMPs straddle several sectors. For example, the latest group of NMPs who were appointed in January 2007 included the following (with the groups they nominally or notionally represent in parenthesis): Cham Hui Fong (labour movement); Gautam Banerjee (professionals and foreign talent); Kalyani K Mehta (women, elderly and social workers); Edwin Khew (business and the environment); Loo Choon Yong (business and entrepreneurs); Eunice Olsen (youth and community service); Jessie Phua (women and business); Siew Kum Hoong (young professionals and post-1965 generation); and Li-ann Thio (intelligentsia, women and post-1965 generation).

Singapore's Parliament has been the main engine for constitutional change. Given its dominance of Parliament,[108] the PAP has absolutely no difficulty meeting any super-majority requirement for constitutional amendments within the House. At the same time, it has succeeded in transforming Singapore's Parliament into one of the most unusual legislatures in the world. While the forms these changes have taken are unique, the motivations remain largely the same as when Singapore became independent in 1965. Racial and minority representation was uppermost on the minds of the Singapore's leaders when the GRC amendment was passed. The fact that it simultaneously carried the burden of municipal government made it easier for the incumbent party to remain in office.

The fact that the PAP Government eschewed the options of proportional representation or the creation of an upper house demonstrates its abiding concern for swift and unencumbered action. An upper house must have some blocking powers if it is to have any credibility and this would mean the whittling away of centralised state power the Government has hitherto enjoyed. Most systems of proportional representation would also mean the erosion of the single plurality system which gives total power to the one who reaches the post first, regardless of how many other candidates there may be in the race. This would mean having to share power with the opposition, a prospect that cannot possibly be viewed with any enthusiasm by the PAP.

The creation of the NCMP and the NMP schemes is yet another attempt to accommodate demands for greater plurality of views and representation within Parliament without the need to share any real power. These ersatz

108 The People's Action Party occupied *all* the seats in Parliament between 1968 and 1981. Between 1981 and the present time, there have not been more than four opposition members in Parliament at any time. At the time of writing, there are two opposition members – Chiam See Tong (Singapore Progressive Party) and Low Thia Kiang (Workers' Party) – in a house of 84 elected members.

opposition members do not have the same legitimacy as duly elected members and are not permitted to vote on motions of no confidence against the government,[109] constitutional amendments,[110] Money Bills,[111] Supply Bills[112] or a motion to remove the President.[113] They can, however, be elected as Speaker or Deputy Speaker.[114]

Finally, it would be impossible to appreciate the full impact of these changes to the Legislature without looking at the support mechanisms for electing its members. These changes, coupled with the lack of an independent elections commission to manage elections and to draw electoral boundaries gives almost total discretion to the incumbent government to decide how each election is to be run.[115]

Conclusion

Unlike so many other post-colonial societies, Singapore has succeeded brilliantly in building a strong state. The structure of constitutional development is as much a product of 'Asian' perspectives on law, order and governance as the imperatives of a developmental state.[116] States need to be strong if they hope to harness the necessary economic and social resources and mobilise them for economic development. Without strong centralised power, this would be impossible. The problem is that economic success tends to be self-legitimising and a populace lulled into the comfort zone brought by the trappings of economic progress is apt to forget the cost they have paid in terms of their constitutional liberties and rights. Perhaps they realise the price and are happy to pay it and that may well explain the PAP's consistent and overwhelming success at the polls.

Most of the changes made to the Singapore Constitution have their roots in the bitter political lessons learnt by the PAP top leadership, most notably former Prime Minister Lee Kuan Yew during the formative decade of Singapore, from 1955 to 1965. These difficult experiences have led him

109 Art 39(2)(d).
110 Art 39(2)(a).
111 Art 39(2)(c).
112 Art 39(2)(b).
113 Art 39(2)(e).
114 Art 39(4).
115 I have addressed these difficulties in Kevin YL Tan, 'Constitutional Implications of the 1991 Singapore General Election' (1992) 13 Sing LR 1; and Kevin YL Tan, 'Is Singapore's Electoral System In Need of Reform' (1997) 14 Commentary 109–17.
116 On the developmental state and its imperatives, see generally, Kevin YL Tan, 'Economic Development and the Prospects for Constitutionalism' in Anthony Chin and Alfred Choi eds, *Law, Social Sciences And Public Policy: Towards A Unified Framework* (Singapore: Singapore University Press, 1998), pp 187–206; and 'The Role of Public Law in a Developing Asia' [2004] Sing JLS 265–86.

to adopt a totally pragmatic approach to constitutional reform. Changes would be made if they were absolutely necessary to get on with the business of government. There is no room for abstract ideas of constitutionalism or tradition. Even as early as 1965, Lee was reluctant to overhaul the Constitution. Speaking in 1984, he recalled:

> . . . in 1970, our Constitution was in a mess – part State Constitution, part Federal, part amendments after separation. Untidy. So I asked the British High Commissioner, Sir Arthur de La Mare, in 1970, I said, 'You have got a lot of legal experts. I remember them from my Constitutional talks. They draft so many. They become experts. Polish it up for me'. And he did me a great service. They polished it up. It came back in April 1971 . . . I thought perhaps I ought to tell the House how careful I am about fiddling around with constitutions . . . The FCO had done a first-rate job. The Attorney-General pencilled in his comments. I read the draft through, and I paused. I paused for several months and read it again, and I reflected on the matter for several weeks more. I decided that the experts just had no idea why we made certain basic alterations, like when an MP leaves his party and crosses the Chamber he loses his seat and he re-contests an election. He thought that was unusual and said, 'Refer back to British practice.' I said, 'No, no, we stay put.' I have paid an awful price for it in 1961. I have not forgotten that lesson. And please do not forget that the price may yet be paid again. I may not be here, but Singapore and Singaporeans may have to pay for it if I allow a constitutional perfectionist to alter what he thought was a little unusual mote in the Singapore Constitution. I decided to leave the Constitution as it is, just incorporate all the amendments, publish a clean copy. Never regretted it.[117]

It is unrealistic to expect hard-nosed political leaders to worry about constitutional niceties in a time of normal politics. While many states may have begun life by breathing its spirit into a constitution, Singapore began life with a makeshift constitution. Her political leaders had determined from the outset that it was far more important to have good government in place than to stop bad governments from getting worse through constitutional fetters, checks and balances. It was more important that Singapore was a viable and prosperous state, strong and resilient, than an ideal state with a constitution dripping with guarantees and rights. It was a tough choice which the Singaporean people were prepared to accept as a price to be paid for security, peace and economic growth. But forty years

117 See Singapore Parliamentary Debates Official Report 25 Jul 1984, at cols 1817–19.

on, the dynamics are changing and it is perhaps time to reconsider a shift away from state-building towards nation-building. For institutions to live beyond the lifetimes of their creators, they need to encompass the spirit of the people who revere and rely on them. Singapore has spent enough time building a powerful state that has, to paraphrase Madison, enabled 'the government to control the governed'. It is now time to 'oblige [the state] to control itself'.

3 Constitutional jurisprudence

Beyond supreme law – a law higher still?

Tan Seow Hon

The Constitution of the Republic of Singapore[1] declares in Article 4 that it is the supreme law of the Republic. Any law enacted by the legislature that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void.[2] At first blush, such a clause appears to ensure that questions of legal validity may be resolved by reference to the written text of a posited document, avoiding any reference to vague principles that are part of a 'higher' unwritten law of morality, favoured by natural law theorists. The criteria set out in the Constitution become, in jurisprudential parlance, requirements of the positivistic pedigree test that any rule must satisfy in order to count as a valid rule of the legal system. The adoption of a written constitution with a supremacy clause seemingly indicates the victory of, or at least our nation's decision to choose, legal positivism over natural law theory.

Such an analysis is flawed. The written constitution and its supremacy clause fail to foreclose the debate between natural law theory and legal positivism ('the NLTLP debate'), which has at its heart the question whether there is a necessary connection between posited law and the higher law of morality. This chapter suggests that bringing the contentious issues in this debate to the fore in judicial decisions on the Constitution adds richness to our constitutional jurisprudence and increases our awareness of the ways to advance our constitutional jurisprudence.[3]

1 1999 Rev. edn [Constitution].

2 This is supplemented by Art 162 for laws in force before the commencement of the Constitution.

3 I borrow this idea of advancing our current constitutional practice from Dworkin's analogy, in a more general context, that interpreting law is similar to a chain novel enterprise in which different judges write the different chapters. A judge writing a chapter in the middle of the story must find an interpretation fitting the preceding chapter(s), and also create a new chapter based on such interpretation in a forward-looking manner, in which he decides how to best advance the story. See Ronald Dworkin, *A Matter of Principle*, c 6 (Cambridge, Mass.: Harvard University Press, 1985).

We are called to choose between the two schools – acknowledge or reject a higher law of morality in constitutional interpretation – at two levels. First, the vagueness that particular provisions confront us with can neither be adequately resolved by choosing amongst the ordinary canons of statutory interpretation[4] nor by constitutional interpretation approaches such as taking the text's plain meaning or referring to the original intent of the constitution-framers[5] or majoritarian views. The vagueness concerns words that are 'essentially contested concepts',[6] the competing conceptions of which are proffered by each jurisprudential school. In choosing between competing conceptions of the concept represented by such an ambiguous word, for example, 'law' in the phrase 'save in accordance with law' in Article 9, interpreters necessarily choose between either jurisprudential school. Failing to recognise this impoverishes the development of our constitutional jurisprudence; understanding this allows us to draw from the richness of the traditions of the schools. Second, a higher-order choice must be made between the two schools in the very attitude towards the import of a supremacy clause such as Article 4.

Beginning with two contrasting approaches in local cases, I demonstrate how jurisprudential arguments are implicated. I then introduce the NLTLP debate and assess its link to democratic government. I go on to examine the issues, in light of this, that are glossed over in the treatment of the Constitution in relation to acts of legislation and judicial review. I consider the possible effects of a misunderstanding of the significance of a supreme and written constitution, and explain its true significance. Having argued that we necessarily adopt either legal positivism or natural law theory in constitutional interpretation, I address the question of the authority with the mandate to make a decision of such great import. For the purpose of illustrating the practical significance of adopting either school in constitutional interpretation, I selectively analyse local constitutional practice in relation to Articles 9(1) and 12 which best present the problem at the heart of this chapter, to show how current constitutional jurisprudence may be recast with an understanding of the nature of the choice between jurisprudential schools. I conclude with reasons why we should regard our embracing of a written, supreme Constitution as evidencing our choice of natural law theory.

4 Examples of such canons include referring to the literal meaning of words or their purposive meaning when the literal meaning leads to absurdity.

5 In Singapore's case, this might be discerned in the *Report of the Constitutional Commission, 1966* (Singapore: Singapore Govt. Printer, 1966).

6 I borrow Gallie's term (Gallie, 'Essentially Contested Concepts' (1965) 56 Proceedings of the Aristotelian Society 167 at pp 167–8) as used by Ronald Dworkin in *Taking Rights Seriously* (London: Duckworth, 1977), at p 103. A contested concept is a concept that admits of different conceptions.

Two approaches

Two contrasting approaches to fundamental liberties are discernible in *Ong Ah Chuan v Public Prosecutor*[7] and *Colin Chan v Public Prosecutor*.[8]

Ong Ah Chuan

The Privy Council in *Ong Ah Chuan* suggested that the provisions in Part IV of the Constitution should be generously interpreted to give individuals the full measure of the fundamental liberties, avoiding what had been termed the 'austerity of tabulated legalism'.[9] An individual was not limited to textually-explicit rights because he had unwritten rights – here the protection of unwritten rules of natural justice in a trial, an aspect of natural law. Yet, there was neither a clear enunciation of the methodology for arriving at the natural law principles nor an explicit listing of such principles. Indeed, the Privy Council in *Haw Tua Tau v Public Prosecutor*[10] found it 'imprudent' and '(un)necessary' to make a comprehensive list of the fundamental rules of natural justice applicable to the procedure for determining the guilt of a person charged with a criminal offence.[11] This case concerned the rule of criminal procedure that allowed the court to call upon the accused at the conclusion of the prosecution's case to give evidence and to inform him of the adverse consequences and inferences that may be drawn against him if he chose not to testify.[12] The Privy Council said it could decide the case without deciding whether, by virtue of the maxim *nemo debet se ipsum prodere*,[13] such a rule flouted any fundamental rule of natural justice: The rule found no place in the Universal Declaration of Human Rights and the European Convention of Human Rights, and its non-observance did not flout the undoubted fundamental rule of the presumption of innocence.[14]

What difference does astuteness to natural law theorising make? First, that one rule of natural justice (the presumption of innocence) was not flouted did not mean no rule of natural justice was flouted. Perhaps, had the Court been more intentional in drawing upon classical natural law jurisprudence, the reasoning might have been more complete. Second, doubt is cast on natural law theorising in *Ong Ah Chuan*, followed in *Haw Tua*

7 [1980–81] SLR 48 (P.C. from Singapore) [*Ong Ah Chuan*].
8 [1994] 3 SLR 662 (H.C.) [*Colin Chan*].
9 Supra, note 7, at para 23.
10 [1980–81] SLR 73 (P.C. from Singapore) [*Haw Tua Tau*].
11 Ibid., at para 9.
12 The provision was then s. 188(2) but is now s. 189(2) in the Criminal Procedure Code (Cap 68, 1985 Rev. edn Sing.).
13 No one should be obliged to give himself away.
14 Supra, note 10, at para 24.

Tau, by the latter's suggestion that what might be properly regarded by lawyers as rules of natural justice changed with times.[15] This seemed relativistic.[16] An exposition of the relevance of social conditions of the times is necessary in view of the universal and immutable nature of natural law. Still, the principle of charity in interpretation[17] suggests that sensitivity to the times, which includes local conditions,[18] need not violate the general universal nature of the requirement of fairness in trials. The statement about local conditions should be taken together with the Court's statement that whether a particular practice adopted by a court of law offended a fundamental rule of natural justice was not to be assessed in isolation but in light of the part it played in the judicial process.[19] To use the court's own example, compelling the accused to answer questions in a process in which the judge was vested with inquisitorial functions was not contrary to natural justice.[20] The overriding concern with fairness was universal, though its specific manifestation varied according to local conditions.

Colin Chan

A different attitude to fundamental liberties is discernible in the Singapore High Court's judgment[21] in *Colin Chan* that suggested that the Constitution must be interpreted primarily 'within its own four walls'.[22] While the Court

15 Ibid., at para 26.

16 Much has been written about cultural relativism and the impact of such a philosophy in human rights law. See, e.g., Joanne R. Bauer and Daniel A. Bell eds, *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999). For the purposes of this chapter, it suffices to contrast in general terms the natural law theory approach which considers that universal and immutable principles exist, with a culturally relativistic theory or one sensitive to local conditions (such as the need to emphasise particular values due to sensitivities of race, geography and so on).

17 The principle of charity, enunciated by Donald Davidson, requires the interpretation of texts to maximise agreement between ourselves and the speaker. See <http://plato.stanford.edu/entries/davidson/>.

18 The idea of sensitivity to local conditions, part of the larger concept of 'autochthony' coined by Professor GW Bartholomew (*CHS CPO GmbH v Vikas Goel* [2005] 3 SLR 202, at para 87, cited in case, *infra*.), is almost commonsensical and, it is submitted, does not undermine the universality of norms. In this regard, Phang J.C. (as he then was), said of tailoring English rules to suit local conditions in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604, at p 614 that these had to be scrutinised for appropriateness 'on a more general level – that of persuasiveness in so far as logic and reasoning are concerned'.

19 Supra, note 10, at para 29.

20 Ibid.

21 The application to refer questions of law to the Court of Appeal was rejected in [1995] 1 SLR 687.

22 The court was citing *Government of State of Kelantan v Government of Federation of Malaya*, [1963] MLJ 355 [*State of Kelantan*]: supra, note 8, at para 51.

did not mean that the Constitution was to be interpreted within the confines of its *text*, it advocated a reference to local *context*, dismissing cases from other jurisdictions.[23] Is this culturally and socially relativistic approach a rejection of principles of a universal law? Not exactly, as sensitivity to local conditions does not equate with a rejection of universal norms, but might involve the tailoring of norms to local conditions. There is, however, a de-emphasis on the dignity of each individual associated with human nature when the Court said that the sovereignty, integrity and unity of Singapore were 'undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which [tended] to run counter to these objectives must be restrained'.[24] Arguably, the Court put the will of the state first, allowing it to define national needs of sovereignty, integrity and unity.[25]

I suggest, however, that the statement about the Constitution's paramount mandate be given its proper place. Immediately preceding it was the Court's suggestion that the right of religion must be reconciled with the right of the State to employ its sovereign power to ensure peace, security and orderly living, without which the constitutional guarantee of civil liberty would be a mockery.[26] The paramount mandate served the civil liberties of the individual; if so, the state's coercive force employed to ensure preconditions of liberty must not violate the liberty. But this presupposes that one has at least a general idea of the scope of the liberty. Directly referencing the NLTLP debate to give human dignity and posited law (reflecting state will) their proper places clarifies our constitutional jurisprudence. Understanding human dignity according to a higher law enables understanding of when liberty is violated. While Article 15(4) clarified that the religious liberty guaranteed did not mean that any act 'contrary to any general law relating to public order, public health or morality' was authorised, the proper balance between possibly conflicting values of religious freedom on the one hand, and public order, public health or morality, on the other, would be clarified by a direct and fuller elucidation of human nature, as provided by natural law theory. If, on the other hand, a higher law is rejected, the definition of the liberty would be left to the will of the State or the majority of the citizens.

23 It quoted *State of Kelantan*, which suggested that the Constitution was not to be interpreted in light of analogies from other countries such as Great Britain, the United States of America, or Australia: ibid.

24 Supra, note 8, at para 64. This has been criticised as a form of extra-textualism since no such mandate is explicit in the constitution: Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam*?' [1997] Sing JLS 240 at p 265.

25 That is not to say that such a state could not respect human rights or be a respectable democracy.

26 Supra, note 8.

It is regrettable that neither *Ong Ah Chuan* nor *Colin Chan* properly considered the relevance of a universal law. While it may seem that a philosophical discourse on the nature of fundamental liberties[27] is abstract, it offers valuable guidance for future cases on the extent to which the state may define fundamental liberties, or whether there are inalienable rights which may not be compromised in any balancing exercise. The scope of fundamental liberties, when delineated by reference to a theory of human nature, becomes clearer, so while we must protect the preconditions for enjoyment of the liberties, if the coercive force of law used to ensure the preconditions actually violates the fundamental liberties, it would be farcical. Philosophising has the practical effect of clarifying the interests at stake.

Natural law theory, legal positivism and democratic government

What lies at the heart of the NLTLP debate and how is it relevant to cases such as those mentioned in the preceding section? What is its link to democratic government?

The NLTLP debate

The age-old debate between natural law theory and legal positivism concerns the connection between law and morality.[28]

Natural law theory asserts that laws posited by human authorities must conform to universal higher principles[29] referable to an absolute or objective conception of human nature[30] or God's law[31] or the law of reason.[32]

27 E.g. the High Court gave such a discourse in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943 (H.C.) *[Taw Cheng Kong* (H.C.)].

28 While some claim that the debate is really at cross-purposes as positivism concerns what the law is, while natural law theory concerns what it ought to be, on closer analysis, both schools are really interested in the question of what the law is. (Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans by Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 2002), at p 5.)

29 These are, generally speaking, moral principles.

30 The Stoics, for example, had an elaborate conception of nature. See AA Long, *Hellenistic Philosophy: Stoics, Epicureans, Sceptics*, 2nd. edn (Berkeley and Los Angeles: University of California Press, 1986) at pp 147–78.

31 William Blackstone, *Commentaries* (1765) Book I, section 2, at p 41:

> This law of nature, being co-eval with mankind and dictated by God Himself, is of course superior to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

There may be theories of law that lay claim to a necessary connection between laws and morals which are not, strictly speaking, 'natural law theory', so defined. These

Accordingly, a manifestly unjust law *is* not law.[33] The adjudicator expresses his fidelity to law by striking down the purported law; he is not merely acting according to his conscience or what he believes to be his moral obligation. Natural law also serves as a standard that law *ought to* conform to. Non-natural law legislators, in contrast, may not regard themselves as bound to comply with such standard in positing laws, and may regard themselves as representing the interest groups that voted them into power. The problem which natural law theorists face is that of demonstrating the existence or content of the higher principles of morality,[34] with which they claim posited law must be connected, in a pluralist world sceptical to objectivity claims in general.[35]

Legal positivism, in contrast, asserts that there is no necessary connection between laws and morals,[36] though morals often do influence the law.[37] Legal positivism is concerned with the issuance of law according

could refer, for example, to a system of higher principles that are neither ontological, nor linked to God's law.

Whether such a system is viable is another question. See Alexy, supra, note 28.

32 Jules Coleman and Scott Shapiro, eds., Kenneth Einar Himma, assoc. ed., *Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2002) at pp 5–8.

33 In Latin, *lex injusta non est lex*. See, for example, Radbruch's view in the Hart-Fuller debate (HLA Hart, 'Positivism and the separation of law and morals' (1958) 71 Harv. L. Rev. 593 at pp 616–17). Compare with Finnis' interpretation of Aquinas and natural law theory in John Finnis, *Natural Law and Natural Rights*, reprint with corrections (New York: Oxford University Press, 1980) [Finnis, *Natural Rights*] at pp 351–68. My contention is that the correct position for natural law theory must be one that adopts the maxim. See Seow Hon Tan, 'Validity and obligation in natural law theory: Does Finnis come too close to positivism?' in (2002–03) 15 Regent. U.L. Rev. 195. Indeed, some positivists do regard themselves as taking such a position (Finnis, *Natural Rights*, at p 26).

34 Moral realism, the commitment to the objectivity of ethics, according to which moral facts and moral properties independent of beliefs exist, and moral judgments as assertions and claims about these properties, which are knowable, is not a popular position in the postmodern world. Robert Audi, ed., *Cambridge Dictionary of Philosophy*, 2nd. edn (Cambridge University Press, 1999) at pp 588–9.

35 See Ronald Dworkin, ''Natural' Law Revisited' (1982) 34 U. Fla. L. Rev. 165 at p 165.

36 This shall be referred to as the separability thesis or separation thesis. Austin wrote that '[t]he existence of law is one thing; its merit or demerit is another'. J Austin, *The Province of Jurisprudence Determined*, ed. by HLA Hart (London: George Weidenfeld and Nicolson Ltd., 1954), cited in MDA Freeman, *Lloyd's Introduction to Jurisprudence*, 6th edn (London: Sweet and Maxwell, 1994) [6th edn of *Lloyd's*], at 260. Hart noted: '[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.' HLA Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994) [Hart, *Concept*] at pp 185–6. Kelsen observed that legal norms may have any kind of content: Hans Kelsen, *The Pure Theory of Law* (1934), cited in 6th edn of *Lloyd's* at pp 312–13.

to authority and with its social efficacy. What law is is a question of social fact.[38] Law may be identified according to a master rule of the system.[39] Where the constitution is supreme, for example, the master rule states that whatever is in line with the constitution is law.

The relation of the schools to democratic government

Constitutionalism and democracy go hand in hand. What is of especial interest to the constitutional lawyer is this: If legal positivism treats as law what people regard as law, is this somehow democratic in being based on inter-subjective consensus, since democracy means to give effect to the will of the people? Is natural law theory undemocratic?

The legal positivist, John Austin, regarded law as commands issued by a sovereign – someone rendered habitual obedience and who renders habitual obedience to no one else. Austin may be criticised for equating law with power. The scholarship in positivism has been dominated, since Austin, by HLA Hart who emphasised the internal point of view of the subjects of law: Rules were distinguishable from habits of obedience as they had, in addition to the external aspect of observable regularity of behaviour, an internal aspect in the form of a critical reflective attitude shared by most members of society towards a certain conduct in question. Members accepted certain patterns of behaviour as a common standard, and their attitude was displayed variously. This included criticism members directed at those who deviate or threaten to deviate, demands for conformity, acknowledgment that the line of conduct and the criticisms and demands in question were proper and justified, and a normative vocabulary of 'ought', 'must', 'should', 'right' and 'wrong' being applied to the conduct in question.[40] At first blush, it seems we have moved away

37 A legal system that expects to command the respect of its addressees must rest upon the addressees' sense of obligation or a conviction of its moral value: Hart, *Concept*, ibid. at pp 202–3.

38 This is called the social fact thesis. The Austinian sovereign command thesis of law has been largely superseded by HLA Hart's concept of law, which I take to be representative of legal positivism. John Austin suggested that laws are commands issued by a sovereign, an individual or a body which is habitually obeyed by the bulk of persons within a territory and which does not habitually obey others. J Austin, *The Province of Jurisprudence Determined*, ed. by HLA Hart (Indiana: Hackett Publishing, 1998) at pp 193–5. This definition of law has been criticised on many grounds, including that of being too simplistic and inept for a representative democracy where the electorate is sovereign, and for neglecting the internal point of view of participants – the sense of obligatoriness – that distinguishes a rule from a mere habit (Hart, *Concept*, supra, note 36, c IV).

39 The master rule may be simple, referring to an authoritative list of rules in a written document, or it may be complex, referring to general characteristics possessed by primary rules of the legal system, with the characteristics becoming the identifying criteria for the rules. Hart, *Concept*, supra, note 36 at pp 94–5.

from the view of law as power to the view of law as what people regard to be law, which seems democratic. In reality, Hart only requires that rules of behaviour, which are valid according to the system's ultimate criteria of validity, be generally obeyed by citizens, and the rules of recognition specifying criteria of legal validity and its rules of change[41] and adjudication[42] be effectively accepted as common public standards of official behaviour by its officials. Only the attitude of the officials is relevant, and the citizens may be obeying the rules without any critical reflective attitude.[43] Given that we find officials' acceptance of secondary rules by observing their enforcement of the rules addressed to citizens, the fact that the rules are by and large enforced is critical in isolating the mass of rules that we regard to be legal, and which we use to deduce the rule of recognition. If so, Hart's theory may not be very different from the power view of law as that which is effectively enforced. Legal positivism is not necessarily democratic.

Is natural law theory anti-democratic? Due to its association with the church and its dominance in the medieval pre-Enlightenment world, natural law theory is mistakenly criticised for an elitist notion of law apprehended only by a class of high priests and not by the common citizenry, and for an unacceptable conflation of law with morals. The latter point actually attacks a straw man because a natural law theorist does not expect all morals to be legislated or all sins to be made crimes. The apparent link with religion is also misconceived, as the fathers of natural law theory thought natural law may be apprehended by reason.[44]

40 Ibid., at p 57.

41 These empower an individual or body of persons to introduce new rules. Ibid., at pp 95–6.

42 These identify the individuals who are to adjudicate and the procedure to be followed. Ibid., at p 97.

43 Hart notes in extreme cases, the normative use of legal language may be confined to officialdom: 'The society in which this was so might be deplorably sheeplike; the sheep may end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.' Hart, *Concept*, supra, note 36, at p 117.

44 The Stoics first spoke of a universal law over a cosmic city. See Cicero, cited in AA Long and DN Sedley, *The Hellenistic Philosophers: Volume 1: Translations of the Principal Sources, with Philosophical Commentary* (Cambridge University Press 2001) (1987), AT 67S, 432–3 and Malcolm Schofield, *The Stoic Idea of a City*, 2nd edn (University of Chicago Press, 1999), at p 2. Compare with Gisela Striker, ed., *Essays on Hellenistic Epistemology and Ethics* (New York: Cambridge University Press, 1996), at 249, noting that the expression 'natural law' is first used in Plato's *Gorgias* as a paradox, and the fourth century BC is full of attempts to show that justice is natural. Striker notes that the Stoics were the first to introduce the idea of nature as a personal lawgiver.

Aquinas, who was influenced by the works of Aristotle, is generally favoured by natural law theorists today. His treatise on law occurs as Questions 90–7 of *Summa*

Significance of a supreme, written constitution

By having a supreme, written constitution, have we chosen one school of jurisprudence over another?

Misconception: Legal positivism and the supremacy clause

Given legal positivism's suggestion that the master rule where the constitution is supreme tells us that whatever is in line with the constitution is law, have we not chosen legal positivism over natural law theory through Article 4? Have we not decided to avoid the vagaries of contentious principles of morality by enunciating our criteria for legal validity in the written text of the Constitution? The moral principles we employ in constitutional interpretation, according to such a view, must be restricted to those explicitly incorporated by the text of the Constitution.

Article 4 states that any law enacted by the legislature after the commencement of the Constitution that is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. It is supplemented by Article 162, which requires all laws in force prior to the commencement of the Constitution to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. Together, these two articles ('the supremacy clause') seem to effect the state of affairs whereby 'whatever is in line with the Constitution is law'.

It is erroneous to conclude from the coincidence between the master rule and the supremacy clause that we have adopted legal positivism. The error pertains to the nature of the master rule in legal positivism, and the significance of legal theory for the practical understanding of law.

According to Hart, the master rule is found as a matter of social practice. Its existence as a matter of fact is demonstrated by way of particular rules

Theologica, a systematic work of theology, and might give an impression of association with the church. The secular/sacred divide, however, was strict in Aquinas' time, and the church is not likely to have favourably viewed his foray into the secular, by being influenced by the works of a (Greek) pagan. More importantly, Aquinas, in emphasising that human law must be in line with natural law, and that natural law precepts may be understood by what he called practical reason, was not describing a system of law that could be apprehended only by a special class of high priests. He specifically separated natural law from divine law, which includes the Ten Commandments and the 613 rules for Jews. The attraction of natural law lay in the fact that it may be apprehended by reason, and did not require specific revelation: MDA Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 5th edn (London: Stevens, 1985), at 82. Hence, even if one rejects aspects of Aquinas' theory pertaining to divine law, or eternal law coming from God, his idea about natural law can be employed in a democratic society. Compare with Fulvio Di Blasi, *God and the Natural Law,* trans. by David Thunder (Indiana: St Augustine's Press, 2006).

being identified as rules of the legal system. If the Constitution is supreme, that issues *from the state of affairs* by which we regard whatever is in line with the Constitution as law, i.e. our social acceptance of the supremacy clause as the master rule confers such status on it. We may not infer it from the written text alone.

The forgoing lends to a clarification of another point – the significance of legal theory for the practical understanding of law. At a higher level, the debate between legal positivism and natural law theory cannot be settled by any acceptance of a master rule by the subjects of the legal order. At its heart is the very question of whether law is what people regard (or accept) as law, or law is what conforms to a higher law. This may be difficult to understand in any postmodern pragmatic[45] society, in which pejoratives – 'abstract', 'theoretical' and 'academic' – might be applied towards such a question. After all, if the highest court has said something is law, what is the point of asserting that it does not conform to a higher law? Therefore, critics would assert, law is what a court says it is. This view, however, glosses over the question of the principles by which the court should be guided. The natural law view that law must conform to reason is a practical principle that ought to guide the court and by which the decisions of the court may be critiqued. The purpose of *theory* is to *guide practice* and to provide a standard by which practice may be judged. The NLTLP debate always remains open and can never be settled by the acceptance of any master rule by the subjects, let alone by any declaration of supremacy.

Reality: Natural law theory and the adoption of a written constitution

Contrary to the idea that the adoption of a written constitution suggests our preference for positivism, some have argued, in relation to the US Constitution, that the very crafting and ratification of the Constitution was an affirmation of natural law principles and their suitability for a just political order, and an intention to reflect them in the constitutional text.[46]

45 This is not a critique of Singapore society, as various 'practical' or 'realistic' views of law are favoured everywhere. E.g. American legal realists and critical legal scholars view law as politics.

46 Robert P George, 'Natural Law, the Constitution, and the Theory and Practice of Judicial Review' (2001) 69 Fordham L. Rev. 2269 [George, 'Natural Law, Constitution'], at p 2269 and Robert P George, 'The Natural Law Due Process Philosophy' (2001) 69 Fordham L. Rev. 2301 [George, 'Due Process Philosophy']. More generally, see *Symposium: The Constitution and the Good Society* (2001) 69 Fordham L. Rev. 1569. That said, one will still have to engage the same question of authoritative conclusion of the debate, as the question will be asked as to why the intent of the framers of the Constitution should be conclusive. In the local context,

This is radical as we are suggesting that *beyond supreme law, there is a law higher still*. As a tactical choice, some scholars prefer to resolve the difficult question of manifestly unjust laws by reference to the text of the constitution instead of arguing they should be struck down for violating natural law.[47] Even so, it is the incorporation of natural law principles that makes this possible. The NLTLP debate is often implicated in this manner, when ambiguities in constitutional provisions requires interpretation according to either school of jurisprudence. Such an ambiguity does not arise from a dictionary-type vagueness of any word used, such as in the case of the classic legal interpretation problem posed to first-year law students of whether a legislative rule that prohibited 'vehicles' in the park included a prohibition against an electrically propelled toy motor-car[48] which may be resolved by reference to the purpose of the legislation in question. Rather, the words in the provisions are contested concepts for which it seems different conceptions are proffered by the two schools of jurisprudence, with the result that in the attempt to elucidate them, the NLTLP debate is engaged, even if we were to treat the text of the Constitution as supreme, and restrict our moral theorising to the explicit moral principles incorporated. Examples of contentious words are found in our fundamental liberties – the protection of 'life' and 'liberty' of the individual which he may not be deprived of save in accordance with 'law', and the individual's entitlement to 'equality' before the law.

Legal positivism does not shed light upon such morally loaded concepts. If moral concepts are explicitly incorporated by the Constitution, the interpretive question is whether these concepts are defined by a higher law

one imagines that it will be further asked why the very adoption of the model of constitutionalism through our constitutional commission should indicate our preference for US-style constitutionalism, even if it was uncontentious in the USA (and it is not).

47 For example, Alexy, in dealing with the discriminatory German law purportedly in force during the Third Reich that stripped emigrating Jews of their German citizenship on the ground of race, noted that the Federal Constitutional Court struck the law down on the ground of conflict with the 'fundamental principles of justice': Alexy, supra, note 28, at p 7. The Court said: 'Duly enacted lawlessness that is obviously in violation of the constituting basic principles of the law does not become law in virtue of having been applied and obeyed.' Ibid. citing BVerfGE 23 (1968), 98, at p 106. Such an argument is non-positivistic in that it resorts to non-posited principles to deny the discriminatory law any legal character. Alexy suggests that instead of mounting such an argument, one could resort to the anti-discriminatory provision of the German Constitution to achieve the same results. By this latter argument, the place of the constitution as supreme law is not contested, and one simply relies on its own provision to invalidate a law. Notably, it is easy to conclude from such positivistic arguments, if they are more common, that the supremacy of the Constitution is never an issue, but the conclusion is not a corollary of such arguments, which might have been preferred as a tactical choice.

48 I borrow Hart's example. Hart, *Concept*, supra, note 36, at p 129.

or by mere human convention. While this is a slightly different question, I will refer to it as the NLTLP debate, as the definition of the constitutional (moral) concepts by reference to human convention may be loosely categorised as legal positivism. I will later examine the Singapore courts' treatment of these concepts.

Legitimacy of the Constitution

The preceding points are sometimes obliquely discussed in another form, glossing over the significance of the NLTLP debate. Scholars ask what confers legitimacy on the Constitution, whether it is a legal act of the government of a previous regime, adoption by a constituent assembly or approval of the people.[49] The discussion stays within the bounds of positivism by focusing on the will of the people or human convention[50] and neglects the requirement of a justification that arises from a higher law. While in practice it may not deviate from justification based upon higher law in a by and large just society, the possibility of citing an oppressive and unjust majority will as the basis for legitimacy and used to push constitutional interpretation in line with such will remains real. In such a case, referencing the NLTLP debate makes a difference. Moreover, making the legitimacy argument by reference to the will of the framers begs the question of why it should continue to bind us, and treating our non-revolt as acquiescence is artificial. Only by understanding our co-equal dignity under natural law is our consent meaningful in founding legitimacy.

Implied limitation on the power of amendment

Understanding the NLTLP debate also sheds light on whether there exists an implied limitation on the power to amend the constitutional provisions. Courts have approached the issue by asking whether the Constitution has a certain implicit structure that must not be derogated from. Several of the judges in the Indian Supreme Court thought so, and enunciated what is known as the 'basic features doctrine' in *Kesavananda v State of Kerala*,[51]

49 See e.g. Carl J Friedrich, *Limited Government: A Comparison* (New Jersey: Prentice-Hall, 1974), at 110 [*emphasis added*]:

> Legitimate rule is rightful rule, and many specific grounds have been believed in the course of the evolution of government. Constitutionalism has been the modern ground: *only a regime which is based upon the will of the people is legitimate*. To put it another way: the constitution-making power, the constituent power of the people provides legitimate government.

50 See e.g. Kevin Tan, 'The Evolution of Singapore's Modern Constitution: Developments from 1946 to the Present Day' (1989) 1 S.Ac.L.J. 17.

51 AIR 1973 SC 1461 cited in Kevin Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 2nd edn (Butterworths Asia, 1997), at pp 136–44.

which was rejected by the Singapore High Court.[52] Amongst the basic features of the Indian Constitution suggested are the separation of powers between the three branches of government and the secular character of the constitution. The reasoning, however, remained within the positivistic framework. The judges focused on the objectives in the preamble and the directive principles that set the parameters of the constitution. Sikri CJ, for example, relied upon a common understanding of the constitution-makers that certain provisions were not to be amended, discerned from the constitution and the circumstances of drafting.[53] While this may constrain the amendment of fundamental liberties of the individual and achieve a similar result to an understanding of liberties according to natural law theory, it is positivistic insofar as it depends on the will of constitution-makers. There is no necessary connection between the basic features doctrine and the protection of fundamental liberties according to natural law because in some cases the intention of the constitution-framers and the natural law understanding of fundamental liberties may be at variance. While it remains open for us to make an argument for the applicability of the doctrine, a more fruitful discussion should directly draw upon the arguments of natural law rather than the basic features doctrine, according to which we might be restricted to second-guessing the intention of the constitution-framers in a situation where we have no lofty preamble or general directives to rely upon.[54]

Neither the choice of a written constitution nor our acceptance of Article 4 can foreclose the NLTLP debate. If, at the heart of the debate, the question is whether law is what conforms to reason, or is what people regard as law, then what people accept cannot authoritatively decide the question. Still, we are called to choose between the two schools whenever a concept in the Constitution is contested, and our choice has practical consequences on the import of the Constitution. Failing to realise that a choice has to be made tends to favour a positivistic approach, where we accept the posited text as delineating the boundaries of rights. Such focus on the posited text in turn may facilitate an interpretation of rights that favours state power being exercised over the individual, insofar as the claim

52 *Teo Soh Lung v Minister for Home Affairs* [1990] SLR 40 (H.C.). It upheld amendments made to Art 149 in 1989, which provides for the validity of legislation against subversion notwithstanding its inconsistency with constitutional liberties embodied in Arts 9, 11, 12, 13 or 14 of the Constitution. The Court of Appeal suggested it was unnecessary to see if the amendments were invalid as violating the Constitution's basic structure.

53 Supra, note 51, at p 137.

54 Drawing upon the idea of a higher law to which the Constitution must conform, we may argue that the effect of the Constitution is not exhausted by its explicit text, and a substantively similar interpretation of the fundamental liberties as would have been suggested by the basic features doctrine may be arrived at.

of positivism is that there is no necessary, only contingent, connection between law and morality. In a positivistic legal regime, we are left to the grace of those in power.

Mandate to decide constitutional questions

Thus far, I have suggested that judicial and other pronouncements, or even the attitude of the members of society, cannot answer the question at the heart of the NLTLP debate, of whether law has a necessary connection with morality. Nonetheless, we necessarily choose to advance either theory in our constitutional practice. Who should decide which theory to advance?

The judiciary or the legislature?

One view is that the judiciary is rightfully the guardian of fundamental liberties against state power, and they may maximise the protection of pre-existing natural rights through the interpretation of constitutional rights.[55] This focus on the dignity of the person assumes a natural law approach, though our constitutional jurisprudence has not articulated this assumption. Given that the judiciary necessarily affirms a particular conception of human nature, is it the rightful authority to determine such questions – to pronounce on the content of higher law? The question becomes more compelling when approaches in other jurisdictions are looked at, such as when the US Supreme Court may have possibly gone against popular opinion and legislative view, when it struck down an anti-sodomy law in *Lawrence v Texas*,[56] or when the Massachusetts Supreme Court held that marriage licences could be granted to same-sex couples in *Goodridge v Department of Public Health*.[57] A true-blue Thomist,[58] while wanting the judiciary to protect individual rights, may end up with a judiciary that takes quite a different view of dignity from him. The alternative view, accepted by the Singapore High Court in *Rajeevan Edakalavan v*

55 See e.g. Michael S Moore, 'Justifying the natural law theory of constitutional interpretation' (2001) 69 Fordham L. Rev. 2087, at 2099–105 and 2115. Moore's argument for judicial review is a consequentialist one which suggests that the justification for judicial review is that courts tend to offer greater protection of natural rights than the legislature. For a critique of Moore's ignoring of the constitutional shortfall of rights when compared with natural rights, see James E Fleming, 'The natural rights-based justification for judicial review' (2001) 69 Fordham L. Rev. 2119. See also Thio, supra, note 23 at pp 249–50.

56 539 US 558 (2003).

57 798 N.E.2d 941 (Mass. Sup. Ct., 2003).

58 By this I mean someone who affirms St Thomas Aquinas' theory of human nature in the whole of his work on systematic theology, *Summa Theologica*, whereby he understands Man to be made in the image of God.

Public Prosecutor,[59] is that the legislature, comprising the democratic representatives of the people, rightfully determines the rights of the individual and may limit them in the absence of specific guarantees in the Constitution.[60]

Griswold v. Connecticut,[61] in which the US Supreme Court invalidated an anti-contraception law in Connecticut on the grounds that it violated a fundamental right of marital privacy, though this was neither explicit nor plainly implicit in the text, illustrates this. Justice Black, who dissented, criticised the majority's jurisprudence of finding the right in 'penumbras, formed by emanations'[62] from various other specifically enunciated rights, as a form of 'natural law due process philosophy'.[63] Interestingly, the substantive outcome of the case is something which true-blue Thomists[64] will probably disagree with, showing us the different views of 'natural law principles' that each could take.[65] Given the difficulty of verifying opinions

59 [1998] 1 SLR 815 [*Rajeevan*], at para 21.

60 Such a view may still be qualified by the presumption that Parliament legislated in line with the rule of law, and procedural and substantive fairness may be read into the statute; if it is so qualified, the judiciary has the final say. See *Marathaei d/o Sangulullai v Syarikat JG Containers (M) Sdn Bhd and An* [2003] 2 MLJ 337. The court in this case referred to the equal protection clause of the Malaysian Constitution (Article 8(1)), as did the court in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1, which suggested that 'law' referred to 'a system of law that [was] fair and just': '[A]rt 8(1) is a codification of Dicey's rule of law. Article 8(1) emphasises that this is a country where Government is according to the rule of law. In other words, there must be fairness of State action of any sort, legislative, executive or judicial.' On appeal to the Federal Court ([2004] 2 MLJ 257) in the latter case, the court reversed the decision and also noted that any reference to common law received from England was of common law at the date of the Constitution and was subject to modification by written law. In that case, the common law right of access to justice was not a guaranteed fundamental right but may be legislatively excluded by clear words (adopting *PP v Kulaisingam* [1974] 2 MLJ 26).

61 381 US 479 (1965) [*Griswold*]. This is discussed by Robert George in George, 'Natural Law, Constitution' supra, note 46, at p 2269.

62 *Griswold*, ibid., at p 484.

63 Ibid., at p 524.

64 If their stands are in line with the Vatican's: '[E]xcluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation – whether as an end or as a means.' See *Humanae Vitae, Encyclical of Pope Paul VI on the Regulation of Birth* (25 July 1968), para 14, online: Vatican <http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html> This was affirmed by Pope John Paul II in Message of John Paul II to the Director of the Centre for Research and Study on the Natural Regulation of Fertility (27 Feb 1998), online: Vatican <http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/february/documents/hf_jp-ii_spe_19980227_fertilidade_en.html>.

65 Indeed, other unwritten rights read into the US Constitution included the freedom to contract, which was used to strike down workers' protection legislation in decisions which showed a lack of astuteness concerning the realities of the unequal bargaining position between employer and employee. *Lochner v New York* 198 US 45 (1905). It may be

as to the content of natural law principles in a world of equals, who has the authority to pronounce on them?

Affirmation of natural law theory does not necessarily vest such authority in the judges.[66] Robert George suggests one may reject

> [t]he idea that judges are empowered as a matter of natural law, to invalidate legislation as 'unconstitutional' even where that legislation does not violate any norm fairly discoverable in the constitutional text, or . . . its structure, logic, or original understanding, on the basis of the judges' personal – and, in that sense, one might say (without suggesting anything about their metaethical status) 'subjective' – beliefs about natural law and natural rights.[67]

George opines that the question of the scope and limits of judicial review is settled by the positive law of the constitution, and what natural law requires, at least in a 'basically just regime', is that judges and other officials respect the limits of their own authority.[68] This is because 'judicial usurpations of constitutionally established popular or legislative authority, even in what judges take to be good causes, are themselves unjust'.[69] The authority and scope of judicial review is a matter to be resolved prudently by the type of authoritative choice among morally acceptable options, what Aquinas called '*determinatio*'.[70]

Natural law theory does not call for expansive review as undertaken in *Griswold*,[71] but it requires us to make a prudential choice as to the authority question; one can imagine that it would violate Aquinas' *determinatio*[72] if one were to vest authority in a random group of bandits. Furthermore, it is the standard by which we judge that the authority, in whom power is not vested (by positive law), acts unjustly by usurping the power.

argued that natural law and natural rights do not embody the anti-paternalistic theory of *laissez faire* capitalism or social Darwinism. See John E Fleming, 'Fidelity to natural law and natural rights in constitutional interpretation' (2001) 69 Fordham L. Rev. 2285, at p 2287.

66 George suggests that 'natural law itself does not settle the question of whether it falls ultimately to the legislature or the judiciary in any particular polity to insure that that positive law conforms to natural law and respects natural rights': George, 'Natural Law, Constitution' supra, note 46, at p 2279.

67 George, 'Due Process Philosophy', supra, note 46 at pp 2303–4 and also George, 'Natural Law, Constitution' supra, note 46, at 2283.

68 George, 'Due Process Philosophy', ibid., at pp 2304–5.

69 Ibid., at p 2305.

70 This is distinguished from matters that can be resolved 'by a process akin to deduction' from the natural law itself: ibid.

71 Ibid.

72 St Thomas Aquinas, *Summa Theologica*, I–II 95.2.

We are talking throughout of a 'reasonably just regime'[73] – one which 'it would be wrong for judges to attempt to subvert'.[74] When is the system not reasonably just? First, when the authority, in whom the power is vested to decide questions of constitutionality, does not meet Aquinas' *determinatio*; second, when the posited laws are by and large unjust but declared by the authority in which power is prudentially vested to be constitutional. Elucidating the circumstances of 'basic justice' shows that we run into an impasse when 'basic justice' is a qualification to George's view that positive law should decide the question of authority: If George requires that positive law that vests authority is prudentially made, who rightfully decides on whether it is prudentially made? We run into the very same problem of the mandate to decide. If, on the other hand, 'basic justice' is not a qualification, a different problem arises: We would have allowed positive law to decide the question of authority, not requiring it to be tested by Aquinas' *determinatio*! Conceptually, however, the first option, impasse notwithstanding, must be right in principle.

Understanding legislation in light of the jurisprudential underpinnings of constitutionalism

Making laws

The local political demography of the one-party-dominant state presents a peculiar problem. If we favour a natural law interpretation of the Constitution, it does not follow that we should leave the deciphering of the content of natural law to legislative determination. If our starting point is our status as co-equal human beings in a true democracy, each person's view counts, and we look for an inter-subjective consensus of citizens as to morality or the higher law, not because morality is based upon consensus, but because such consensus may be the best gauge of the content of the moral law. The consensus in Singapore does not equate with the legislative view,[75] which may not be representative of the majority opinion in a one-party-dominant state like ours, and in which the party whip may not be lifted and all members may be compelled to vote in a particular manner. An option is to lift the party whip on certain occasions and to encourage each member of the legislature to understand his role in deciphering higher law.[76]

73 George, 'Natural Law, Constitution' supra, note 46, at p 2283.

74 Ibid.

75 Compare with then Yong CJ's view in *Rajeevan*, supra, note 59.

76 George suggests that where it is not clear on certain rights, the US Constitution leaves the matter to the judgment of a democratically constituted and accountable legislature at the state or national level, not because it is not concerned with natural law and

Checking constitutionality of laws

A second option, not favoured in *Rajeevan*,[77] is to count on the judiciary, but to exhort the judiciary to discern the inter-subjective consensus of society and to understand its task to be one of upholding a higher law, rather than playing politics.[78] As a higher law is not necessarily discernible through majority opinion, the judiciary, skilled in legal analysis, may be tasked with filtering out opinions that are based upon assumptions that are not internally consistent or coherent. Such inter-subjective consensus pertains to the content of the higher law and is conceptually distinct from an inter-subjective consensus or aggregate of personal opinions of the citizenry. The problem of discerning constitutional norms is one that constitutional scholars wrestling with the authority of the judiciary in judicial review must address, as long as they are not merely looking at the results of an opinion poll. Apart from a reference to natural law, other scholars such as Frank Michelman[79] and Jurgen Habermas[80] have developed

natural rights, but because it 'is part of the strategy of the Constitution's framers and ratifiers for giving effect to the principles of natural law and protecting natural rights'. George, 'Due Process Philosophy', supra, note 46, at p 2307. If we may better give effect to natural law principles through our elected representatives, given our political demography of a one-party-dominant state, George's view cannot be adopted without implementing changes to make the vesting of authority in the legislature a prudential one.

77 Supra, note 59.

78 Compare with Daniel JH Greenwood, 'Beyond the Counter-majoritarian Difficulty: Judicial decision-making in a polynomic world' [2001] Rutgers L. Rev. 781.

79 A brief mention shall be made of Michelman's method, as an example of a methodology to decipher relevant norms. Michelman advocates a form of republicanism not necessarily tied to the Judaeo-Christian moral and ethical standards that were the foundation of the original constitution, nor to majority sentiments of morality: Frank Michelman, 'Law's Republic' (1988) 97 Yale L.J. 1493 ['Michelman, *Law's Republic*'], at p 1495.

He conceives of a process-oriented dialogic republicanism in which he urges judges to give effect to the 'distinct and audible voice' of the citizenry. (See also Stephen M Feldman, 'The Persistence of Power and the Struggle for Dialogic Standards in Post-modern Constitutional Jurisprudence: Michelman, Habermas and Civic Republicanism' [1993] Geo. L.J. 2243.) His aim is to ensure that the citizens achieve self-rule, hence his interest in the norms they subscribe to. He conceives of republican constitutionalism as a non-static, ongoing 'normative tinkering' – a revision of the normative histories that make political communities sources of contestable value and self-direction for their members. He seems to find the justification for this in extending political community to 'the persons in our midst who have as yet no stakes in "our" past because they had no access to it': Michelman, *Law's Republic, id.* at pp 1495–6. A fund of public normative references is built up from the contested norms of the past. This fund is the matrix of the identity of the political community, and shows how to advance constitutional interpretation: Michelman, *Law's Republic, id.* at pp 1513–14. Michelman acknowledges that for his process-oriented dialogic republicanism to work

various ideas of deliberative democracies in which the judiciary has a duty to give effect to various voices in constitutional interpretation.[81]

Taking stock: Problems with each school of jurisprudence as the basis for constitutionalism

Having assessed the roles of the judiciary and the legislature, it is apposite to take stock of the problems of either school as the foundation of constitutionalism.

> in the real world where pre-political dissensus exists, a political process can be 'jurisgenerative', i.e. validate a societal norm as a self-given law:
>
> > [O]nly if (i) participation in the process results in some shift or adjustment in relevant understandings on the parts of some (or all) participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative. (Michelman, *Law's Republic, id.,* at p 1527)
>
> While the requirements seem difficult to meet, they do not require that disagreements disappear, but rather that the law-like utterance of the citizens is validated when participants agree that it warrants being promulgated as law, and they presumably do so when they come to hold the same commitments in a new way (Michelman, *Law's Republic,* ibid., at p 1527).
>
> The arenas of potentially transformative dialogue – presumably the centres in which the material that goes to build up the 'fund' emerges, and in which requirement (ii) must be met – are not the most visible, formal legislative assemblies such as Congress, the state legislatures or the councils of major cities. Rather, they occur in what we know as public and social life – 'in the encounters, and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organisations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organisations of all kinds; workplaces and shop floors; public events and street life; and so on (Michelman, *Law's Republic, id.,* at p 1531). It is in these conversations we decipher norms. He notes that, 'citizenship encompasses not just formal participation in affairs of state but respected and self-respecting presence – distinct and audible voice – in public and social life at large' (Michelman, *Law's Republic, id.,* at p 1531). Michelman also counts on the judges to 'listen for voices from the margins', and suggests they have a situational advantage over the people at large in doing so (Michelman, *Law's Republic, id.* at p 1537). Notably, even a scholar who is not an advocate for 'traditional' natural law does not automatically veer to opinions that prevail in an opinion poll, but tasks the judiciary with discernment for norms that should count in constitutional interpretation.

80 Jurgen Habermas, *Between Facts and Norms*, trans. by William Rehg (Cambridge: Polity Press, 1996). Habermas, too, propounds a discourse theory as a model for a form of democracy that involves all citizens in the genesis of legitimate law, but he looks to what he calls 'communicative reason', in lieu of the Thomist practical reason, in his bid to discern social norms.

81 Compare with Ronald Dworkin, who considers it the responsibility of the judge to find and advance an interpretation of rights that best fits and justifies the legal institutions and materials. Supra, note 3 at pp 160–1.

The dilemma of the natural law theorist

There is no easy answer to the question of the appropriate authority for the deciphering of the content of natural law, if we adopted a natural law interpretation of the Constitution. The elucidation of unwritten rights by the legislature is meaningful only if the members of the legislature understand their role and existing constraints on their voting are removed in the promulgation of contentious legislation. Where explicit and plainly implicit rights (as opposed to those found in the 'penumbras formed by emanations') are concerned, judicial review must remain. Here, judges are not making new rights in an undemocratic manner[82] but giving effect to explicit constitutional rights. But is the distinction between explicit and plainly implicit rights, on the one hand, and those found in the 'penumbras formed by emanations', on the other, a viable one? Perhaps not, because even in relation to *Haw Tua Tau*, we have seen that it is precisely the case of unwritten rights that are a contentious issue that the judiciary has to deal with. While *Marbury v Madison*[83] suggests that courts must have a power of judicial review in order to ensure that constitutionalism is meaningful, judicial review becomes problematic in view of the potentiality of expansiveness of judicial review. If we discouraged the judiciary's role by suggesting that the legislature has pronounced on the content of natural law, we might end up doing away with judicial review!

Conceptual differences aside, is there a practical difference between discerning the content of a higher law on the one hand, and majority opinion or some other norms,[84] on the other hand? The dilemma the natural law theorist faces is that he is compelled to rely upon a human pronouncement of the content of higher law.[85] It seems human fiat

82 Someone like Ronald Dworkin will hardly regard judges to be acting undemocratically when he is tasked with giving effect to the community morality embedded in the legal institutions and materials in interpreting background political rights and pronouncing on concrete rights of the litigants. See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); 'The Arduous Virtue of Fidelity' (1997) 65 Fordham L. Rev. 1249 and *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996).

83 5 US (1 Cranch) 137 (1803) at pp 177–8. The Court of Appeal in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103 (C.A.) [*Nguyen* (C.A.)], at para 58 stated that in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410 (C.A.) [*Taw Cheng Kong* (C.A.)], it did not doubt the statement of the High Court in *Taw Cheng Kong* (H.C.), supra, note 27, at para 14 to the effect that courts have the power and duty to ensure the observance of constitutional provisions against legislative and executive action which contravenes constitutional rights.

84 For example, see Michelman and Habermas, supra, notes 79 and 80, respectively.

85 See Philip Soper, 'Some Natural Confusions about Natural Law' (1992) 90 Mich. L. Rev. 2391, at p 2407.

86 Only if one holds that the judge's decision does not necessarily impose obligations does fiat not control (or that the law – which in this sense includes what the judge, even

controls,[86] but this paradox is illusory. There remains a real conceptual distinction between fiat *per se* of a tyrant who acts on his whimsical view of morality, and judgments that take into account higher law. While the former does not have to cohere with an inter-connected system of principles, the latter, flowing from reason, would have to find its place in an inter-connected coherent system of moral principles. While the former is not open to question, the persuasiveness of each view of natural law on any particular matter may be compared with views on other matters, and one might use, for example, the Socratic dialectic[87] or elenchus[88] to reveal contradictory assumptions of various moral positions. The judge's view is also not final but might be open to revision upon further elucidation of other moral principles. In other words, one does not end up exalting the judge instead of the legislature, and ultimately taking a positivistic stance.[89] In practice, though, what the judge (including the appellate judge or the judge in subsequent decisions) decides is binding, at least until it is overruled. Nevertheless, there remains a conceptual distinction between fiat and discernment of a higher law.

The rejection of legal positivism as a viable theory behind constitutionalism

Might we advance constitutional jurisprudence in a positivistic manner? It is submitted there is no meaningful way we can do so. Honore suggests that fundamental liberties as enunciated in the constitution may incorporate moral criteria, in which case we cannot ignore moral considerations in interpretation. All provisions require interpretation and application, and fall to be interpreted by reference to morality. The only issue is whether the provisions are to be interpreted by reference to popular morality or what is known as critical (or the right or objective) morality. Honore opines that a provision that assures a person of a fair trial has a right to a trial that is objectively fair, not merely to one that fits the current morality.[90]

one considering higher commands, says it is – cannot be said to impose obligations just because he has decided it to be morally sound): ibid., at p 2412. Soper writes that one view of this situation is that, in the case in which fiat controls, 'natural law's protest against fiat is irrelevant', and in the case in which one decides that fiat does not control, 'legal obligations collapse entirely into moral obligations'. Ibid., at pp 2415–16.

87 A dialectical argument is one 'conducted by question and answer, resting on an opponent's concessions, and aiming at refuting the opponent by deriving contradictory consequences'. Supra, note 34, at p 233.

88 In an elenchus, one refutes someone's claim to knowledge 'by showing the interlocutor that what he thinks he knows is inconsistent with his other opinions': ibid., at p 257.

89 Supra, note 85 at pp 2415–16.

90 Tony Honore, 'The Necessary Connection between Law and Morality' [2002] OJLS 489.

This makes good sense, especially if the provisions of the constitution are to be a viable check against state and majority power.

In Honore's view, law has a necessary connection with morality. Such a connection 'derives from positive law, since the positive law of societies with legal systems, unlike the theory of positivism, makes arguments addressed to critical morality admissible in the interpretation and application of law'.[91] This renders the idea of advancing the enterprise in a positivistic manner nonsense. Reference to natural law[92] is mandatory.

Contested concepts in our constitutional provisions

When we are called to choose between conceptions that stem from natural law theory or legal positivism, our choice is whether to refer to a higher law in understanding an essentially contested concept. I will examine this in relation to Articles 9(1) and 12.

Article 9(1)

Article 9(1) provides that '[n]o person shall be deprived of his life or personal liberty save in accordance with law'. The simplicity of this provision belies at least four contested concepts.

First, who is a 'person'? Does a foetus, for example, count? Some constitutional scholars argue that they are protected.[93] Second, what is the essence of 'life'? Does the provision protect us from arbitrary deprivation of our physical existence through a death sentence or more? Other courts have suggested that life was not to be construed narrowly and meant more than mere animal existence.[94] It might mean the fundamental right to live with human dignity and free from exploitation, which may also require the protection of minimum conditions of living or work or education,[95] and the right to a quality of life or livelihood.[96] Third, what does 'personal liberty' refer to? A narrow reading might suggest freedom from physical restraint, while a broader one might include the right to travel.[97]

91 The legal system in which there exists an 'unwritten law that consists in interpretation' is contrasted with a 'system of threats', where there is no corresponding 'inbuilt pressure' in advancing the law morally. Honore denies that unjust laws are not law, distinguishing himself from what he calls 'old-fashioned natural lawyers'.

92 Honore referred to this as 'critical morality'.

93 Robert George made this argument in relation to the equal protection clause of the US Constitution: 'Justice, Legitimacy and Allegiance: 'The End of Democracy?' Symposium Revisited' (1998) 44 Loy. L. Rev. 103 at pp 110–13.

94 *Munn v Illinois* 94 US 113 (1877) cited in Tan Tek Seng *v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (K.L.C.A.) *[Tan Tek Seng]*.

95 *Bandhua v Union of India* [1984] SC 802, cited in *Tan Tek Seng*.

96 *Tan Tek Seng*, supra, note 94.

97 See, e.g. *Loh Wai Kong v Government of Malaysia and Ors* [1978] 2 MLJ 175 and *Maneka Gandhi v Union of India* AIR [1978] SC 597.

Generally, reference to natural law that emphasises human dignity will advocate a generous reading in favour of the individual. Conversely, not referring to higher law tends to lead to a constriction of the liberties, because law according to positivism is what complies with the rule of recognition, which I argued boils down in some situations to an endorsement of official power.[98] Should the state be allowed to define such morally loaded concepts as 'person', 'life' and 'liberty' when it is not the giver of life? This (rhetorical) question inclines us to realise that constitutionalism is an affirmation of a higher law.

Such higher law, however, may vary for liberals and classical natural law theorists. The corresponding provision in the Constitution of the United States, albeit one that protects 'liberty' instead of 'personal liberty', has been read to include the right to privacy – the right of the individual to be free from unwarranted governmental intrusion into matters fundamentally affecting a person, such as whether to bear or beget a child or matters relating to sexual intimacy, thus opening the door for legislation allowing abortion[99] and the striking down of anti-sodomy provisions,[100] conclusions that the Thomist would not agree with.[101] They also show another manner of reaching conclusions that constrain state power, not explicitly by reference to a higher moral law, but simply by invoking the right to privacy in the form of freedom from governmental intervention in all decisions affecting an individual's or his family's destiny.[102] Implicitly, if not explicitly, the liberals extol autonomy as the ultimate foundational value, and claim to eschew contentious moral questions. Some might argue, for example, in the case of abortion, that one does not know whether a foetus is a person, and the mother should be allowed to choose whether to let the foetus remain in her body.[103] The fact that such persons are against

98 The rule of recognition is inferred from the officials' acceptance of it evidenced by their upholding certain laws.

99 *Roe v Wade* 410 US 113 (1973).

100 *Lawrence v Texas* 539 US 558 (2003) [*Lawrence*] overruling *Bowers v Hardwick* 478 US 186 (1986) [*Bowers*].

101 See arguments of Robert George, etc. in Robert P George, *In Defense of Natural Law* (New York: Clarendon Press, 1999) [George, *Defense of Natural Law*] and Robert P George and Christopher Wolfe, eds, *Natural Law and Public Reason* (Washington, DC: Georgetown University Press, 2000).

102 Per Justice Stevens in *Bowers*, supra, note 100, at p 217.

103 John Finnis notes that insofar as liberals would agree that a newborn baby is treated as equal to adults in basic rights, this involves as much an imposition of their own comprehensive doctrine as those who insist that the baby a day before birth is entitled to the same forcible protection. Furthermore, a woman's right to control her body was in fact manifestly disputed and never accepted by any state until the Supreme Court overthrew the abortion laws of every state in the US. John Finnis, 'Abortion, Natural Law and Public Reason' in George and Wolfe, supra, note 101, at p 90. See also Finnis' critique in 'On the Practical Meaning of Secularism' (1998) 73 Notre Dame L. Rev. 491, at p 504.

murder, however, must mean they have concluded that the termination of the foetus' existence does not amount to murder. The decision to allow abortion is not neutral as to the metaphysical question about the nature of the foetus' life; it is arrogant to assume that practical decisions could be settled without reference to moral or metaphysical views widely in dispute about the status of embryonic and fetal human beings.[104] Such a realisation should push a debate on higher law and absolute values to the fore.

Finally, given that a person may be deprived of 'life' and 'personal liberty' 'in accordance with law', how the last clause is interpreted is of utmost importance. Even if 'life' and 'personal liberty' were read widely, if 'law' meant enactment of legislation according to the procedure established by law,[105] the protection offered by Article 9(1) is nugatory. It might seem that such a holding avoids the chaotic reference to natural law which makes each judge a law unto himself,[106] and questions of whether the procedure established by law is 'fair, just and reasonable'.[107] 'Law' is defined in Article 2 of the Constitution, non-exhaustively, to include 'written law and any . . . other enactment or instrument . . . in operation in Singapore . . .' Section 2 of the Interpretation Act[108] suggests that written law means 'the Constitution . . . and enactments by whatever name called . . . for the time being in force in Singapore'. Therefore, 'law' is whatever is validly passed by Parliament.[109] But this is question-begging, for the very question is what is validly passed, since what violates Article 9(1) would not be in force. We are left with the question of what 'law' in Article 9(1) means – whether it refers additionally to constitutional validity, and not just compliance with processes for passing legislation.[110] Apart from the positivistic understanding of law as an enactment that complies with the requisite majority and other procedural requirements such as the assent of the President, or the opposing view of law as natural law, there are two other interpretations: fundamental rules of natural justice and international law. I will explore the significance of each.

104 Robert George's argument in George, *Defense of Natural Law*, supra, note 101 at pp 206 and 213.

105 *Arumugum Pillai v Government of Malaysia* [1975] 2 MLJ 29 suggested that 'law' meant what was duly enacted within the legislature's competence. The court could not inquire into the reasonableness of the law.

106 Tinsaw Maw Naing v The Commissioner of Police, Rangoon [1950] Burma Law Reports 15, at p 27.

107 *Jabar v Public Prosecutor* [1995] 1 SLR 617 (C.A.) [*Jabar*], at para 53.

108 Cap 1, 2002 Rev. Ed. Sing.

109 *Jabar*, supra, note 107, at para 53.

110 Kan J in *Public Prosecutor v Nguyen Tuong Van* [2004] 2 SLR 328 (H.C.) [Nguyen (H.C.)], at para 77 referred to *Jabar*, and certainly thought that it referred to constitutional validity, likewise the Court of Appeal in *Nguyen* (C.A.), supra, note 83, at para 88.

Fundamental rules of natural justice

The Privy Council suggested in *Ong Ah Chuan* that in a constitution based upon the Westminster model, phrases such as 'equality before the law', 'protection of the law' and 'in accordance with law' refer to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England in operation in Singapore before the commencement of the Constitution. The constitution-makers assumed that the 'law' that citizens would have recourse to for the protection of fundamental liberties would not flout those fundamental rules. Otherwise, the purported entrenchment of the liberties would be little better than a mockery. Critics have noted that the reference to natural justice was odd because it ensured fairness in administrative and judicial procedures, and was not developed in relation to the substantive fairness of the content of legislation.[111] *Ong Ah Chuan* involved section 15 of the Misuse of Drugs Act,[112] which created a rebuttable presumption that a person with more than two grams of heroin had it for the purpose of trafficking. The issue pertained to the trial procedure as it was asked whether such a presumption violated the presumption of innocence, and whether the latter was in turn part of the rules of natural justice, but the case leaves open the question of whether the concept had applicability to questions of substantive fairness, which are likely to be raised by Article 12.

In any event, several inroads have been created which threaten the effect of this principle. A court might say, as in *Public Prosecutor v Mazlan bin Maidun*,[113] that a rule was a mere evidential rule and should not be elevated to constitutional status when there was no specific constitutional guarantee.[114] This has been criticised for going against the tenor of *Ong Ah Chuan,* applied in *Haw Tua Tau*. What was considered in *Haw Tua Tau* was an evidential rule too,[115] and the two cases considered precisely what was protected under unwritten fundamental rules of natural justice when there was no specific constitutional or statutory provision protecting a particular right.[116] A second inroad lies in holding that the legislature can by clear words exclude the principles of natural justice in the absence of specific constitutional guarantees.[117]

111 See, for example, AJ Harding, 'Natural Justice and the Constitution' (1981) 23 Mal LR 226.

112 Cap 185, 2001 Rev. Ed. Sing.

113 [1992] SGHC 134. The court here dealt with the privilege against self-incrimination.

114 Otherwise, this would involve in the interpretation of Article 9(1) an unjustified degree of adventurous extrapolation. Ibid., at para 15.

115 In this case, the Court considered the rule that allowed it to draw adverse inferences if the accused exercised his right to remain silent. Supra, note 10.

116 Michael Hor, 'The Privilege against Self-Incrimination and Fairness to the Accused' [1993] Sing JLS 35, at p 47.

117 In *Kulasingham v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204. The Court considered the *Land Acquisition Act* which provided for a hearing concerning

Why have courts been willing to consider the fundamental rules of natural justice but not other natural law principles? While both are unwritten, the former is perceived to be less vague and derivable from established ideas of procedural fairness. However, the former is a subset of the latter such that considering the former suggests the acceptance of an unwritten law. Perhaps the fear of judicial activism could be mitigated not by the rejection of all principles of natural law, but by allowing their application in cases of manifestly unjust legislative enactments. If the fear is that each judge becomes a law unto himself leading to uncertainty of the law as each judge brings his own subjective notion of a higher moral law into adjudication, constraining judicial review by reference to natural law to clear cases of manifest injustice where there is much inter-subjective consensus addresses this. Moreover, the concern with certainty is ultimately a concern with the expectations of citizens. Certainty serves the rule of law that serves the larger ideal of justice. Excluding the operation of natural law and allowing a manifestly unjust law to stand defeats the very purpose of certainty.[118]

International law

More recently, the Court considered principles of international law in *Nguyen* (H.C.),[119] examining whether there was a customary international law rule against the death penalty.[120] Unfortunately, the Court of Appeal noted that even if there was a customary international law rule, domestic statutes prevail in the event of conflict.[121] Therefore, even if 'law' in Article 9(1) included customary international law rules, this inclusion had little teeth as these could be overridden by legislative acts. The will of the state prevailed over the will of the international community. This is a problem when we stay within the bounds of positivism.

Legal positivism claims to have several virtues in its isolation of the enterprise of law from other enterprises such as politics or morality, an

the quantum of compensation for acquired land. It was argued that the acquisition itself was to be subject to a hearing, as Article 13 of the Malaysian Constitution provided that no one was to be deprived of property, save in accordance with law. Using the statutory interpretation maxim, *expressio unius est exclusio alterius,* the Court held that the provision of a compensation hearing meant that it was excluded where the acquisition was concerned. It is difficult to see, however, how the employment of the maxim may be understood within the general holding that the legislature could expressly exclude the application of the principles of natural justice, as the maxim was about exclusion by implication.

118 More generally, Lyons makes a convincing case against the arguments of formal justice in David Lyons, 'On Formal Justice' (1973) 58 Cornell L. Rev. 833.

119 *Nguyen* (H.C.), supra, note 110.

120 In particular, death by hanging.

121 *Nguyen* (C.A.), supra, note 110, at para 94.

isolation achieved through its pedigree test by which one may conclusively test whether something is a rule of the legal system or not.[122] I shall assess two apparent virtues of the avoidance of subjective bias and the achievement of analytical clarity.

Where subjective bias is concerned, I suggest two evaluative steps taken by a positivist such as Hart: First, coming up with the master rule from looking at the rules of the legal system that are treated as rules; second, using the master rule as a test for law. In relation to the first, Hart observes what rules are being followed by the citizens and enforced by the officials with the necessary internal point of view of obligatoriness,[123] and works out the rule of recognition they follow in determining whether something is law. An evaluative criterion is involved in this step as one decides to treat the obedience of citizens and enforcement of officials as conclusive in determining that certain rules constitute law, from which one then works out the pedigree test.[124] If a particular manifestly unjust rule is regarded as law by the enforcement of the highest court, substantive injustice of the rule is treated as irrelevant. The evaluation of the positivists continues in the second step of using the master rule as a test for law – a clearly prescriptive task. Realising the evaluative steps allows us to debunk the view that positivism avoids subjective bias by being merely descriptive.

Positivism's claim of a clearer[125] concept of law also compromises other values.[126] Alexy points out that 'clarity in terms of simplicity is not the only goal of concept formation'.[127] 'Simplicity must not prevail at the expense of adequacy'.[128] The apparent lack of clarity that stems from the need to draw a line between norms that are unjust in the extreme and those which are not (if morals are necessarily brought in and unjust laws are not laws) should be addressed as a question of legal certainty, rather than clarity, for it may well be confusing for a judge to have to hold an extremely unjust norm to be law.[129] Legal certainty is not compromised if notions of justice are rationally justifiable and extreme injustice is knowable.[130] Furthermore, legal

122 The test may, however, have a criterion that incorporates moral concerns.

123 See text accompany note 40.

124 Finnis doubts if it is possible to describe law from the 'rubbish heap of miscellaneous facts' that one faces, unless one employs evaluative criteria to determine what the relevant facts are: Finnis, *Natural Rights*, supra, note 33.

125 Presumably, though, if one adopts the version of soft positivism by which the test may incorporate moral requirements, the clarity might be lost, as moral requirements are contentious.

126 Judith N Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986), at p 34.

127 Alexy, supra, note 28, at p 43.

128 Ibid.

129 Ibid., at p 44.

130 Ibid., at p 52.

certainty is not the only value, and must be weighed against substantive justice.[131] Legal certainty serves the rule of law, and the rule of law serves the larger concern of justice, which includes substantive justice. If substantive justice is compromised, legal certainty is pointless.

Positivism is content to regard as law whatever people regard as law in a given society, as law is essentially human convention, whereas natural law theory insists on conformity to reason/higher law. Understanding the contending claims and the evaluative nature of legal positivism has an important bearing on our assessment of the arguments against the reliance on 'vague higher ideals' which are pejoratively referenced by judicial approaches that abhor such reliance.

Article 12

Article 12(1) reads: 'All persons are equal before the law and entitled to the equal protection of the law'.[132] Interpreting this provision without reference to a higher law simply requires that posited laws apply the same standards to all persons, without questioning the justness of those standards. Laws that treat everyone equally badly makes a mockery of the provision when viewed against the historical context of equivalent provisions in the US,[133] or the Aristotelian understanding of qualitative equality as being proportionate to merit.[134] For persons to be equally *protected* by the law,

131 Ibid.

132 Interestingly, the equality provision is similar to those in other jurisdictions. See e.g. the Fourteenth Amendment of the US Constitution or Article 7, Universal Declaration of Human Rights. This is unlike the different wording of a provision such as Art 15(4) when compared with equivalent provisions from other jurisdictions. Art 15(4) qualifies the religious liberty guaranteed by Art 15(1) by suggesting that it does not authorise any act contrary to any general law 'relating to public order, public health or morality'. In contrast, Art 18(3) of the International Covenant of Civil and Political Rights states: 'Freedom 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.' While the latter allows law to qualify religious liberty only when the limitations are 'necessary' for certain purposes, our corresponding provision places no such restriction. On a literal interpretation, the law merely has to relate to public order, public health or morality. Cynics might say that our equality provision is similar to those in other jurisdictions because the principle that like must be treated alike is really empty of content and its meaning must be determined by judicial interpretation. Hypothetically speaking, a constitution drafter wanting to weigh the balance in favour of the state rather than the individual could afford to frame the provision as such. Conversely, it could be counter-argued that the provision is the same because equality is foundational to all constitutions in the sense that our equal dignity as human beings is the very basis for the democratic ideal and constitutionalism.

133 See also David Lyons' argument, supra, note 118 at pp 849–51.

134 Aristotle, *Nicomachean Ethics*, 2nd edn, trans. by Terence Irwin (Indiana: Hackett Publishing), pp 1158b30–1159a13.

we need to understand what amounts to *just* treatment of persons. Justice is explicated by a higher law. All laws necessarily differentiate between persons, for example, by applying certain consequences when the person with certain characteristics does certain acts under certain circumstances. For example, different punishment is meted out for causing death by negligence and intentionally, though death to the victim results. The law is not treated as discriminatory; different states of mind call for different punishments because of different moral blameworthiness.

Equality is empty of content without a higher law, which suggests the relevant similarity or difference between persons that calls for a particular treatment, and is the basis for the Constitution's recognition that all are equal before the law, in spite of our many inequalities in fact. We are born with different abilities, looks, chances for success and wealth. What is recognised is our equal moral worth or dignity. An understanding of our human nature and the essential trait[135] that gives us equal moral worth is crucial to understanding what treatment is called for and what the relevant similarities and differences are. Peter Westen points out that the likeness referred to in the equivalent provision in the US Constitution cannot be likeness in every respect[136] nor can it be likeness in some respects.[137] It must mean people who are morally alike in a certain respect – a moral standard specifies a certain just, and not merely uniform, treatment.[138] In this sense, equality is circular and tautological: Circular because it 'tells us to treat like people alike, but when we ask who 'like people' are, we are told they are 'people who should be treated alike'';[139] tautological because once the moral standards determining the relevant likeness of people are articulated, the formula that like persons should be treated alike becomes superfluous, because the moral standards also determine the appropriate treatment of each person without a need to compare that treatment with another's,[140] i.e. equality is derivative of (or logically posterior to) rights.[141]

135 This has puzzled philosophers. Francis Fukuyama, for example, in *Our Posthuman Future* (London: Profile Books, 2002) asks what the elusive factor X is that makes us human and gives us equal status underneath all other contingent and accidental characteristics. The American Declaration of Independence is clear that Factor X comes from being created equal by a sovereign creator.

136 No two persons can be alike in every respect. The question is what characteristic is relevant. For example, if conscription of men above 18 years of age is required by law, the relevant characteristic chosen by law is gender, and the differences of the men in height and educational background are deemed irrelevant.

137 Everyone is alike in some respects, and the question is again that of relevant characteristic. Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harv. L. Rev. 537, at p 544.

138 Ibid., at pp 544–7.

139 Ibid., at p 547.

140 Ibid.

141 Unless a moral standard for just treatment exists (which in fact determines the substantive rights of the person), there can be no standard of comparison between two

Since justice is about giving each person his due, Aristotle rightly thought that the principles of equality and of justice are equivalent.[142]

Westen argues that the equality provision should be abandoned, as a reference to rights would already explicate just treatment. Equality was apt to confuse in various ways, of which I shall mention two: How redress is determined, and the nature of the rights in question.

In relation to redress, in *Palmer v Thompson*,[143] the city closed a swimming pool that was meant for whites only in response to a decision that they had denied blacks equal access.[144] Westen suggests that an equality-based claim obscured the analysis, as the plaintiffs' claim was that the city had stigmatised them by operating a pool from which they were excluded – an injury aggravated by the decision to close the pool altogether, which symbolised the depth of the city's ideological opposition to integration.[145]

Perhaps the Singapore Court of Appeal's reasoning in *Taw Cheng Kong* (C.A.)[146] comes close, even though there may be other reasons why its holding is correct. The Court examined the Prevention of Corruption Act,[147] the legislative object of which was to suppress corruption. Section 37(1) made the Act applicable to Singapore citizens outside Singapore: An offence committed by a Singaporean outside Singapore may be dealt with as if it occurred within Singapore. While it made sense that the legislation should stamp out corruption by fixing criminal liability on all those whose acts had effects in Singapore, even if committed outside, the Act instead applied to acts committed outside Singapore only in the case of Singapore citizens, and even when their acts had no effects in Singapore. The Court applied the reasonable classification test, according to which the classification of the law must bear a rational relation to the object of the law. The High Court had noted that the citizenship differentia in section 37(1) was under-inclusive in failing to fix criminal liability on foreigners whose acts outside of Singapore had effects in Singapore, and over-inclusive in relation to Singapore citizens whose acts had no effect in Singapore.[148] The Court of Appeal said it was Parliament's prerogative to frame the provision as widely as possible, and Parliament had to restrict its operation to citizens in view

persons: equality for like persons logically follows from the moral standard which applies universally to persons with the morally significant likeness: ibid., at pp 548–56.

142 Ibid., at pp 556–8.

143 403 US 217 (1971).

144 The Supreme Court rejected the argument that the remedy of closing the pool was constitutionally inadequate to redress the injury the blacks suffered, as now the city was treating them alike.

145 Supra, note 137 at pp 590–1.

146 Supra, note 83.

147 Cap 241, 1993 Rev. Ed. Sing.

148 Supra, note 146, at paras 48–9.

of international comity. Although the Court acknowledged that it captured a segment of Singaporeans not contemplated by the Act (no effects in Singapore), it did not offend the equality provision because all of them were caught as a class.[149] Westen might critique this on the ground that equality does not just call for the same, but appropriate, treatment. That said, the conclusion is justifiable as corruption was morally wrong even without effects in Singapore, and there was nothing particularly arbitrary about the law.

A Westen-type argument was advanced in *Public Prosecutor v Nguyen Tuong Van*,[150] when the defence argued in the High Court that equal protection was not concerned in comparative terms with the punishment imposed on an individual, but with injustice in the form of a disproportionate sentence.[151] The High Court had dismissed the Privy Council's judgment in *Reyes v The Queen*,[152] which decided that a mandatory death sentence violated an individual's basic humanity,[153] as this relied on a provision[154] that prohibited 'inhuman or degrading punishment' for which there was no local equivalent. When the defence argued that the mandatory death penalty offended Article 12, Kan J referred to the question of proper and impermissible classification criteria that he settled by reference to *Ong Ah Chuan*.[155] One should not take this to be a dismissal of the defence's substantive argument of Article 12's concern with proportionality; Kan J's statement pertains to *Ong Ah Chuan* being binding on its decision that the sentence was not disproportionate.

The equality analysis also obscures rights. Westen argues that some rights are more important than others. For example, while men and women are not to be discriminated solely on the ground of gender, peculiarities of gender may call for different treatment. In Rehnquist J's dissent in *Craig v Boren*,[156] the law under consideration prohibited the sale of beer to males under 21 and females under 18. Discoursing in terms of equality means one applies the categorical level of scrutiny[157] mandated for cases of gender

149 Ibid., at para 82.
150 *Nguyen* (H.C.), supra, note 110.
151 Ibid., at para 73.
152 [2002] 2 AC 235.
153 *Nguyen* (H.C.), supra, note 110, at para 89, quoted Lord Bingham: 'To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances, to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity.'
154 Belize Constitution Act (Chapter 4, 2000 Rev. Ed.), s. 7. ibid., at paras 85–91.
155 Ibid., at paras 79–84.
156 429 US 190 (1976), at 217–20. Westen, supra, note 107, at p 586, n169.
157 In the US, there are three levels of scrutiny. For socio-economic cases, there must be a rational relation between the legal classification and its object that must not be inherently bad. Strict scrutiny is applied for suspect classification like race or national

discrimination without looking at the substantive nature of the right. Rehnquist J. did not categorically apply the standard of intermediate scrutiny to this gender-based classification. Instead, he looked for evidence suggesting a difference between drinking and driving habits of men and women. The state could reasonably conclude that young males posed the greater drink-driving hazard, applying a different prohibition to them. While one may not agree that the equality analysis necessarily confuses in this example, as the majority perhaps failed to realise that males and females were not alike in relation to drinking and responsibility, one can see that equality adds nothing to the determination of just treatment, which hinged on empirical evidence of drinking habits.

As we have not dealt with controversial cases such as gender orientation[158] in Singapore, one may think a higher law is not necessary for understanding Article 12. In controversial cases, such as *Bowers v Hardwick*,[159] which concerned an anti-sodomy statute, the need to refer to a higher law in determining relevant differentia is seen. The dissenting judges, Blackmun J and Steven J, argued that the individual had a right to make the decisions affecting his own destiny and the definition of sexual intimacy was in the nature of such a right as individuals defined themselves in a significant way through this. Such arguments implicate metaphysical questions about human nature – whether each human being is autonomous, or whether a higher moral law judges the act to be contrary to nature and there could be no right to engage in sodomy.

Our tendency to resort to what has been called 'social policy', instead of moral theorising, in *Ong Ah Chuan*, further obscures our perspective of the relevance of higher law. The defence argued that the mandatory death sentence for drug trafficking of 15g or more of heroin offended the principle of equality because it condemned a friend who gratuitously supplied his addict friend with 15g of drugs, and let off a professional mercenary trafficker found with 14.99g. Whether particular dissimilarities justified differentiation in punishment imposed upon individuals who fell within one class and those within another, and if so, what the appropriate punishments were, were treated as questions of social policy, which under the Constitution was for the legislature to decide, as long as the factor adopted was not 'purely arbitrary' but bore a reasonable relation to the social object

origin, or when the classification significantly burdens the exercise of a fundamental right, whereupon the government must demonstrate the classification serves a compelling governmental interest. During the era of Chief Justice Burger, a third tier of intermediate or heightened scrutiny was added to the discourse and applied to semi-suspect classification like gender, where the classification must bear a substantial relation to an important governmental interest.

158 Andy Ho, 'Time to put straight some legal quirks?' in *The Straits Times* (Singapore), 27 Oct 2006, at p 29.

159 *Bowers*, supra, note 100.

of the law. The Privy Council held that the social object of the Misuse of Drugs Act was 'to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine'.[160] As the social evil was broadly proportional to quantity, there was nothing unreasonable in the legislature's decision that an illicit dealer on the wholesale scale who operated near the apex of the distributive pyramid required a stronger deterrent.[161] The Privy Council appeared to reject moral theorising when it suggested that Article 12 was not concerned with equal punitive treatment for equal moral blameworthiness, but for similar legal guilt. But this is only apparent. The Privy Council in fact expressed that the punishment was condign.[162] What it meant by the legislature's prerogative in relation to social policy was that it was the right authority to decide, based on information available about illicit drug trade in Singapore, where the appropriate quantitative boundary lay between the two classes of dealer. There was nothing arbitrary about the legislature's decision.

Notably, in *Nguyen* (C.A.), albeit again referencing 'sociological data', the Court of Appeal emphasised that it was wrong to decide the issue based on a blind acceptance of legislative fiat. The Court ought to look at the proper weight to be ascribed to the views of Parliament, and it was open to the defence to provide material to show that the gravity of the offence could not be gauged by the quantity of the drug alone.[163] This indicated a willingness to give effect to theorising beyond social or legislative policy, and opens the door for an analysis based on the higher law that Article 12 assumes and which makes the equal protection of the law truly meaningful.

What to do with the questions that won't go away

The concern of this chapter has been with the significance of a written, supreme constitution, which does not make us legal positivists, and fails to foreclose the reliance on the higher law that natural law theorists advocate. There are contested concepts within our constitutional provisions, particularly well-illustrated by Articles 9(1) and 12(1), which may only be understood by reference to the conceptions offered either by legal positivism or natural law theory, such that a practical choice must be made between either jurisprudential school in our elucidation of the provisions.

More than that, I hope I have made a case for the view that our nation's choice of constitutionalism is meaningful in the protection of individuals

160 Supra, note 7, at para 38.
161 Ibid., at para 38.
162 Ibid.
163 *Nguyen* (C.A.), supra, note, at 83 paras 73–4.

only if the provisions are understood in accordance with a higher law of morality. First, constitutional supremacy is meant as a constraint against state power: If the state may qualify rights by positing laws in accordance with procedural requirements, our constitutional supremacy is merely formal. Second, concepts that are incorporated into our Constitution, such as 'life', 'liberty' and the idea of equality, raise metaphysical questions about human nature, to be resolved by reference to morality. Their contentious nature, however, has led to our reluctance to examine them, or the difficult question of the rightful authority to pronounce on the debatable content of the higher law.

We are in an unenviable quandary: On the one hand, we are reluctant to let unelected members of the judiciary pronounce on the content of the unwritten rights; on the other, we cannot limit judicial review to the extent when anything that the legislature decides goes. The Singapore Court certainly recognised this problem. While the Court of Appeal in *Taw Cheng Kong* (C.A.) emphasised the presumption of constitutionality of legislation, in *Nguyen* (C.A.), it held that it was wrong to decide on our fundamental liberties simply by blind acceptance of legislative fiat, emphasising the continued importance of judicial review. A balance is necessary, but we have no available formula because the question of rightful authority cannot be easily settled once we recognise the nature of law-making as conformity to a higher law about our equal moral worth – a law neither promulgated by the legislature nor created by the judiciary.

In a pluralist society, judging by the types of questions presented before the courts of other jurisdictions in recent years, especially over homosexual rights, the scope of our fundamental liberties will become more contentious. We should neither be incapacitated nor avoidant, as a refusal to recognise the metaphysical nature of the questions that confront us has the worse consequence of practical decisions being made without an awareness of our assumptions and the true nature of the debate. I would venture to say that the recognition of the Constitution's foundation in a higher law, a continued debate on the content of absolute values assumed by our Constitution, and the understanding of the difficult question of the rightful authority, are worthy steps towards increased vigilance on the parts of the legislature and the judiciary. While we do not have all the answers, if we recognise our equal moral worth, these steps are the best we can take towards the advancement of our constitutional jurisprudence.

4 Comparative law and constitutional interpretation in Singapore

Insights from constitutional theory

*Arun K Thiruvengadam**

Introduction

This chapter focuses on a specific phenomenon: the use of foreign judicial decisions in constitutional adjudication within Singapore. While not legally binding, the use of foreign decisions has become increasingly widespread in contemporary times. One purpose of my contribution is to analyse Singapore practice against the backdrop of comparative trends in other jurisdictions in order to gain a better understanding of the Singapore experience. To describe the phenomenon of citing foreign judicial authority, I use the term *trans-judicial influence*.[1]

The Singapore legal system represents a fascinating confluence of the forces of colonialism, globalisation and migration (of people and laws). Singapore has a long history of legal borrowings, resulting in a complex and diverse legal system bearing the imprint of several different legal traditions.[2] The existing legal system was modelled principally on the English legal system during the period of colonial rule,[3] but has undergone

* I thank Michael Ewing-Chow, Michael Hor, Kevin Tan and Li-ann Thio for their comments. The usual caveat applies.

1 In adopting the term, trans-judicial influence, I follow the lead of the US scholar Kim Lane Scheppele who points out that the more commonly used term 'borrowing' has confusing implications in the realm of constitutional law. Using the term 'influence' allows the inclusion of a broader range of possibilities – positive, negative, direct and indirect – under the rubric of the phenomenon to be studied. While Scheppele uses the term 'cross-constitutional influence', I have modified it slightly to indicate my focus on judiciaries: Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models', (2003) 1 ICON 296 at pp 297, 300.

2 Andrew Harding explores this theme, illustrating it with examples from Singapore and other South-east Asian nations: See generally, 'Comparative Law and Legal Transplantation in South-east Asia: Making Sense of the 'Nomic Din'', in *Adapting Legal Cultures* (David Nelken and Johannes Feest, eds) 199–222 (2001); 'Global Doctrine and Local Knowledge: Law in South-east Asia', (2002) 51 ICLQ 35–53.

important changes since independence, especially with the adoption of a written constitution.[4]

Unsurprisingly, lawyers in Singapore have historically and routinely cited foreign constitutional cases – especially from common law countries – before courts. This chapter provides a non-exhaustive overview of broad trends in engagement with foreign constitutional cases, using typical examples to analyse closely the reasoning that accompanies such usage.

Analysis of trans-judicial influence enables us to study a much more basic issue concerning constitutional adjudication: the fundamental disagreements among judges over appropriate approaches to constitutional interpretation and adjudication. What do the patterns of engagement reveal about the foundational interpretive beliefs and choices of Singapore judges in constitutional cases? My principal claim is that the overall approach of Singapore's judiciary towards citing foreign cases in constitutional decisions adheres to what I call the National Formalist model. This is, however, not unique since judges adhering to this model exist in the contemporary Australian and American judiciaries. I contrast the law in Singapore with the other dominant model of contemporary constitutional practice, the Cosmopolitan Pragmatism model, whose chief adherents are found in the contemporary judiciaries of India, Canada and South Africa.

I begin with a focus on historical trends of trans-judicial influence in Singapore within two broad time periods: 1965 to 1989 and 1989 to the present. I then set out the two theoretical models advanced to explain differing patterns of trans-judicial influence in several contemporary jurisdictions. Then the focus is on decisions exemplifying the National Formalist model in Singapore, with a short conclusion on the themes explored.

Trans-judicial influence and its historical trends in Singapore

Courts have referred to and relied upon judicial decisions from foreign jurisdictions since the beginning of the modern era. Though there is evidence of trans-judicial influence among countries in Continental Europe dating back to the eighteenth century,[5] the practice appears to have gained

3 The Second Charter of Justice of 1826 is generally regarded as the instrument which introduced English law into Singapore. See generally Andrew Phang, *From Foundation to Legacy: The Second Charter of Justice* (Singapore Academy of Law: Singapore, 2006).

4 For an authoritative description of Singapore's constitutional history, see generally, Kevin Tan and Thio Li-ann, eds, *Constitutional Law in Malaysia and Singapore* (Butterworths Asia: Singapore, 1999).

5 H. Patrick Glenn, 'Persuasive Authority', (1986) 32 McGill LJ 261, at p 275 (noting that judges in eighteenth century Italy resorted to this practice). [hereinafter Glenn, *Persuasive Authority*].

widespread currency during the British colonial period, especially in territories subject to the common law.[6] It is now well-documented that the principal exporters of law and legal theory in the modern era – the United Kingdom, France, Germany and the United States – all borrowed heavily from foreign models during crucial stages in the development of their legal systems, and judges played an active part in such borrowing.[7]

Colonialism and imperialism had a major impact on the legal transplantation of laws, and on judge-made law. Arguably, colonial habits of referring to foreign judicial decisions have seeped into the legal cultures of former colonies and have lingered beyond the Age of Empire. Indeed, judges in a number of former colonies continue to make extensive use of foreign law in their contemporary decision-making.[8] Singapore's situation as a former colony may be exceptional (though not unique) in that it continued to have links with English courts (most notably the Judicial Committee of the Privy Council) until well beyond the period of its formal independence.[9] This may partially account for the fact that during the period when appeals from Singapore courts lay to the Privy Council (1965–94), judges in Singapore displayed a fairly high degree of engagement with trans-judicial influence. While trends of trans-judicial influence in Singapore do not conform to any consistent pattern, they can be broadly divided into two distinct phases.

Trans-judicial influence in constitutional cases in Singapore (1965–89)

Historically, Singapore's judiciary has relied extensively on foreign judicial reasoning as a natural part of the common law reasoning characteristic

6 Anthony Lester, 'The Overseas Trade in the American Bill of Rights', (1988) 88 Colum LR 537.

7 Glenn, 'Persuasive Authority', supra, note 5, at p 263

8 See generally, U Drobnig and SV Erp, eds, *The Use of Comparative Law by Courts* (Kluwer Law International: London, 1999) (detailing how judiciaries in several former colonies continue to apply or defer to judicial authorities from former colonial power several years after the grant of formal independence). In some common law countries, previously part of the British Empire, it could be argued that the technique of resorting to comparative experience was 'born out of habit' during the period of empire when courts in England decided matters from across the Commonwealth, and courts within the colonies became accustomed to looking comparatively to forge solutions in cases before them. Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law', (2006) 13 Ind. J. Glob. Leg. Stud. 1.

9 Although Singapore became independent in 1965, it continued to have judicial ties with both Malaysia and England. Appeals from the Singapore High Court continued to be referred to the Federal Court of Malaysia until 1970 (with the understanding that for Singapore appeals, only Singapore judges were to sit). Singapore cases continued to be appealed before the Privy Council until 1994, when ties with foreign courts were completely severed.

of many British colonies.[10] This was true even in constitutional law cases,[11] despite the Privy Council's observation in *Ong Ah Chuan v Public Prosecutor* (1981), that cases from other jurisdictions (specifically, India and the US) were ill-suited for interpreting Singapore's constitutional provisions.[12] As this chapter later demonstrates, the central holding of the Privy Council was rejected and overruled by the same court in later years. That apart, even the prescription to avoid foreign cases seems particularly odd, since the text of the Singapore constitution, like its Malaysian counterpart, was inspired in several places by the text of the Indian constitution.[13] Given this genealogy, one would expect that Indian and Malaysian constitutional decisions would be of interest to lawyers and judges in Singapore when interpreting textually similar provisions. In practice, that is exactly what happened: lawyers in Singapore regularly cited Indian and Malaysian cases, and in some instances, particularly in the immediate aftermath of independence, judges in Singapore have grounded their decisions on foreign cases.

Until the late-1980s, it was common to find frequent references to case law from England, India, and Malaysia in Singapore judicial decisions dealing with various public and private law issues.[14] Additionally, in cases involving questions of municipal law, Singapore courts have relied on

10 See generally, Victor Ramraj, 'Comparative Constitutional Law in Singapore', (2002) 6 Sing JICL 302.

11 See, e.g. *Jacob v Attorney General*, [1969–71] SLR 364 (rejecting a claim that a government employee was dismissed without adhering to principles of natural justice, and relying upon Malaysian and English cases, while distinguishing Indian decisions).

12 [1980–81] SLR 48, at p 61. The Privy Council upheld the constitutionality of provisions which imposed a mandatory death penalty for trafficking in drugs and imposed legal presumptions against persons in possession of drugs beyond a specified minimum quantity. Lord Diplock rejected authorities from India and the US which the accused relied upon. ('[T]heir Lordships are of opinion that *decisions of Indian Courts* on Pt III of the Indian Constitution *should be approached with caution as guides to the interpretation* of individual articles in Pt IV of the Singapore Constitution; and that *decisions of the Supreme Court of the United States* on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, *are of little help* in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.') [Emphasis added].

13 Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs', [2002] Sing JLS 328, at p 347 ('[T]he Singapore constitution was cut from the same cloth as the Malaysian constitution, which was itself inspired by the Indian constitution.')

14 See generally, Michael F Rutter, *The Applicable Law in Singapore and Malaysia* (Malayan Law Journal: Singapore, 1989). Chapters 12–14 set out several instances of decisions from Singapore which cite and apply English, Malaysian and Indian judicial decisions.

decisions from other common law jurisdictions such as Canada,[15] South Africa,[16] Kenya,[17] Australia and Ireland.[18]

Trans-judicial influence in constitutional cases in Singapore (1989-present)

In 1989, Singapore's Court of Appeal delivered a landmark ruling in *Chng Suan Tze v MHA*[19] which relied on foreign cases for a significant part of its holding. The issue related to the executive power to detain without trial persons suspected of being subversive or anti-national under laws such as the Internal Security Act[20] (ISA). In 1959, a court in Singapore, relying upon the House of Lords' decision in *Liversidge v Anderson*[21] ruled that 'it was not open to the Court to inquire whether in fact [there were] reasonable grounds for being satisfied that the detention was necessary'.[22]

This position was reaffirmed in 1971 by Chief Justice Wee Chong Jin in *Lee Mau Seng v MHA*, where he held that 'it is not open to a court in Singapore to examine the grounds' of detention.[23] In *Lee Mau Seng*, Wee CJ concluded that the ISA scheme excluded a judicial enquiry into the sufficiency of the grounds to justify the detention. *Lee Mau Seng* is also relevant for our inquiry into the use of foreign constitutional cases: the lawyer for Lee Mau Seng, David Marshall, sought to rely on two decisions of the Indian Supreme Court to persuade Wee CJ that it was open to a court to examine the grounds of detention. Notably, Wee CJ took great pains to understand the import of the Indian cases, quoting from them at length. After setting out the facts and ratio of the Indian cases, he then examined the provisions in the Singapore Constitution to conclude there were material differences in the wording of the applicable constitutional provisions, rendering the Indian cases inapplicable in Singapore.

15 *The Halcyon Isle* [1978] 1 MLJ 189, at p 191. The case involved maritime law and issues of conflict of laws, where Wee CJ relied on a Canadian Supreme Court decision to support his conclusion. Similarly, in *AG v Wong Tong Hoy*, [1983] 1 MLJ 370, at p 374, a Singapore High Court decision involving civil contempt of Court, Justice TS Sinnathuray relied on a Canadian Supreme Court decision to fortify his conclusion.

16 *DEF v Comptroller of Income Tax* [1961] 1 MLJ 55.

17 Ibid.

18 *Hoalim,* [1975] 1 MLJ 231. The case involved land acquisition issues and Wee CJ preferred to follow two Irish cases over conflicting English decisions. See also, *Yeap Hock Seng v MHA* [1975] 2 MLJ 279, where a Malaysian judge relied on an Irish Supreme Court decision to determine whether a writ of habeas corpus would lie.

19 [1988] SLR 133.

20 Cap 143,

21 [1942] AC 206.

22 *Re Choo Jee Jeng* [1959] MLJ 217.

23 [1971] 2 MLJ 137.

By 1989, however, Wee CJ seemed to have changed his mind, both on the issue of preventive detention and the applicability of foreign decisions in Singapore. Writing the opinion for the court in *Chng Suan Tze* (joined by Justices LP Thean and Chan Sek Keong), Wee CJ handed down what some consider to be 'the single most important constitutional decision in the history of the [Singaporean] nation'.[24] Reviewing detention orders issued in the wake of the infamous 1987 'Marxist Conspiracy' cases, the Court allowed the appeals of four detainees, and discharged them from custody.[25] The Court adopted a strategy of 'subtle manoeuvring'[26] by over-ruling the government on a technicality. It was a condition precedent under the ISA to obtain the 'satisfaction of the President' for detention without trial. The government produced an affidavit signed by the Permanent Secretary of the Home Affairs Ministry stating the government was satisfied of the need to detain the individuals. However, the Court pounced on the affidavit's wording by distinguishing presidential satisfaction from that of the government, holding there was 'no admissible evidence of the President's satisfaction'.[27]

What is most interesting is that having held in favour of the detainees on this technical and factually weak basis, the Court then engaged in a discussion of the substantive issues at stake. Some commentators have argued that these observations were only *obiter,* since its actual holding rested on separate grounds. Nevertheless, what the Court proceeded to declare was both unprecedented and significant. It stated that the 'subjective test' hitherto applied to test the validity of detentions (whereby courts would adopt a hands-off attitude towards review, looking only to see if the detention orders were procedurally valid) was no longer good law, because this reasoning was based on two House of Lords decisions rendered in the early 1940s,[28] which were subsequently pronounced, by the same court, to be wrongly decided.[29] Wee CJ noted that even in Malaysia, there

24 Michael Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas', in *Global Anti-Terrorism Law and Policy* (Victor Ramraj *et al.* eds., Cambridge Univ. Press, 2005) 273–94, at p 281

25 *Chng Suan Tze v MHA* [1988] SLR 132 (C.A., Singapore)

26 Hor, supra, note 24, at p 282.

27 Hor notes this holding is puzzling because on facts, '[t]here could have been no doubt that the President was satisfied'. It was clear from the circumstances that the Cabinet (on whose advice the President's satisfaction would be based) supported the detentions. Hor, ibid., at p 283.

28 *Liversidge v Anderson* [1942] AC 206 and *Greene v Secretary of State for Home Affairs* [1942] AC 284.

29 The House of Lords first recorded its doubts about the validity of the subjective test propounded in *Liversidge* and *Greene* in *Nakkuda Ali v Jayaratne*, [1951] AC 66 and later in *Ex parte Rossminster*, [1980] AC 952.

was movement away from the 'subjective test' towards a more objective review of the grounds of detention.[30]

In addition, Wee CJ cited decisions from the Privy Council,[31] the Supreme Courts of Zimbabwe[32] and South West Africa (present-day Namibia)[33] to show the global trend away from the 'subjective test' towards a more 'objective test'. After undertaking this comparative survey, the Court analysed the relevant Singapore constitutional provisions to conclude that the subjective test would have to be rejected. In stirring words, the Court held:

> [W]e would respectfully say that *we agree with judicial opinion expressed in other jurisdictions*, to the effect that the court can objectively review the President's exercise of discretion in the context of preventive detention on national security grounds . . . In our view, *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*. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act *and a court of law must be able to hold it to be so*[34]

This analysis, particularly the reasoning in the last line above, shows the Court's assertion of the power of judicial review over issues of preventive detention that was quite unprecedented. Furthermore, the Court relied heavily on foreign judicial opinions to conclude that the government had erred in using the ISA to detain four persons on charges of anti-national activity, before ordering their release.

The government apparently took great umbrage at the decision, and acted swiftly to enact constitutional amendments to reverse its effects. While moving these constitutional amendments, the Minister for Law suggested that this judicial 'misadventure' was inspired and occasioned by the direct reference to foreign judicial decisions.[35] By acting swiftly to overturn the 'errant' judicial ruling, the government sought to reject the Court's assertion of judicial review power over preventive detention cases. This indicated the

30 Wee CJ analysed the recent Malaysian Supreme Court decisions of *Karpal Singh* [1988] 1 MLJ 468 and *Re Tan Sri Raja Khalid* [1988] 1 MLJ 182 to so conclude.
31 *AG of St Christopher, Nevis & Anguilla v Reynolds* [1980] AC 637.
32 *Minister of Home Affairs v Austin* (1987) LRC (Const) 567.
33 *Katofa v Administrator General for South West Africa* [1985] 4 SA 211.
34 *Chng Suan Tze*, supra, note 19 at pp 152, 156. [Emphasis added].
35 Law Minister Prof. S. Jayakumar, 52 SPR 25 Jan 1989, cols 463, 468–9.

government's disapproval of the judiciary's reliance on foreign judicial decisions. This episode is explored in greater detail later in this chapter, as it is significant in explaining the judiciary's current stance towards transjudicial influence.

Singapore's higher judiciary appears to have taken the executive branch's cue in the aftermath of *Chng Suan Tze* quite seriously: this case possibly marks the last time a Singapore court attempted to broaden the ambit of its own powers, or that of a rights provision, by citing foreign decisions. Indeed, courts in Singapore seem to have very consciously exercised restraint since being held up for scrutiny in Parliament in 1989. As noted earlier, between 1965 and 1989, under the stewardship of Wee CJ, the Singapore courts did look to foreign judicial cases in a number of constitutional cases. However, since the early 1990s, under the leadership of Chief Justice Yong Pung How, the judiciary has formally adopted the 'four walls' doctrine. This requires a constitution to be interpreted within its four walls, and not by reference to other constitutions, thereby rendering the use of foreign judicial decisions illegitimate. Incidentally, the adoption of the doctrine coincided with the aggressive pursuit of an 'Asian Values' approach in foreign affairs, and a strong communitarian domestic agenda by the Singapore government.

The trend towards trans-judicial influence established under Yong CJ has continued without change under his successor, Chief Justice Chan Sek Keong, who took office in March 2006. This has happened despite Chan CJ's personal record of creatively engaging with trans-judicial influence in his own judgments.[36] Though Chan CJ has yet to decide a major constitutional case himself, cases decided after his elevation to the office have reiterated the 'four walls' doctrine. It remains to be seen how the future trend of trans-judicial influence in Singapore will play out.

It must be emphasised that Singapore's judiciary has not taken the 'four walls' doctrine to its logical conclusion, i.e. a complete rejection of foreign judicial authority. As Professor Thio Li-ann has demonstrated, Singapore's judges actually cite foreign judicial decisions quite often, and somewhat

36 For example, when he was a Judicial Commissioner, Chan Sek Keong JC in *Cheong Seok Leng v PP* [1988] SLR 565 held that the non-publication of subsidiary legislation in Singapore would render it void in law. To reach this conclusion, Chan JC had to interpret provisions in the Interpretation Act. In doing so, he relied on general interpretive principles as laid down in an Indian and two English cases. Cheong, *id.*, at p 577. Later, he relied on another set of cases decided by the Supreme Court of the State of Victoria, the Supreme Court of India, and the High Court of Australia to buttress his conclusion that publication of subsidiary legislation was a mandatory requirement not just in Singapore but in common law countries sharing similar traditions. Cheong, *id.* at pp 581–2. Furthermore, the landmark decision of *Chng Suan Tze*, delivered by Wee CJ, which was notable for its extraordinary reliance on foreign cases, was joined by Justices LP Thean and Chan Sek Keong.

paradoxically, even in cases where the 'four walls' doctrine has been reiterated. Such citation is, however, extremely selective. Only foreign cases which 'buttress the existing status quo' by 'prioritising statist or communal interests over individual rights' are cited.[37] Thio is critical of the process by which foreign cases have been 'instrumentally utilized' to 'solidify particularist values' and cites several instances. I rely upon one case from Thio's array of examples to illustrate her argument. Thio criticises the decision in *J. B. Jeyaretnam v Lee Kuan Yew* (1992),[38] where the Court of Appeal of Singapore rejected pro-free speech decisions of the US Supreme Court and the European Court of Human Rights, but sought to derive support from pre-Charter decisions of the Canadian Supreme Court which adopted positions that were inimical to free speech. This is problematic not only because some foreign decisions are treated differently from others, but also because the foreign decisions relied on by Singapore's judges were inappropriate. The pre-Charter Canadian cases were inapposite because they were given against the backdrop of a constitution lacking written rights guarantees. In contrast, the Singapore Constitution has entrenched rights provisions in respect of speech, which make the pre-Charter decisions unsuitable to its interpretation.

Singapore's engagement with foreign judicial decisions is multi-faceted and complex, despite the adoption of the 'four walls' doctrine. Analysing trans-judicial influence in Singapore is made easier by the fact that detailed studies of the impact of foreign constitutional cases on Singapore constitutional jurisprudence already exist.[39] Thio in particular has paid close attention to how Singapore's judges have engaged with foreign cases.[40] Her recent article tracks the use of foreign cases in several significant constitutional cases decided over the last two decades in Malaysia and Singapore.[41] Thio's overall conclusion is that in Singapore, foreign decisions have been engaged selectively and only to support results already reached by the judges. Her analysis appears to reaffirm earlier criticism of the practice as only facilitating a 'cherry-picking' of convenient authorities.[42]

37 Li-ann Thio, 'Beyond the 'Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore', (2006) 19 Colum J Asian L 428. [hereinafter, Thio, *Transnational Judicial Conversations*].

38 [1992] 2 SLR 310.

39 Ramraj, supra, note 10; Thio, 'Transnational Judicial Conversations', supra, note 37.

40 See generally, Thio Li-ann, 'An 'i' for an 'I'? Singapore's Communitarian Model of Constitutional Adjudication', (1997) 27 HKLJ 152; Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam', (1997) Sing JLS 240.

41 Thio, 'Transnational Judicial Conversations', supra, note 37.

42 This argument is frequently made in the vast literature on this topic; it was first advanced by an Indian scholar who conducted a wide survey of how foreign decisions were used in constitutional adjudication in India, Israel, Canada and Australia. PK Tripathi, 'Foreign Precedents and Constitutional Law', (1957) 57 Colum. L. Rev. 319.

Without disputing her analysis, my claim is that Singapore practice can be better understood by focusing on the underlying approaches to constitutional interpretation and adjudication that are on display when judges advance written reasons for rejecting or applying particular foreign decisions. Such an approach will show that the particular strategies that Singapore's judges adopt in reacting to foreign cases are actually dictated by their deeper beliefs about what is a proper approach to constitutional adjudication. What is revealed by this analysis may be of help in understanding how judges in Singapore approach constitutional questions in general, beyond the limited issue of trans-judicial influence.

Two models of constitutionalism to explain trans-judicial influence

Many scholars have offered varied explanations for the increasing frequency of trans-judicial influence in the contemporary world.[43] Several of them have noted that in recent years, a number of additional factors have contributed to an increase in rates of trans-judicial influence.

A non-comprehensive list of these contributory factors would include: i) the greater quantity of comparative constitutional cases to draw upon, as a number of constitutional and supreme courts have built up their corpus of domestic constitutional law over several decades; ii) the similarity in issues that such courts are asked to decide upon which makes trans-judicial influence appear more natural and logical, relating, for instance, to issues of freedoms of speech and religion, and executive emergency powers; iii) the greater availability of foreign judicial decisions due to the internet and the willingness of courts to translate their decisions into English; iv) the increasingly global nature of legal education, which exposes law students to the constitutional jurisprudence of other nations, and to more sustained levels of interaction when they study in other jurisdictions in exchange and post-graduate programmes; and v) the increasing interaction among judges of different nations at specially organised conferences and through inter-court exchanges that are held at regular intervals in several jurisdictions.[44]

43 See, e.g. Frederick Schauer, 'The Politics and Incentives of Legal Transplantation', in *Governance in a Globalising World* at pp 253, 256 (Joseph Nye, John Donahue, eds, Brookings Institution Press: Washington, 2000); Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 20(4) *OJLS* 499–532; Sujit Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation', (1999) 74 Indiana LJ 819, at p 828; Basil Markesinis and Jorg Fedtke, 'The Judge as Comparatist', (2005) 80 Tulane L Rev. 11.

44 See generally, Mark Rahdert, 'Comparative Constitutional Advocacy', (2007) 56 Am. U. L. Rev. 553.

Most commentators have adopted an 'external view',[45] focusing almost exclusively on the political and socio-economic factors which contribute to the increase in trans-judicial influence.[46] Only a few studies have adopted the 'internal view', focusing on how lawyers and judges officially justify their reactions in pleadings and judgments. Such works are in a minority, and have problematic limitations. I seek to harmonise the 'internal' and 'external' views by focusing on the reasons advanced by judges for either resisting or embracing foreign decisions, taking into account the broader cultural and political contexts of judicial decision-making.[47] However, my focus leans more towards the 'internal view' because it is under-represented in the existing debate. I argue that focusing on how judges actually engage with foreign decisions by studying their reasons is one of the best ways to properly assess the practice of trans-judicial influence.

Judges across the world are guided by similar considerations in constitutional interpretation: the ordinary or technical meaning of words in constitutional texts; evidence of their originally intended meaning or words; 'structural' interpretations; 'underlying' principles; judicial precedents; scholarly writings; comparative and international law; and contemporary understandings of justice and social utility.[48] However, individual judges and legal systems vary in the extent to which they lean towards one or more of these factors, and the ends of their interpretive pursuits. Based on my research on six jurisdictions, namely, Australia, Canada, India, Singapore, South Africa, and the US, I seek to draw inferences about common approaches to engaging foreign cases in these jurisdictions.

My claim is that tracking the actual practice of constitutional courts engaged in trans-judicial influence reveals that there are essentially two dominant, contrasting models of constitutionalism, and that these are reflected in the differing reactions to the practice of trans-judicial influence. I argue that a judge's response to the phenomenon of trans-judicial influence depends on his broader approach to the task of constitutional

45 Stephen M Feldman, 'The Rule of Law or the Rule of Politics? Harmonising the Internal and External Views of Supreme Court Decision-Making', (2005) 30 Law and Soc. Inq. 89 (explaining the difference between 'internal' and 'external' points of view in terms that I adopt here).

46 See, e.g. the views of Schauer, supra, note 43.

47 Feldman proposes to harmonise the internal and external views by suggesting an 'interpretive-structural' view which he describes at length but not in clear, definite terms. See Feldman, supra, note 44 at pp 99–124. My attempt at harmonising the two views seeks to pay far more attention to the expressed reasoning and analysis in judicial decision-making, while also taking into account external factors which influence the choices that judges make.

48 Jeffrey Goldsworthy, 'Introduction', in *Interpreting Constitutions*, at p 5 (Jeffrey Goldsworthy, ed., Oxford University Press: Oxford, 2006) [hereinafter *Interpreting Constitutions*].

interpretation.[49] The two theoretical models I present here help elucidate the depth of the disagreement between those who embrace the reasoning in foreign decisions, and those who tend to be sceptical and/or restrictive in the manner in which they engage them.

The National Formalism model of constitutionalism ('Nationalist' or 'Formalist' Model)

The National Formalism model of constitutionalism is premised on the belief that a nation's constitution is deeply rooted in its particular history and political traditions. Therefore, attempts to interpret constitutions must be in tune with, and reflect, national practices, cultural habits and values. Judges who adhere to this model tend to display scepticism towards using foreign judicial decisions in constitutional adjudication, as they consider such comparative materials outside the realm of relevant or legitimate sources of constitutional adjudication.

Other traits displayed by Nationalist judges display as a group are reflected in strategies and techniques of constitutional interpretation beyond their responses to foreign decisions.

National Formalist judges emphasise the 'counter-majoritarian dilemma' posed by the task of constitutional interpretation. They believe the legitimacy of constitutional review hinges upon judges not foisting their subjective value choices through their binding decisions. Nationalist judges seek to limit judicial discretion through various interpretive strategies. This leads them to accord greater priority and deference to the decisions of the legislature and executive.

National Formalist judges conceive of the law as being about *rules*.[50] Rules compel decision-makers to respond in a determinate way to the presence of delimited triggering facts.[51] Rules therefore aim to confine the judicial

49 I am not the first to draw such links as my argument builds upon the insights of several other scholars making similar claims, though there are significant and substantial differences between their approaches and mine. See generally, Lorraine Weinrib, 'Constitutional Conceptions and Constitutional Comparativism', in *Defining the Field of Comparative Constitutional Law*, at p 3 (Vicki Jackson and Mark Tushnet, eds, Praeger: Westport, 2002); Sarah Harding, 'Comparative Reasoning and Judicial Review', (2003) 28 Yale J. Int'l L 409; Harold Hongju Koh, 'International Law as Part of our Law', (2004) 98 AJIL 43, at p 52; Paul Kahn, 'Comparative Constitutionalism in a New Key', (2003) 101 Mich. L. Rev. 2677; Jed Rubenfeld, 'Unilateralism and Constitutionalism', (2004) 79 N.Y.U. L. Rev. 1971.

50 In the words of the most prominent contemporary academic advocate of legal formalism, '[a]t the heart of the word 'formalism', in many of its numerous uses, lies the concept of decision-making according to *rule*'. Frederick Schauer, 'Formalism', (1988) 97 Yale LJ 509, at p 510.

51 Kathleen Sullivan, 'The Supreme Court 1991 Term Foreword: The Justices of Rules and Standards', (1993) 106 Harv. L Rev. 22, at p 58. [hereinafter, Sullivan, *Rules and Standards*].

decision-maker to facts, leaving the inevitably arbitrary and subjective value choices to non-judicial actors. National Formalist judges set such great store by rules precisely because they perceive them to be value-free and hence, more consonant with controlling judicial discretion.

Judges within this model also tend to emphasise 'rule of law' values including certainty, adherence to rules of natural justice, predictability, stability, coherence, determinacy and congruence.[52] Such judges believe that 'for the rule of law to obtain, the law must be a body of objective rules or principles that can control the decisions of those willing to act as its faithful servants'.[53]

The attraction that National Formalist judges feel towards the interpretive strategies of *textualism* and *originalism* (broadly defined as privileging the understandings/intentions of constitutional framers[54]) can be understood as a manifestation of their desire to abide by clear, predetermined rules that constrain the discretion of legal decision-makers. American judges who have most forcefully espoused the virtues of originalism have asserted that it furthers the cause of the rule of law, limits judicial discretion and ensures predictability and certainty.[55] As a corollary, judges who embrace originalism tend to reject approaches to constitutional interpretation that view the fundamental text as a 'living constitution'.

It is sometimes argued that originalism is a peculiarly American phenomenon but this is not so. Nationalist judges and jurists in Australia have developed interpretive styles of 'literalism' and 'legalism' which are versions of textualism and originalism.[56] The approach adopted by Singapore's judges to constitutional interpretation has, as will be demonstrated later, important parallels to the motivating logic of American originalist judges.

Given their commitment to rules, Nationalist judges are sceptical about the use of standards in adjudication, which they perceive as allowing for

52 See generally, Lon R Fuller, *Morality of Law* at pp 33–8 (rev. edn, Yale University Press: New Haven, 1969); Joseph Raz, 'The Rule of Law and its Virtue', (1977) 93 LQR 195.

53 Thomas C Grey, 'Judicial Review and Legal Pragmatism', (2003) 38 Wake Forest L. Rev. 473, at p 479.

54 Originalism is a particularly contested term within US constitutional discourse, where it tends to be particularly dominant, as compared to other jurisdictions. Jack Balkin contends that there is a difference between 'original meaning' and 'original expected application', preferring the former over the latter: Jack Balkin, *Abortion and Original Meaning*, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925558 (last visited on 15 May 2007).

55 Antonin Scalia, 'Originalism: The Lesser Evil', (1989) 57 U. Cin. L. Rev. 849 at pp 863–4; Robert H Bork, *The Tempting of America: The Political Seduction of the Law*, at pp 145, 153, 318, 351–2 (Free Press: New York, 1990).

56 For an espousal of 'moderate originalism' in interpreting the Australian constitution: Jeffrey Goldsworthy, 'Interpreting the Constitution in its Second Century', (2000) 24 Melb. U. L. Rev. 677.

greater judicial discretion. Their preference for rules is also reflected in their favouring interpretive strategies of categorisation over those involving balancing. Categorical interpretive styles are more rule-like in their orientation, and consist of bright-line boundaries involving the classification of fact situations as falling on one side or the other.[57] This can be used to 'inhibit judicial discretion' and 'shrink the role of courts in decision-making about public life'.[58]

One can also expect Nationalist judges to have a similar respect for longstanding domestic precedents. Constant overruling of precedents can lead to a break in the continuity, stability and certainty of the law, values greatly cherished by National judges.

National Formalist judges are extremely sensitive to the sources of law. A leading academic advocate of legal formalism describes this as the belief in the 'limited domain' of the law, which entails adherence to the idea that 'legal decision-makers, especially judges and the lawyers who argue before them, draw on an information set in making their decisions that is different from the information set upon which other policymakers or public decisionmakers draw'.[59] This feature of National Formalism is particularly relevant for the phenomenon of trans-judicial influence: judges adhering to this conception of constitutionalism may well believe that references to foreign sources of law go beyond the legitimate sources of legal authority.

In keeping with their belief in the differentiated nature of law and legal reasoning, National Formalist judges privilege specifically *legal* forms of reasoning. The implicit assumption is that 'once the similarity between cases is recognised, legal reasoning is simply a matter of making a logically valid deduction of a holding from a statement of the law (major premise) and a statement of the facts (minor premise)'.[60] As such, deductive and analogous forms of reasoning form important tools in the interpretive armoury of National Formalist judges. It is important to recognise, however, that very few modern Formalist judges adhere to the caricature of formalist reasoning as being a form of 'mechanical jurisprudence'[61] under which cases are solved by a mechanical exercise of syllogistic reasoning. Most such

57 Kathleen Sullivan, 'Rules and Standards', supra, note 51, at p 59. See also, Kathleen Sullivan, 'Post-Liberal Judging: The Roles of Categorization and Balancing', (1992) 63 U Colo. L. Rev. 293.

58 Sullivan, 'Post-Liberal Judging', ibid., at p 306 (describing how Justice Scalia used categorical approaches to reduce judicial discretion in a series of cases decided in the early 1990s).

59 Frederick Schauer and Virginia J Wise, 'Legal Positivism as Legal Information', (1997) 82 Cornell L. Rev. 1080, at p 1099.

60 Legal Pragmatism' *The Internet Encyclopaedia of Philosophy*, available at: http://www.iep.utm.edu/l/leglprag.htm (last visited on 2 Sep 2006).

61 This refers to Roscoe Pound's famous attack on legal formalism: 'Mechanical Jurisprudence', (1908) 8 Colum. L Rev. 605.

judges acknowledge that hard cases cannot be resolved through applying clearly applicable rules, but still insist that most legal issues can be resolved by applying the reason underlying the ordinary language of rules.[62]

Formalist judges strongly believe they lack authority to look into the social consequences of their decisions. This is consistent with their emphasis on pre-determined rules, history, and on finding the intentions of those who formulated rules in the past. Formalist judges consider that the task of looking at social consequences inevitably involves taking on an illegitimate policy-making role, given their belief that elected representatives should make basic policy choices.

The typical interpretative strategies adopted by Formalist judges are examined in greater detail in the next section. While focusing upon constitutional decisions from Singapore which refer to foreign cases, I set out three modes that are typically exhibited by Formalist judges.

To summarise, judges of the National Formalist persuasion share, apart from their scepticism towards trans-judicial influence, the following traits: i) a preference for rules because of their tendency to limit judicial discretion while enhancing the values of certainty, stability and predictability; ii) a preference for the interpretive strategies of textualism and originalism; iii) a reluctance to overrule settled precedents; iv) a belief in the superior representative capacity (or democratic legitimacy) of the legislative and executive branches, leading to a deferential attitude towards them coupled with a general reluctance to second-guess their decisions; v) a preference for rules over standards; vi) a belief in the 'limited domain' of the law and a corresponding privileging of forms of legal reasoning in their opinions; and vii) avoidance of judicial policy-making.

The Cosmopolitan Pragmatism model of constitutionalism ('Cosmopolitan' or 'Pragmatist')

The Cosmopolitan Pragmatism model of constitutionalism conceives of constitutions as normative attempts to embody notions of fundamental justice. Cosmopolitan Pragmatist judges believe they are vested with the important task of maintaining constitutional values and traditions, while ensuring that such traditions keep up with changing societal realities and norms. They view themselves as performing unique, specialised roles and believe that they should be treated as the equal partners of other governmental actors. Given this self-understanding, Pragmatist judges tend to be far more self-assured of their own authority and powers in interpreting constitutions than their Formalist counterparts.

62 See e.g. Frank Easterbrook, 'Text, History and Structure in Statutory Interpretation', (1994) 17 Harv. J L and Pub. Pol'y 61, at p 68 (conceding that 'Hard questions have no right answers').

Cosmopolitan Pragmatist judges believe that their peers in other constitutional democracies work on a common set of problems dealing primarily with rights and legitimacy, notwithstanding their different local contexts. They assert that such differences do not detract from the fact that courts everywhere confront similar sets of issues (relating to both rights issues and institutional design) and that similar analytical tools are used. Cosmopolitan Pragmatist judges generally attach great value to foreign judicial decisions, and often pay close attention to how their fellow constitutional judges decide similar issues, though without feeling bound to follow them.

Apart from sharing a common openness to foreign law, Cosmopolitan Pragmatist judges also exhibit other similar traits in their overall approaches to constitutional interpretation which extend beyond the issue of trans-judicial influence.

As a general matter, Pragmatists reject foundational theories and conceptions of reasoning in which acceptable methods of reasoning and the permissible raw materials are specified in advance. They believe that reasoning cannot be reduced to an algorithm or predetermined methodology, but must be based on the touchstone of experience.[63]

Pragmatists in general are guided by some unifying beliefs. A leading judicial proponent of Pragmatist thinking in the US is Judge Richard Posner, who has asserted that the core of legal pragmatism is a 'heightened judicial awareness of and concern for consequences, and thus a disposition to ground policy judgments in facts and consequences rather than in conceptualisations and generalisations'.[64]

In methodology, Pragmatists reject the idea that 'correct outcomes can be deduced from some overarching principle or set of principles'[65] – a belief they identify as a central feature of Formalist thinking. Pragmatists offer an alternative view for resolving legal dilemmas by embracing the Aristotelian concept of 'practical reason'. 'Practical reason' has been defined to mean the idea that judges can and should decide cases 'not by deductive logic, but by a less structured problem-solving process involving common sense, respect for precedent and an appreciation of society's needs'.[66]

Judge Richard Posner has illuminatingly commented on the issue of how Pragmatist judges differ from Formalists in terms of securing consistency

63 Ibid. The oft-quoted statement of US Supreme Court Justice Oliver Wendell Holmes, that the life of the law is experience rather than logic, has been offered by many pragmatists as the basic credo of pragmatism.

64 Richard A Posner, 'Legal Pragmatism', in *The Range of Pragmatism and the Limits of Philosophy*, 144 at pp 147–8 (Richard Shusterman, ed., Blackwell Publishing: Oxford, 2004).

65 Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement', (1996) 84 Geo LJ 2071, at p 2085.

66 Daniel A Farber, 'The Inevitability of Practical Reason: Statutes, Formalism and the Rule of Law', (1992) 45 Vand. L Rev. 533.

with past practices and precedents, a central concern of Formalist judges.[67] According to Posner, Pragmatist judges seek to do the best they can for the present and future, 'unchecked by any *felt* duty to secure consistency in principle with what other officials have done in the past'.[68] Significantly, Pragmatists do not underestimate the importance of precedents, traditions and conventions. For them, these have value from a pragmatic viewpoint: '[t]he pragmatist judge . . . regards precedent, statutes, and constitutions both as sources of potentially valuable information about the likely best result in the present case, and as signposts that must not be obliterated . . . as people may be relying upon them'.[69] In novel cases, the pragmatist judge goes beyond precedents and 'looks also or instead to sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify'.[70]

For this reason Cosmopolitan Pragmatist judges tend to favour the idea of a 'living' or 'evolving' constitution, over 'originalist' interpretive techniques. Many find unacceptable the idea of being absolutely bound by the specific intentions of constitutional drafters years, decades or centuries after the adoption of their respective constitutions, in times where human societies in general (and their individual nations in particular) faced considerably different social conditions and problems. This idea of 'living constitutionalism' has been embraced by courts in most modern common law countries with bills of rights.[71]

The preference for a 'living constitution' model of interpretation is distinct from, but linked to the preference for 'purposive' approaches to constitutional interpretation that many Cosmopolitan Pragmatists exhibit. Pragmatist judges lean towards versions of purposive interpretation that permit 'the recognition of implications, provided they are necessary for express provisions to achieve their provisions'. More radically, some Pragmatist judges are prepared to advance purposive interpretations where 'the enacted words may be stretched, compressed, supplemented or over-ridden – in effect, rewritten'.[72] Former President of the Israeli Supreme Court Aharon Barak has addressed the basic features of the purposive approach to interpretation. Barak asserts that a purposive approach to

67 Richard A Posner, 'Pragmatic Adjudication', (1997) 18 Cardozo L Rev. 1, at p 4 [hereinafter, Posner, 'Pragmatic Adjudication'].

68 Posner, 'Pragmatic Adjudication', ibid., at p 4.

69 Ibid., at p 5.

70 Ibid.

71 James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts', (2006) 43 San Diego L Rev. 1 (providing examples from Canada, New Zealand and Israel). Views endorsing this concept have also been expressed by judges in India, England, the US and other nations.

72 Jeffrey Goldsworthy, 'Conclusions' in *Interpreting Constitutions*, supra, note 47 at p 322.

constitutional interpretation requires striking 'the right balance between subjective and objective aspects, namely between the intent of the framers of the constitution (at various levels of abstraction) and fundamental contemporary values' with greater weight being accorded to the latter category. Cosmopolitan Pragmatist judges from several jurisdictions have expressed their self-understanding as 'partner[s] to the authors of the constitution', endorsing purposive modes of constitutional interpretation.[73]

Even as Cosmopolitan Pragmatist judges strive to evolve forward-looking solutions geared towards positive social consequences, they seek to moderate their reasoning and results by accounting for concerns about the limits of adjudication and the judicial process.

Given their sensitivity to facts and context, Cosmopolitan Pragmatist judges exhibit a preference for standards over rules because using standards allows them to 'collapse decision-making back into the direct application of the background principle or policy to a fact situation'.[74] In addition, standards also enable them to factor in the totality of circumstances more easily than they can through rule application.

Cosmopolitan Pragmatists prefer balancing approaches which enable them to consider 'all relevant factors with an eye to the underlying purpose or background principles or policies at stake'.[75] Balancing has been defined as 'based on the identification, valuation and comparison of competing interests' and this methodology consists of analysing constitutional issues 'by identifying interests implicated by the case' and reaching a decision or constructing a rule of constitutional law by 'explicitly or implicitly assigning values to the identified interests'.[76] A number of Pragmatist judges endorse proportionality review, which incorporates techniques of balancing.

Cosmopolitan Pragmatists are open to interdisciplinary perspectives and reject the idea that law is an autonomous discipline, or has a 'limited domain'. They disdain the idea that solutions to human problems must be resolved with a singular focus on *legal* forms of reasoning, tending to draw upon an eclectic range of sources.

I have argued elsewhere,[77] that a typology of such cases shows that Cosmopolitan judges typically engage with foreign cases in the following ways: i) Using foreign constitutional decisions for guidance on broad

73 Judges who have made such statements include US Supreme Court Justice Breyer, Canadian Supreme Court Judges Brian Dickson and Justice Iacobucci and Indian Supreme Court Justices Krishna Iyer and Jeevan Reddy.

74 Sullivan, supra, note 57, at p 58.

75 Ibid., at p 60.

76 T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing', (1987) 96 Yale LJ 943, at p 945.

77 Arun K Thiruvengadam, 'The Common Illumination of our House'?: Foreign Judicial Decisions and Competing Approaches to Constitutional Adjudication, Unpublished JSD dissertation submitted to New York University School of Law (November 2006).

principles of constitutional interpretation;[78] ii) Using foreign law to frame the issues posed for adjudication and/or to formulate evaluative tests and frameworks;[79] iii) Relying on a 'global consensus' *per se* as persuasive;[80] iv) Using foreign law in factually and legally analogous situations;[81] v) Using foreign law to 'cast an empirical light' on 'the consequences of different solutions to a common legal problem';[82] vi) Distinguishing foreign law substantively (and providing fuller clarity and/or justifications for the domestic position);[83] vii) Using foreign law to 'read in' or 'create' implied or un-enumerated rights;[84] and viii) Drawing upon principles of constitutional practice, procedure and remedies.[85]

In summary, the broad features of the Cosmopolitan Pragmatism model, apart from its embrace of trans-judicial influence, can therefore be summarised as follows: i) a belief that judges should use the power of judicial review in a manner befitting the status of judges as partners (and not subordinates) of other constitutional actors; ii) a focus upon context-specific, inductive modes of reasoning which are sensitive to the facts at hand, and a scepticism towards approaches which hold that correct outcomes can

78 E.g. *Law Society v Skapinker*, [1984] 1 SCR 357) (the Canadian Supreme Court looked at US cases to draw broad interpretive insights for construing the new written Bill of Rights after the Canadian Charter was adopted); *S. v Zuma*, 1995, (2) SA 642, (the South African Constitutional Court relied on Privy Council and Canadian decisions in formulating principles of constitutional interpretation); and *Charanjit Lal v Union of India*, [1950] 1 SCR 869 (the Indian Supreme Court relied on judicial tests evolved by the US Supreme Court to frame its approach towards equality issues).

79 E.g. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 (Canadian Supreme Court Justice Wilson's judgement relying on English and American cases to address 'political questions').

80 E.g. *Lawrence v Texas*, 539 US 558 (2003) (US Supreme Court Justice Kennedy's opinion holding an anti-sodomy statute as unconstitutional relied upon decisions of the ECHR, among others).

81 E.g. *President of South Africa v Hugo*, 1997 (4) SA 1 (South African Constitutional Court) (relying on a range of comparative case-law to hold that the pardoning power of the President can be reviewed); *Theophanous v Herald and Weekly Times Ltd.*, (1994) 182 CLR 104 (High Court, Australia) (relying on US case law to carve a constitutional defence to defamation).

82 E.g. *Printz v US*, 521 US 898 (US Supreme Court, 1997) (relying on examples from European states to throw light on an issue of federalism in the US).

83 E.g. *Soobramoney v Minister of Health*, 1998 (1) SA 765 (South African Constitutional Court) (distinguishing an Indian case and using that analysis to underscore the distinctiveness of the South African right to health-related constitutional provisions).

84 E.g. the Indian Supreme Court decisions which collectively evolved rights to a free press in India: *Romesh Thapar v State of Madras*, AIR 1950 SC 124, *Express Newspapers v Union of India,* AIR 1958 SC 578, and *Sakal Papers v Union of India*, AIR 1962 SC 305.

85 E.g. *Khosa v Minister of Social Development*, 2004 (6) BCLR 5679 (South African Constitutional Court) (relying on Canadian and US cases to hold that courts can act pre-emptively to strike down laws not yet implemented).

be deduced from overarching principles; iii) an openness to all forms of authority (including conventional authorities such as text, precedent, structure, etc.) but the absence of an unduly deferential attitude towards them, and a readiness to jettison them in favour of other authorities that advance what they perceive as the 'best results'; iv) a preference for interpretive strategies that advance a 'living constitution' model; v) an acceptance of purposive interpretive strategies; vi) a preference for standards over rules and for balancing approaches over categorical ones; vii) the rejection of 'autonomous' conceptions of the law and an openness to interdisciplinary perspectives.

Singapore judicial decisions exemplifying national formalism

Based on the trends outlined above on trans-judicial influence, it is fair to assert that Singapore's judiciary has an almost exclusively National Formalist approach to constitutional interpretation.[86] The Singapore judiciary generally adopts an attitude of great deference towards the executive and legislature (especially in cases involving national security issues). A remarkable statistic, especially given the current climate of the increasing judicialisation of politics, is that over the 40 years of Singapore's history as a constitutional democracy, there has not been a single instance of any legislative enactment being struck down as unconstitutional.[87] Equally, there are very few instances of executive actions being struck down. This is so, despite the acceptance by the Singapore judiciary of the constitutional basis for the power of judicial review over legislative action.

The current Singapore judiciary also conforms to the basic tenets of National Formalist constitutionalism by adopting a literal interpretation of constitutional provisions. In case after case interpreting rights, when called upon to adopt an interpretation amenable to an expansion of individual liberties, the courts in Singapore have stuck closely to the black letter text of the law, adopting extremely narrow, legalistic and formalistic approaches to interpretation.[88] As Thio describes it, in this approach,

86 The Singapore judiciary does not adopt a National Formalist approach to *all* cases. Some insightful commentators note that Singapore judges paradoxically adopt a Nationalist approach exclusively in relation to public law issues, while quite regularly adopting Cosmopolitan Pragmatist techniques in the private and commercial law spheres. Eugene Tan, 'Law and Values in Governance: The Singaporean Way', (2000) 30 HKLJ 91.

87 Though the High Court in *Taw Cheng Kong v PP* [1998] 1 SLR 943 did strike down a parliamentary statute as unconstitutional, the ruling was overturned on appeal by the Court of Appeal in *PP v Taw Cheng Kong* [1998] 2 SLR 410.

88 See generally, Thio Li-ann, 'An 'i' for an 'I'? Singapore's Communitarian Model of Constitutional Adjudication', (1997) 27 HKLJ 152; Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam', (1997) Sing JLS 240.

'[c]onstitutional principles seem to receive only perfunctory consideration and there is a general reticence when it comes to international 'sources' of law'. This is accompanied by 'a reluctance to declare unwritten law as evinced by the general commitment to strict textualism'. Under this approach, judges avoid 'a purpose-oriented, historical or [moral] approach to constitutional adjudication' because judges 'refuse to adjudge the morality, justice and reasonableness of laws' leading to a very weak corpus of human rights jurisprudence within Singapore.[89]

I now turn to an examination of Singapore cases to illustrate how the National Formalism model works in relation to the practice of trans-judicial influence. To do so, I employ a typology of use of foreign decisions. My purpose here is not to be comprehensive, but to give selected examples which highlight the way Singapore judges use foreign decisions.

In this section, I set out a three-pronged categorisation to illustrate how National Formalist judges in Singapore respond to the citation of foreign judicial authorities.

1 Outright rejection of foreign cases

Although the broad majority of Nationalist judges tend to be sceptical of the value of foreign decisions, only a small number would argue for their outright rejection. This section analyses two cases in which Nationalist judges from Singapore have adopted such a position, while focusing on the reasons advanced. Broadly speaking, the justification Nationalist judges offer for resisting any use whatsoever of foreign judicial decisions is that reference to any non-domestic source for constitutional interpretation is illegitimate though, as my analysis will show, there are other limbs to this overall argument.

In the landmark case of *Colin Chan v Public Prosecutor* (1994),[90] Yong CJ invoked the 'four walls' doctrine to reject the use of foreign authorities in constitutional adjudication in a case involving the ambit of religious freedom. The Singapore government imposed a ban on religious literature published by the Jehovah's Witnesses' (JW) parent body, and the persons convicted for possessing such materials petitioned the High Court, arguing that this ban on their religious materials violated the Article 15 religious freedom guarantee. They cited various decisions of the US Supreme Court in support of their stance.

Yong CJ's response was to quote from the 1963 Malaysian High Court judgment of *Govt. of Kelantan v Govt. of Malaya*,[91] where Justice Thompson held that

89 Thio, Transnational Judicial Conversations, supra, note 37.
90 (1994) 3 SLR 662.
91 [1963] MLJ 355.

> the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.[92]

Yong CJ asserted, without providing any reasons, that this 'would also reflect the position in Singapore'. On the face of it, this doctrine would entirely preclude reference to foreign or international sources.

Various aspects of Yong CJ's reasoning in *Colin Chan* conform to the National Formalism model. The JWs noted they were a peace-loving group and had done nothing to give any cause for apprehension that they might engage in any violent or disruptive acts. It was their refusal to perform national service – in line with their faith which prohibits military service – which led to their being targeted. In response, Yong CJ first acknowledged the constitutional basis for the right to freedom of religion in Singapore, before promptly adding a rider:

> I am of the view that religious beliefs ought to have proper protection, but actions undertaken or flowing from such beliefs must conform with the general law relating to public order and social protection.[93]

Yong CJ relied on the fact that the relevant Minister in government had determined that by refusing to perform national service, the JWs posed a threat to national security. He held that '[s]uch considerations are clearly related to public interest' and concluded that the Minister's determination was valid.[94] Thio has characterised such reasoning as showing a preference for methods of 'categorisation' over 'balancing'.[95] Thio criticises the Court for refusing to perform a balancing of the constitutional issues at stake, and for allowing considerations of public order to trump issues of individual liberty without weighing the conflicting considerations. She points out that for the Court, '[t]he mere fact that the public order factor was present, that its pigeonhole was occupied, was conclusive, regardless of how much it weighed'.[96]

This preference for categorical methods of reasoning over a balancing of interests, is a standard interpretive tactic employed by Nationalist judges. In elaborating why he rejected the claims asserted by the JWs, Yong CJ reaffirmed one of the main themes of National Formalist thought by holding that the judicial function in reviewing executive actions was very narrow:

92 *Colin Chan,* supra, note 90, at p 681.
93 *Colin Chan*, ibid., at p 684.
94 Ibid., at p 686.
95 Thio Li-ann, 'The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v. Public Prosecutor*', (1995) 16 Sing LR 26 at pp 77–91.
96 Ibid., at p 83.

> The basic proposition in judicial review is that the court will not question the merits of the exercise of the ministerial discretion. There can be no enquiry as to whether it was a correct or proper exercise or whether it should or ought to have been taken. The court cannot substitute its own view as to how the discretion should be exercised with that actually taken.[97]

This reveals Yong CJ's tendency to defer to the executive and the legislature, on the theory that the people's elected representatives have greater authority to make policy decisions than judges. His approach to constitutionalism is representative of the views of the Singapore judiciary, and continues to be dominant.

This approach is evident in the High Court decision of *Chee Siok Chin v. Ministry of Home Affairs* (2005),[98] delivered a decade after the decision in *Colin Chan*. Here, four persons conducted a silent, non-violent protest by holding signs outside a government office. Police officials interrupted this protest by ordering the protestors to disperse while purportedly exercising powers under a law relating to 'public order and nuisance'. The protesters sought a High Court declaration that the police violated their constitutional rights to freedom of expression and assembly. In rejecting their claims, Justice VK Rajah construed the power of the Singapore Parliament to control public order in a very expansive manner, arguing that the 'wide legislative remit' under the relevant statute gave the executive the power to adopt a 'prophylactic approach in the maintenance of public order'.[99] He further held that 'the right of assembly may be subordinated to public convenience and good order for the protection of the general welfare whenever it is necessary or expedient'.[100] Such a response to claims of violation of individual rights exhibits a judicial attitude of great deference to the legislature and executive, a signature trend among Formalist judges.

97 *Colin Chan*, supra, note 90, at p 682. (Emphasis added). I leave aside for now whether this construction of the limits of judicial review is at all a 'basic proposition in judicial review'. Yong CJ appears to be confusing principles of judicial review of administrative action (that have evolved in England which lacks constitutionally entrenched rights and where judges are counselled not to substitute their own views for executive decisions) with the considerations that arise in cases where individual constitutional rights are allegedly violated. The latter case clearly requires judges to closely examine the basis for the decision made by the executive. As Singapore has a constitutional bill of rights in Singapore, Yong CJ's position on the broad principle of judicial review he sets out is unsustainable, reflecting a deep misunderstanding of the interplay between principles of administrative and constitutional law.

98 [2006] 1 SLR 582.

99 Ibid., at p 603, para 50.

100 Ibid., at p 604, para 53.

Reacting to the citation of foreign judicial authorities, Rajah J (as he was then) while reiterating the applicability of the 'four walls doctrine' and rejecting the foreign decisions cited before him, explained:

> Different countries have differing thresholds for what is perceived as acceptable public conduct. . . . *There are no clearly established immutable universal standards*. Standards set down in one country cannot be blindly or slavishly adopted and/or applied without a proper appreciation of the context in another. *It is of no assistance or relevance to point to practices or precedents in any one particular country and to advocate that they must be invoked or applied by the court in another*. The margins of appreciation for public conduct vary from country to country as do their respective cultural, historical and political evolutions as well as circumstance. . . . *In the final analysis, the court will not only be guided but indeed be bound by the manifest intent and purport of both the* Constitution *and domestic legislation, not by abstract notions of permissible conduct*.[101]

These are certainly well articulated reasons why a judge faced with the task of constitutional interpretation should be wary of foreign influences. In the tradition of conventional Nationalist judges, Rajah J emphasised that the only relevant considerations for a judge engaged in constitutional adjudication are 'the manifest intent and purport of both the Constitution and domestic legislation'.

Responding to the argument that judges in Singapore should use proportionality analysis to assess if government action violated the protestors' rights, Rajah J was once again reluctant to rely on foreign decisions or to use balancing methods of analysis. Instead, he argued that 'the notion of proportionality' is 'a continental European jurisprudential concept imported into English law by virtue of the UK's treaty obligations'.[102] This itself was reason enough to avoid the doctrine. Justice Rajah emphatically asserted that:

> Proportionality is a more exacting requirement than reasonableness *and requires,* in some cases, *the court to substitute its own judgment for that of the proper authority*. Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.[103]

101 Ibid., at pp 630–1, para 132. [Emphasis added].
102 Ibid., at p 616, para 87.
103 Ibid., at p 616, para 87. [Emphasis added].

Both of Rajah J's claims are based on highly contestable premises.[104] His reasoning showcases the scepticism of National Formalist judges towards two distinct phenomena closely associated with Cosmopolitan Pragmatism: the use of foreign decisions and balancing modes of analysis. Rajah J also invokes the worst-case scenario of Formalists: that the balancing entailed by proportionality analysis is a way for judges to impose their own subjective views and values into the adjudication process.

The judicial reasons offered over the span of more than a decade in the *Colin Chan* and *Chee Siok Chin* cases still fail to explain why the Singapore judiciary, until recently quite enthusiastic in its engagement with foreign law, has now adopted a clear hands-off policy to using foreign constitutional decisions. As noted earlier, the fuller explanation for the Singapore legal system's avoidance of foreign constitutional decisions is to be found in a speech made by Singapore's Law Minister, S Jayakumar before Parliament in 1989. The speech was delivered soon after *Chng Suan Tze*, where Wee CJ relied upon foreign judicial authorities to declare that the government did not have untrammelled authority in detaining citizens. The government reacted swiftly to repudiate this decision by enacting legislative and constitutional amendments. While moving the amendments to Singapore's Internal Security Act, Law Minister Jayakumar specifically criticised the Court of Appeal's use of foreign precedents:

> First, Sir, ... *if we allow foreign case law and precedents to allow our courts to be involved in an interventionist role*, then we will have an untenable position – clearly an untenable position – because our law on national security matters will be *governed by cases decided abroad, in countries where conditions are totally different from ours*. . . . Second reason, Sir, ... is that *if Singapore courts are allowed, because of all these foreign precedents, to review the discretion of the Executive on security matters*, as expounded in the Court of Appeal judgment, then Singapore judges will in effect become responsible for

104 David Beatty in *The Ultimate Rule of Law* (Oxford Univ Press: Oxford, 2004) [hereinafter, Beatty, *Ultimate Rule of Law*] has asserted that what is known to Continental Europeans as proportionality analysis, is a modified version of the kind of analysis that common law constitutionalism has been witness to for several decades. By analysing cases from several jurisdictions, Beatty shows that judges in many different jurisdictions use essentially the same kind of constitutional analysis to test claims of violations of rights. Therefore, the notion of proportionality is not as new to common law as Justice Rajah suggests. Equally debatable is the claim that English judges have borrowed proportionality analysis to adjudicate upon human rights issues in contemporary times. Some English judges argue that they have used age-old common law modes of reasoning (which bear significant parallels with proportionality analysis) to protect the rights under the new Human Rights Act.

> and answerable to decisions affecting national security of Singapore because they would then have the final say. . . . *Our courts, Sir, should not therefore be involved in the exercise of these powers of detention*.[105]

In arguing that Courts should have a limited role in intervening in matters which the executive considers as involving national security, Minister Jayakumar adopted a position typical of National Formalist reasoning, which advocates judicial restraint in such sensitive matters.

Soon after this episode, Wee CJ retired and was succeeded by Yong CJ, who, during his 15-year tenure, showed himself a strong adherent of National Formalism. This is evident from an analysis of the many significant constitutional cases he and his fellow judges decided during this period, a few of which are examined below.

2 Dismissing foreign cases by focusing on superficial or non-significant distinctions

A second way Nationalist judges resist foreign decisions is by asserting that they have little value because of differences undermining their applicability. Distinctions are drawn by pointing either to differences between: i) the national system in question and the parent jurisdiction of the foreign authority; or to ii) the facts of the cases concerned; or iii) the applicable laws and constitutional provisions. While these can be, and very often are, sound reasons counselling against the reliance on foreign decisions, I argue that most Nationalist judges engage in a fairly superficial process of making these distinctions. In this section, I examine three decisions in which this pattern is clearly discernible.

Chief Justice Yong's engagement with US cases on religion in Colin Chan

In *Colin Chan*, Yong CJ invoked the 'four walls' doctrine to repel the force of the foreign decisions (consisting, it appears, chiefly of US Supreme Court decisions) cited before him. These decisions were relied upon to support the proposition that banning JW religious publications and convicting them for possessing those materials violated their religious freedom. Aside from invoking the 'four walls' doctrine, Yong CJ distinguished the US cases counsel cited.

This attempt occupied one short paragraph in his otherwise detailed judgment. He began by noting that the Jehovah's Witnesses' lawyer 'referred

105 Jayakumar, *Singapore Parliamentary Debates Official Report*, 25 Jan 1989, at col 468–9.

me to various judicial pronouncements in the United States on the right to freedom of religion'.[106] Interestingly, Yong CJ never specifically named the judgments cited before him, or the propositions for which they were cited. He merely declared that there was 'a fundamental difference' between the right to freedom provisions in the American and Singapore constitutions. Without elaborating on these differences, Yong CJ declared:

> The social conditions in Singapore are, of course, markedly different from those in the United States. On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context.[107]

Once again, Yong CJ failed to mention what the 'various views as enunciated in the American cases' were. Significantly, he neglected to elaborate on the differences in social conditions between Singapore and the US that make any analogy inappropriate. By using the term 'of course' he implied these differences in social context were so obvious as not to merit elaboration. This is problematic because, on the face of it, there are parallels between the US and Singapore contexts in relation to the right to religious freedom. Though Article 15 of the Singapore constitution employs different language, it seeks to enshrine a similar concept – the right to religious freedom. And, the right is prized in both societies, albeit in different ways. Both Singapore and the US are secular states and both are multi-ethnic and multi-religious countries where the principle of secularism play a similarly crucial stabilising role. For Yong CJ to suggest that no comparisons are possible at all appears to be a wrong and superficial way to distinguish the US decisions.

Yong CJ's reasoning should be understood against the tendency of Nationalist judges to be deeply sceptical of the utility of foreign decisions. To such a judge, the differences in relevant conditions seem so obvious and impossible to overcome, that he may not feel the need to actually enumerate them, believing these to be self-evident. Such a judge sees no problem in summarily rejecting the implications of the foreign normative standard by simply asserting the uniqueness of conditions within his jurisdiction. However, it has been argued that such summary dismissal of foreign cases arguably violates those values associated with a 'rule of law' culture such as clarity and transparency of reasoning.[108]

106 *Colin Chan* supra, note 90, at p 681.
107 Ibid.
108 Ramraj, supra, note 10, 303, at p 331.

Chief Justice Yong's dismissal of Privy Council and US Supreme Court decisions in Edakalavan

Rajeevan Edakalavan v Public Prosecutor (1998)[109] was decided four years after *Colin Chan*, and required Yong CJ to confront foreign judicial decisions delivered by the Privy Council and the US Supreme Court. Although Yong CJ attempted to meet the cases more fully, his attempt at distinguishing the cases remains unconvincing.

Edakalavan pleaded guilty to 'outraging the modesty' of a woman and was duly found guilty and sentenced. He had no legal representation at trial. After sentencing, he engaged counsel and appealed against his conviction. One argument before the High Court was that he was not informed of his right to counsel under Article 9(3) of the Singapore Constitution.[110] He argued that this lapse vitiated the trial because his ignorance about the law led him to make mistakes which could have been avoided with legal representation. In his judgment, Yong CJ considered two foreign decisions on whether the police and other authorities were legally obliged to inform an arrested person of his right to counsel.

The first was the Privy Council decision in *A-G of Trinidad v Whiteman* (1991).[111] Here, the Privy Council while interpreting a provision similar to Article 9(3) of the Singapore Constitution held that upon arrest and detention by the police, a person had a constitutional right to be informed of his constitutionally-guaranteed right to retain and instruct a legal adviser of his choice, and to have discussions with such legal adviser. Yong CJ conceded that the relevant provision in the Constitution of Trinidad and Tobago (Article 5(2) c(ii)) was very similar to its Singapore counterpart.[112] However, he argued that the Privy Council actually relied more on another provision (Section 5(2)(h)) which prohibited the Trinidad and Tobago Parliament from depriving 'a person of the right to such procedural provisions as are necessary for the purpose of giving effect to the aforesaid rights and freedoms'. Yong CJ asserted that since the Singapore Constitution had no comparable provision, the Privy Council decision was inapplicable, the provisions of the Constitution of Trinidad and Tobago being in 'stark contrast to our Article 9(3)'.[113]

This is an extremely narrow way of construing *Whiteman*. Yong CJ ignores the fact that the Privy Council judgment emphasised the importance of ensuring that arrested persons were informed of their right to counsel, by noting that '[m]any persons might be quite ignorant that they had this

109 [1998] 1 SLR 815.

110 Art 9(3) of the Singapore Constitution provides: 'Where a person is arrested, he . . . *shall be allowed to consult and be defended by a legal practitioner of his choice*.'

111 [1991] 2 WLR 1200.

112 *Edakalavan*, supra, note 109, at p 820.

113 Ibid., at p 821.

constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind'.[114] Lord Keith had emphasised the need to construe constitutional provisions 'broadly and purposively, so as to give effect to [their] spirit' arguing that this was 'particularly true of those provisions which are concerned with the protection of human rights'.[115] While Yong CJ is correct to note that Lord Keith's judgment in *Whiteman* had referred to Article 5(2)(h) of the Constitution of Trinidad and Tobago, it is clear that it is merely an ancillary provision, and is properly identified as an 'effect and protection clause' which ought to be construed as having been inserted by way of abundant caution by the constitutional draftsman.[116] Yong CJ's analysis ignores the thrust of Lord Keith's judgment which argued for an expansive interpretation of provisions guaranteeing a right to counsel to include a right to be informed of such a right. By seizing on a technical difference in provisions, and by claiming a 'stark contrast' between the comparable provisions (after initially conceding that the germane provisions were similar), Yong CJ demonstrates his tendency to adopt non-rigorous reasoning in engaging with foreign decisions in constitutional cases.

The second case Yong CJ sought to distinguish was the landmark US Supreme Court decision in *Miranda v Arizona* (1966).[117] There, the US Supreme Court read the right to be informed of one's right to consult with a lawyer within the privilege against self-incrimination guaranteed by the US Fifth Amendment. Yong CJ noted that the Supreme Court had read such a right into the US Constitution even though it did not, unlike the Singapore Constitution, have any provision guaranteeing even the right to counsel, let alone the right to be informed of one. Yong CJ used an extremely convoluted process of reasoning to distinguish this case. According to him, the US Supreme Court

> was dealing with the narrower issue of the procedural measures which should be enacted to safeguard the privilege against self-incrimination during the interrogation process and not the broader issue of the right to be informed of the constitutional right to counsel per se.[118]

He then referred to the fact that in an earlier case, *PP v Mazlan* (1993),[119] the courts in Singapore had held that there was no constitutional right

114 *Whiteman,* supra, note 111, at p 1204.
115 Ibid., at p 1204.
116 Michael Hor, 'The Right to Counsel – The Right to be informed', (1993) 5 SACLJ 141, at p 143.
117 384 US 436 (1966).
118 *Edakalavan*, supra, note 109, at p 821.
119 [1993] 1 SLR 512.

against self-incrimination or to silence under the Singapore Constitution. Yong CJ reasoned that since 'there is no equivalent of the Fifth Amendment in Singapore', the decision in *Miranda* 'did not provide a strong authority for reading into Article 9(3) the right to be informed of one's right to counsel' and '[t]o so extrapolate it will be to take the decision completely out of context'.[120]

Ironically, 'Taking the decision completely out of context' is the best way to describe Yong CJ's analysis of *Miranda v Arizona*. If anything, there was a stronger basis for reading a right to be informed of one's right to counsel within Article 9(3), as it already provides a clear right to counsel, unlike the American constitution which is silent on this issue. Yong CJ once again ignored the main thrust of the opinion in *Miranda v Arizona* which sought to interpret provisions guaranteeing rights to accused persons in an expansive manner.[121] Commentators have noted that there is a strong claim for the existence of the privilege in Singapore on the basis of previous judicial decisions as well as Criminal Procedure Code provisions.[122] Even on this ground, therefore, Yong CJ's logic in distinguishing *Miranda* is faulty.

Yong CJ's judgment in this case bears the hallmarks of literalism and legalism that have so often been a part of the National Formalist model. In expressly avoiding a purposive approach to constitutional interpretation, Yong CJ also appears to be signalling his clear rejection of interpretive strategies at the heart of a Cosmopolitan Pragmatist sensibility. Yong CJ's weak reasoning in distinguishing the cases, and the exceedingly narrow approach he adopted towards the interpretation of the rights provision in question, are symptomatic of an extreme version of National Formalism. Further insights into his approach towards constitutional interpretation more generally can be gleaned by his statements in the same case about the proper function of a judge engaged in constitutional interpretation. His argument is that, even while interpreting constitutionally-entrenched rights provisions, a judge has to adopt a circumspect and restrained attitude:

> To read into the right to counsel in Art 9(3) an additional constitutional right to be so informed will be tantamount to judicial legislation. The duty of the judge is to adjudicate and interpret the laws passed by parliament with the aim of ensuring that justice is upheld. . . . Any proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena. *The judiciary, whose duty is to ensure that the intention of parliament as reflected in*

120 Supra, note 118, at p 822.

121 For a critique of the decision in *Mazlan* which held that the privilege against self-incrimination was inapplicable in Singapore, see Michael Hor, 'The Privilege against Self-Incrimination and Fairness to the Accused', [1993] Sing JLS 35.

122 Ibid., at pp 43–7.

> *the* Constitution *and other legislation is adhered to, is an inappropriate forum*. . . . The members of parliament are freely elected by the people of Singapore. . . .
>
> . . . *The judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective . . . The sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in parliament who are the ones chosen by us to address our concerns*. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part.[123]

This is an extremely deferential standard, even by the relatively deferential standards prevalent among National Formalist judges. Arguably, it amounts to the judicial abdication of the primary function of reviewing legislative and executive action. One should, however, allow for the fact that Yong CJ may be at one extreme of the scale even among Nationalist judges in the extent to which he is prepared to defer to the executive and legislative wings of government.

The quoted statement also helps explain Yong CJ's somewhat less rigorous attempts at distinguishing the foreign decisions cited before him. To a Nationalist judge who considers himself a mere agent of the legislature, the idea of enunciating policies while adjudicating upon constitutional decisions, and borrowing what a judge considers to be good policy as laid down in foreign decisions, would seem extremely problematic.

Rejection of decisions of the Privy Council and the Supreme Court of India in Nguyen Van

In a 2005 Court of Appeal decision, the appellant – who had been convicted of smuggling drugs into Singapore and sentenced to death – challenged his conviction on several grounds.[124] Among other things, he challenged the constitutional validity of provisions of the Misuse of Drugs Act (MDA)[125] on the ground that they violated his Article 12 constitutional right to equal protection of laws, as well as his right against arbitrary punishments guaranteed by Article 9 of the Singapore constitution. It was undisputed that the appellant was in possession of more than 15 gms of diamorphine, which attracted the mandatory death penalty.

In relation to Article 9, the appellant argued that the mandatory death sentence was arbitrary as it precluded proportional and individualised sentencing. He relied on several recent Privy Council decisions, which had

123 *Edakalavan,* supra, note 109.
124 [2005] 1 SLR 103.
125 Cap 185.

struck down mandatory death sentences as unconstitutional. The Privy Council in its 1981 decision of *Ong Ah Chuan* had expressly approved the constitutionality of the mandatory death penalty for trafficking in prohibited drugs. It revisited the issue nearly two decades later in the 2002 case of *Reyes v The Queen*[126] and disputed the correctness of *Ong Ah Chuan*. It held that virtually any mandatory death sentence is unconstitutional and violates the inherent dignity of the individual by denying him the right to have a court consider all mitigating circumstances in pronouncing a sentence of death. Two years later, in *Watson v Queen*,[127] the Privy Council reiterated this position, with even more pointed criticism of *Ong Ah Chuan*.

The Court of Appeal's decision in *Nguyen* is more in line with the discredited ruling in *Ong Ah Chuan*, than with the cases which overturned it. In his judgment, Justice Lai Kew Chai quoted extensively from Lord Diplock's ruling in *Ong Ah Chuan*, with what must be interpreted as approval, given that he reached the same conclusion. Lai J distinguished *Reyes* by noting that that decision relied in part on a provision in the Belize Constitution which prohibited torture as well as any inhumane or degrading punishment. He argued that Belize had accepted several obligations under international human rights law, which caused the Privy Council to view its adoption of mandatory death sentences as impermissible. Lai J offered the latter reason to distinguish the *Watson* ruling in Singapore.[128] These arguments – like those adopted by Yong CJ to thwart the force of the Privy Council's rulings in *Edakalavan* – amount to nitpicking, and fail to address the substantive issues forming the basis of the *Reyes* and *Watson*. The problems with a mandatory death penalty as outlined in *Reyes* and *Watson* could plausibly apply to Singapore, which has textually similar written guarantees of rights.

Lai J's response was pointed, extraordinarily brief, and set out in a single paragraph: 'However, we are of the view that the mandatory death sentence prescribed under the MDA is sufficiently discriminating to obviate any inhumanity in its operation. It is therefore constitutional'.[129] He did not elaborate or explain why the law was 'sufficiently discriminating'; it was a bald assertion. In doing so, Lai J conformed to the trend where cases challenging the constitutionality of legislation are treated in an extremely casual manner, according Parliament a great deal of latitude in enacting laws. Such an extreme attitude of deference is rare, even among National Formalist judges.

Lai J's response to the second argument based on equal protection is also problematic. The appellant based his argument on the Indian Supreme

126 [2002] 2 AC 235.
127 [2004] UKPC 34.
128 *Nguyen Tuong Van v PP* [2005] 1 SLR 103, at p 126, paras 85–6, (C.A., Singapore).
129 Ibid., at para 87.

Court's decision in *Mithu v. State of Punjab* (1983).[130] In that case, the central issue was the constitutional validity of Section 303 of the Indian Penal Code, which provided that murder committed by a person already serving a sentence of life imprisonment would automatically attract a mandatory death sentence. The Indian Supreme Court concluded that there was no rational justification for treating life convicts differently from others, particularly because there was no sociological data which showed that life convicts had a greater propensity for committing murder, and struck down Section 303 as unconstitutional. Adopting a similar logic, Nguyen argued that there was no 'rational justification' for imposing the death penalty on someone in possession of more than 15 gms of heroin, because the gravity of the offence could not be gauged by the quantity of the drug alone.

Lai J offered two responses. The first was to state that 'it is not as clear [as it was in *Mithu*] that there is no 'rational justification' for the 15g differentia at all'.[131] Once again, Lai J does not explain why this is so. He offers no reason to support the legislative judgment as being rational or reasonable. Instead, he pinned the fault on the appellant for not having 'provided any materials' in support of his stance. Lai J's second response was to offset the Indian decision by referring to another foreign decision: the Hong Kong Court of Final Appeal's decision in *Lau Cheng v. HKSAR*.[132] There, the Court was faced with a constitutional challenge to the mandatory life imprisonment sentence for murder. The Hong Kong Court paid great attention to the legislative history of the provision, which chose mandatory life imprisonment as a substitute for the mandatory death penalty. Given such a context, the Hong Kong court chose to give particular weight to the views and policies adopted by the legislature.

Adopting this reasoning, Lai J felt that the Singapore Parliament ought to be accorded similar latitude in enacting the MDA and dismissed the Article 12(1) argument. Lai J offers no reason for preferring the Hong Kong Court of Appeal's approach to that of the Indian Supreme Court, even though historically and textually, Singapore's constitutional tradition is more closely aligned with the latter than the former. Through the use of the Hong Kong decision, which recommended a high degree of deference to Parliamentary decisions, Lai J avoided enquiry into the reasonableness of MDA provisions which would have been standard procedure in any judicial proceeding involving a constitutional challenge to a statute. Thus, Lai J's judgment for the Court of Appeal in *Nguyen* conforms to other features of National Formalism beyond its rejection of foreign cases with a potential for expanding the scope of constitutional rights.

130 AIR 1983 SC 473.
131 *Nguyen*, supra, note 127, at para 74.
132 [2002] 2 HKLRD 612.

3 Incorrect reliance on foreign cases

Since National Formalist judges do not attach much value to foreign decisions, and generally consider them to be inferior to other sources, their approach towards analysing foreign cases tends to be less rigorous. This sometimes results in the careless use of foreign authorities, at times under the mistaken belief that a foreign decision supports the view adopted by the Nationalist judge, when a closer examination would have revealed otherwise. While some may view this as deliberate attempts to mislead, I am inclined to believe that such mistakes are attributable more to the casual approach Nationalist judges adopt towards foreign authorities in general. This section examines two relevant Singapore decisions.

Justice VK Rajah's reliance on Indian constitutional law and the decision in VG Row *in* Chee Siok Chin

In *Chee Siok Chin,* Justice VK Rajah resolutely refused to apply foreign decisions. After providing compelling reasons for such avoidance, Rajah J cited some foreign law of his own (from India) to support his conclusion. It is unclear from the judgement whether the initiative to cite Indian law came from the judge himself, or whether he was reacting to Indian authorities cited to him by counsel.

To decide the issue of constitutionality, Rajah J referred to the analogous provision relating to speech and assembly in the Indian Constitution. Rajah J noted that though there were textual similarities, the Indian constitutional provision was more favourable to individual rights since it required restrictions on rights to meet the standard of 'reasonableness', a textual requirement that was absent in the Singapore provision. Rajah J then asserted that 'even with such a constitutional imprimatur of review, the Indian courts have exercised considerable self-restraint in the actual exercise of such a power'.[133] He went on to say that he had taken

> the liberty of referring to the Indian position to illustrate the point that even with the wider constitutional restraints imposed by the Indian constitution, the Indian courts have been most reluctant to exercise their jurisdiction to strike down legislation for purportedly flouting the right of assembly or freedom of speech.[134]

The argument is a very interesting one, and would have persuasive value, but for the fact that it does not accurately reflect the foreign law relied upon. Rajah J's characterisation of the Indian judiciary's approach towards

133 *Chee Siok Chin v MHA* (2006) 1 SLR 582 at pp 601–2.
134 Ibid., at 602.

cases involving free speech and assembly is striking, because it is so completely at odds with how most constitutional scholars and judges perceive the Indian judiciary's record on these issues. This is particularly so with respect to issues relating to press freedom, which, despite lacking a textual foundation in the Indian Constitution, has been 'read in' as a constitutional right, and has been accorded substantive content over time by Indian Supreme Court decisions.[135] Over 60 years, the Indian Supreme Court has developed a sophisticated body of constitutional jurisprudence which has facilitated robust rights to speech, association and assembly in India.[136]

Rajah J cites only two authorities to support his unconventional characterisation of India's constitutional jurisprudence on speech and assembly. The first is a general observation on standards of judicial review in the 1983 edition of a leading commentary by HM Seervai; and the second is the Indian Supreme Court decision in *State of Madras v VG Row*.[137] His reliance on both these sources is problematic,[138] and I focus here on the sole judicial authority he cites. Rajah J quotes and emphasises a passage from the judgement of Chief Justice Patanjali Sastri which appears to counsel judges against interfering with legislative judgments that have after due consideration, imposed restrictions upon rights. Rajah J only refers to a stray statement appearing in paragraph 17 of Sastri CJ's judgment without providing any further context or discussion of the facts in *VG Row*.

In fact, *VG Row* was one of the early cases in which the Indian Supreme Court began developing a robust interpretation of the rights to speech and assembly in India. Here, the Court held as unconstitutional, provisions of

135 I rely on authoritative surveys of the record of the Supreme Court of India by two distinguished constitutional scholars: Soli Sorabjee, 'Constitution, Courts and the Freedom of the Press and the Media', *in Supreme But not Infallible* 334–59 (BN Kirpal, *et al.* eds, Oxford University Press: New Delhi, 2000); and MP Jain, 'The Supreme Court and Fundamental Rights', in *Fifty Years of the Supreme Court of India* 1–101 at pp 43–6 (SK Verma, *et al.* eds, Oxford University Press: New Delhi, 2000).

136 This view is shared by domestic and foreign constitutional law scholars who have studied Indian jurisprudence. See, e.g. Burt Neuborne, 'The Supreme Court of India', (2003) 1 ICON 476, at p 508 (praising the Supreme Court of India for 'impos[ing] sophisticated structural protections such as overbreadth, a ban on prior restraints, and a form of heightened scrutiny designed to preserve free expression').

137 AIR 1952 SC 196; MANU/SC/0013/1952.

138 Justice Rajah's reliance upon Seervai's quoted statement amounts to a *non sequitur*. Seervai's statement to the effect that the Supreme Court usually holds laws invalid only in the clearest cases is not useful in itself. This is particularly so if one recalls that despite purporting to take the power of holding a statute to be unconstitutional very seriously, the Indian Supreme Court has very often struck down laws as unconstitutional. Between 1950 and 1975, the Indian Supreme Court had held more than one hundred Union and State laws, in whole or in part, to be unconstitutional. Since 1975, the number of laws that have been struck down has only increased.

the Indian Criminal Law Amendment, 1908 that imposed restrictions on the right to form associations, because they violated the Article 19(1) constitutional right. In striking down the provision, the Court also emphatically reiterated its power to strike down laws which violated the Constitution.[139] The stirring words the Court employed in *VG Row* have been reiterated in several major subsequent Supreme Court decisions to remind the executive and legislature in India of its fundamental powers under the constitutional scheme.

It is rather ironic that Rajah J chose *this* particular case to demonstrate what he perceives to be the Indian courts' restrained approach towards the speech and assembly rights. Rajah J clearly quoted a stray comment that conveyed the opposite result of the actual ruling in *VG Row*. This appears to have led him to misunderstand (and mischaracterise) the record of the Indian Supreme Court both in the specific case and on the constitutional rights of speech and assembly in general. One real danger in citing foreign law is the lack of expertise in the foreign system (which no domestic lawyer or judge can be reasonably expected to have), which may eventuate in the mischaracterisation of the legal position in that foreign system. Most careful Cosmopolitan Pragmatist judges are fully alive to this danger, and is a factor that makes them adopt a measure of circumspection as they look to foreign systems.

Chief Justice Yong's reliance on the Indian Supreme Court's decision in Swamiar *in* Colin Chan

It is ironic that the decision which revived the 'four walls' doctrine in Singapore sought to rely on foreign decisions to support its conclusion. What makes this reliance doubly unfortunate is that it is factually wrong.

As noted earlier, the petitioners in *Colin Chan* challenged the constitutionality of the ban on JWs. Yong CJ conceded that 'religious beliefs

139 *VG Row*, supra, note 135, at para 14. ('Before proceeding to consider this question we think it right to point out . . . that our Constitution contains express provisions for judicial review of legislation as to its conformity with the constitution unlike as in America where the Supreme Court has assumed extensive power of reviewing legislative acts under cover of the widely interpreted 'due process' clause in the Fifth and Fourteenth Amendments. If, then, the courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the 'fundamental rights' as to which this Court has been assigned the role of a sentinel on the *qui vive*. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. We have ventured on these obvious remarks because it appears to have been suggested in some quarters that the courts in the new set-up are out to seek clashes with the legislatures in the country.')

ought to have proper protection', but went on to assert that actions flowing from such beliefs must 'conform with the general law relating to public order and social protection'.[140] He then relied upon two foreign judicial decisions to support his position. He first cited a 1943 decision of the High Court of Australia, delivered at the height of the Second World War, which upheld a Parliamentary law making military service applicable to all Australians over the objection of JWs' religious right to pacifism.[141] Second, he quoted a single statement from *Commissioner, Hindu Religious Endowments v Swamiar* (1954),[142] an Indian Supreme Court decision, for the proposition that 'the right of freedom of religion must be reconciled with the right of the State to employ the sovereign power to ensure peace, security, and orderly living without which constitutional guarantee of civil liberty would be a mockery'.[143]

There are problems with both the foreign cases cited by Yong CJ. As commentators have noted, the Australian High Court decision in *Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth* was rendered during war-time, and it has been doubted if the same approach would be adopted by that Court during times of peace, which was the fact situation in the Singapore case. Second, the High Court of Australia did not have to balance the text of the law against a constitutionally-guaranteed right of religious freedom, which is the case in Singapore.

There is a graver problem with the reference to the *Swamiar* case. Yong CJ does not discuss the facts of the Indian decision, or tell us anything beyond the single quotation that he lifts from it. This characterisation is problematic when one reads the full text of the judgment. The case involved a challenge to a law to regulate the administration of Hindu religious institutions (including temples). The Court interpreted the right to religion guaranteed by Article 25 of the Indian Constitution in expansive terms, and held that several provisions of the law violated the religious freedom guarantee and were therefore void. The Court also considered foreign decisions at length to ascertain the parameters of the Article 25 right. Yong CJ's stray quote from the judgment is taken from paragraph 20 of Justice Mukherjea's judgment, where he was discussing the Australian High Court approach in *Adelaide v Commonwealth* (the very same decision that Yong CJ referred to just before turning to the Indian decision) and was in fact paraphrasing the approach of Chief Justice Latham. After setting out the Australian decision, Mukherjea J immediately contrasted it with the more tolerant

140 *Colin Chan v PP* (1994) 3 SLR 662, at p 684.

141 Ibid., at pp 683–4. The Australian High Court decision relied upon was *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth,* [1943] HCA 12.

142 AIR 1954 SC 282, MANU/SC/0136/1954.

143 *Colin Chan*, supra, note 140, at p 684, quoting *Commissioner, HRE v. LT Swamiar*, AIR 1954 SC 282.

approach towards JWs adopted by the US Supreme Court in *West Virginia v Barnette*.[144] On the facts before the Indian Supreme Court, Mukherjea J preferred the American approach and expressly rejected the Australian approach. If anything, the ultimate decision in the Indian case supported the case of the Singapore JWs who sought to invoke their freedom of religion. Yong CJ's use of the *Swamiar* decision is particularly ironic, given that the case reached the opposite conclusion than the one he arrived at.

Conclusion

I have sought to show that to understand how judges in Singapore engage with trans-judicial influence in constitutional cases, one must focus on their underlying beliefs about the enterprise of constitutional adjudication more generally.

The models I set out in this paper represent the two dominant strands of constitutionalism among the major common law jurisdictions. I have tried to locate the Singapore approach to constitutionalism within what I have called the National Formalist model in which foreign decisions are treated as illegitimate sources of legal authority, being outside of the arena of proper sources of authority.

As I have sought to demonstrate through an analysis of several cases above, the National Formalist model has been historically dominant in Singapore where judges repeatedly use interpretive strategies that conform to the tenets of this model. Ironically, while every other facet of governance in Singapore demonstrates high levels of pragmatism, the judiciary in Singapore eschews Pragmatist approaches, at least in constitutional cases.[145]

This chapter was written during a time of transition for Singapore's judiciary. In his recent book tracing the colonial roots of the Singapore legal system, Justice Andrew Phang refers incidentally to the need for developing an autochthonous (or indigenous) legal system in Singapore. In doing so, he appears to focus primarily on commercial law, but his argument has important implications for the development of constitutional law, to the extent that he discusses the concept of national identity as well as the values of legitimacy and justice.[146] It is concerns such as these that have motivated Pragmatist judges across the common-law world to exercise their constitutional jurisdiction in more robust forms.

144 319 US 624 (1943).

145 Some observers may well argue that the Singapore judiciary is being pragmatic in refusing to adopt Pragmatist methods of constitutional interpretation that will inevitably involve treading onto the powers of the executive and the legislature. These institutions have so far enjoyed unrivalled – arguably, unprecedented – authority in interpreting the Singapore Constitution.

146 Phang, supra, note 3 at pp 51–64.

More seasoned observers of Singapore's constitutional landscape are sceptical if judicial approaches towards constitutional interpretation (and indirectly, towards trans-judicial influence) will change in the short-term future.[147] In commending the Pragmatist approach, my hope is that judges in Singapore will, in considering whether or not to rely on foreign decisions, also pay attention to the signals they send out about their underlying philosophies and approaches towards constitutional adjudication.

147 Thio, *Transnational Judicial Conversations,* supra, note 37, at p 517. ('[Singaporean and Malaysian] courts are unlikely to move along the lines of the heightened judicialisation associated with some constitutional courts, which has raised the old bugbear of judicial review and the democratic deficit.').

5 Constitutional supremacy
Still a little dicey?

Jaclyn Ling-Chien Neo and Yvonne CL Lee

Introduction

Like most post-colonial nations, Singapore adopted the British Westminster parliamentary system of government with a slight twist. Singapore has a written constitution and Article 4 declares that the 'Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. The legislature and the executive derive their powers from the Constitution[1] and are subject to its terms. In contrast, the British constitution is unwritten and Parliament, not the constitution, is supreme. This is usually understood to mean that Parliament has 'the right to make or unmake any law' and 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[2] Parliament is sovereign; its legislative power is not constrained by any constitutional or legal limit.

The scope of legislative power is the main point of distinction between the doctrines of parliamentary and constitutional supremacy. Dicey identified three essential features of a sovereign Parliament. First, Parliament has the power to alter any law, fundamental or otherwise, as freely and in the same manner as other laws.[3] Second, there is no legal distinction between the constitution and other laws.[4] Third, there is no judicial or other authority which has the right to nullify an Act of Parliament or to treat it as void or unconstitutional.[5] The consequence of a sovereign British Parliament is that the British constitution is flexible – it can be expanded,

1 The Constitution of the Republic of Singapore, 1999 Rev. Ed. Sing. ('Constitution'). 'Art' refers to an Article of the Constitution.
2 AV Dicey, *Introduction to the Study of the Law of the Constitution,* (LibertyClassics: Great Britain, 1982) at pp 3–4.
3 Ibid., at p 37.
4 Ibid., at pp 37–9.
5 Ibid., at p 39.

curtailed, amended or abolished with equal ease.[6] Under the doctrine of implied repeal, a later law in time repeals an earlier one.

The Diceyan doctrine of constitutional supremacy on the other hand is based on the existence of a fundamental compact, the provisions of which control every authority established or existing under the constitution.[7] This doctrine involves three consequences. First, the constitution must almost necessarily be a 'written' constitution. Second, the constitution must be 'rigid' in the sense that it must be either legally immutable like the eternity clause in the Basic Law for the Federal Republic of Germany[8] or alternatively capable of being changed only by some authority above and beyond the ordinary legislative bodies existing under the constitution. Third, every legislative assembly existing under the constitution is merely a subordinate law-making body whose laws are invalid or unconstitutional if they go beyond the limits of such authority. There must exist some person or persons, judicial or otherwise, vested with authority to pronounce upon the legal validity or constitutionality of laws passed by such law-making body.[9] In Singapore, as with the American constitution[10], the determination that a statutory law is constitutional or otherwise generally falls within the purview of the courts,[11] save where such review powers have been expressly excluded in the Constitution.[12]

LR Penna in his 1990 article entitled 'The Diceyan Perspective of Supremacy and the Constitution of Singapore' concluded that the Constitution satisfies the three Diceyan criteria, which he loosely abbreviates as codification, rigidity and judicial review.[13] This means that the

6 Ibid., at p 39.

7 Ibid., at p 78.

8 Art 79(3) of the Basic Law for the Federal Republic of Germany: 'Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Arts 1 and 20 shall be inadmissible.'

9 Dicey, supra, note 2, at p 40.

10 See the landmark case of *Marbury v Madison*, 5 US 137 (1803) where the US Supreme Court assumed the powers of judicial review. Alexander Hamilton in *Federalist No. 78* noted: 'The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.'

11 See, e.g., *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662, at 681, para 73; *Taw Cheng Kong v Public Prosecutor ('Taw Cheng Kong, H.C.')* [1998] 1 SLR 943, at 953, paras 13–14; *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103, at 120, paras 57–8, where Singapore Courts assumed the power to strike down unconstitutional legislative provisions.

12 For example, 'security' laws enacted pursuant to Art 149.

13 (1990) 32 Mal LR 207, at 237.

Constitution is supreme and that Parliament is a subordinate law-making body. Notwithstanding Penna's emphatic conclusion, constitutional developments since independence have been ambivalent in relation to whether the supremacy of the Constitution is preserved. The Constitution is controlled in the sense that in general, it can only be amended by a special two-third parliamentary majority, as provided for in Article 5(2) which states: 'Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the elected Members of Parliament'.[14]

However, the Constitution has been amended so frequently[15] since independence that critics have argued that Singapore virtually has no constitution.[16] The ease with which the Constitution is amended is a direct consequence of the fact that Parliament is dominated by one political party. From 1968 until 1981, the ruling Peoples' Action Party (PAP) controlled all parliamentary seats. After the 2006 General Elections, it retained control of 82 out of 84 elected seats in Parliament, exceeding the two-thirds parliamentary majority required to amend the constitution.

Therefore, while the Constitution formally meets the Diceyan criteria for supremacy in theory, the practice of constitutional supremacy in Singapore is still a little 'dicey' insofar as Parliament effectively has the power to alter the Constitution as freely as other laws. This is so even though the Constitution is the formal source of parliamentary powers,[17] and despite the existence of different procedures for amending statutory laws and the Constitution; while the former requires a simple parliamentary majority, a special parliamentary majority is minimally required by the latter. Furthermore, although the judiciary may adjudge an Act of Parliament unconstitutional and void, this power has not been robustly exercised to limit executive and legislative powers. There has only been one instance where the High Court struck down a statutory provision as unconstitutional and therefore void.[18] This decision was short-lived; it was overturned by

14 Special constitutional amendment procedures are contained in Arts 5(2A) and 5A, and Part III. Arts 5(2A) and 5A which are still not in force, entrench fundamental provisions including those relating to the Elected Presidency. Part III concerns Singapore sovereignty, under which Art 8 requires the approval of at least a two-thirds majority at a national referendum before Part III can be amended.

15 See Appendix for a list of key constitutional amendments since 1965.

16 As observed by then Nominated Member of Parliament, Walter Woon, 'We effectively don't have a constitution. We have a law that can be easily changed by Parliament and by the party in power because the party is Parliament. The changes themselves might not be controversial, but it is unsettling how flexible the Constitution is, unlike say the United States.' *The Straits Times* (Singapore), 6 July 1991.

17 Harding provides an alternative view, see AJ Harding, 'Parliament and the Grundnorm in Singapore' (1983) 25 Mal LR 351.

18 *Taw Cheng Kong, H.C.*, supra, note 11, at 953, paras 13–14.

the Court of Appeal.[19] This suggests that there is no real legal restraint on Parliament's legislative powers. Parliament acts as the *de facto* sovereign institution in the country. The Constitution is flexible, just like the British constitution – it can be amended or abrogated with equal ease – which is characteristic of a sovereign Parliament.[20]

The 'diceyness' in relation to the doctrine of constitutional supremacy in Singapore may be attributable to the uneasy relationship between Singapore's formal constitutional framework and its constitutional ethos. Singapore inherited British parliamentary traditions and mindsets which presumed and worked on the basis of a supreme Parliament.[21] Thus, while the superstructure of Singapore's constitutional democracy is formally based on the doctrine of a supreme constitution, the constitutional ethos from the government's perspective remains firmly characteristic of parliamentary sovereignty. This incongruence was implicitly acknowledged by Dicey who noted that because the English do not distinguish between fundamental and non-fundamental laws, they established colonial legislatures which operated as copies of the Imperial Parliament, or sovereign bodies, within their own spheres. Their freedom of action is controlled only by subordination to the Parliament of the United Kingdom.[22] It may be that the acts of independence and the subsequent adoption of written supreme constitutions did not sufficiently displace underlying parliamentary traditions and mindsets.

In light of the tension between the doctrines of constitutional supremacy and parliamentary supremacy in Singapore, this chapter seeks to go beyond a formalistic evaluation of the Constitution against Dicey's three characteristics of a supreme constitution. It critically examines constitutional law and developments in Singapore against the rationale behind the three

19 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410 ('*Taw Cheng Kong, C.A.*'), at 431–7, paras 60–8. The Court of Appeal affirmed the power of the courts to strike down an unconstitutional legislative provision, but disagreed with the High Court's decision that there was no rational nexus between the over-inclusive and under-inclusive legislative provision, and the legislative object, thereby violating Art 12 (equal protection) of the Constitution.

20 Dicey, supra, note 2, at p 39.

21 For an example of a mindset which presumes parliamentary supremacy based on the English practice, see the decision of a High Court judge, Justice Sinnathuray in *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1985] 1 MLJ 418. Justice Sinnathuray dismissed the applicant's challenge questioning the competency of the Military Court of Appeal issue on the basis that it was a superior court and its decisions could not be reviewed by any prerogative writ or order of the High Court. He failed to consider the constitutional significance of Arts 9(2) and 93 of the Constitution which related to the individual's liberty of person and habeas corpus, and judicial power vested in the Supreme Court being the Court of Appeal and the High Court, respectively. This marginalisation or ignorance of the applicability and relevance of constitutional provisions completely removes the Singapore Constitution as a legal limit on Parliament or Cabinet. See also Victor Leong Wai Meng and Roland Samosir, 'Forever Immune? *Abdul Wahab b. Sulaiman v Commandant Tanglin Detention Barracks*' [1986] 28 MLR 303.

22 Dicey, supra, note 2, at p 54.

Diceyan traits, with a view to distinguish *de facto* supremacy from *de jure* supremacy. We discuss first the Diceyan characteristic that a supreme constitution should have, which is that it must be written. We go on to discuss the rigidity of the Constitution in light of the frequency with which the Constitution has been amended while part IV discusses the existence of judicial review power and its limitations within the context of Singapore.

The written constitution

A supreme constitution is the fundamental and paramount law of the nation.[23] As a starting point, a supreme constitution should be written.[24] Dicey explains that the constitution is 'a compact which contains a variety of terms which have been agreed to, and generally after mature deliberation'.[25] The written requirement is necessary in order for the legal and political actors involved to identify these fundamental terms.

Leaving aside issues of constitutional interpretation, a constitutional text also provides a transparent basis to determine the constitutionality of a legislative or executive act.[26] Any invalidation of a legislative or executive act in the name of the constitution effectively involves a choice to ignore the will of the majority in the name of a higher source of law.[27] Without a written constitution, not only will review and invalidation be difficult, if not almost impossible, since there will not be any text to compare current legislative or executive act against, it will also mean that judges may effectively have *carte blanche* to make or remake the constitution through judicial pronouncements. This implicates questions of legitimacy within a constitutional democracy. In the Westminster system, where there is fusion between the legislature and the executive, members of both Parliament and Cabinet are democratically elected and may be said to represent the people.[28] Judges on the other hand, are usually not democratically elected.

23 See *Marbury v Madison*, supra, note 10, at p 177.

24 Dicey, supra, note 2, at p 79.

25 Ibid.

26 This first characteristic of written-ness is intrinsically bound with the third, that is, the existence of a body vested with authority to pronounce on the constitutionality of legislative or executive acts.

27 Laurence H Tribe, *American Constitutional Law,* (3rd edn, Vol. 1), (New York: Foundation Press, 2000), at p 18.

28 Note however Ackerman's argument that it does not follow that the 'winner of a fair and open election' necessarily represents the will of the People. Neither does it follow that 'all statutes gaining the support of a legislative majority . . . represent the considered judgment of a mobilized majority': Bruce Ackerman, *We The People: Foundations* (Massachusetts and England: Harvard University Press, 1991) p 9. Even Bickel recognised that 'the process of reflecting the will of a popular majority in the legislature is deflected by various inequalities of representation and by all sorts of institutional habits and characteristics, which perhaps tend most often in favor of inertia', Alexander Bickel, *The Least Dangerous Branch* (New Haven and London: Yale University Press, 1962), p 18.

Therefore, where powers of invalidation on the basis of the constitution is vested and exercised by non-elected judges, as in Singapore, this raises the counter-majoritarian difficulty.

Alexander Bickel argues that when a court 'declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it'.[29] Judges exercising judicial review powers do so on the basis that they are upholding the constitution, the fundamental law of the land comprising certain enduring values, against presentism.[30] Indeed, Chief Justice Marshall relied on the very fact that the Constitution of the United States of America was written[31] in holding that the courts should have the power to declare legislative and executive acts null and void.[32] *Marbury v Madison* is the *locus classicus* for judicial review.

The Constitution as the grundnorm

Although Singapore has a written constitution, one fundamental problem, as identified by Harding, is the grundnorm problem.[33] Dicey's criterion that a supreme constitution must 'almost necessarily be a "written" constitution' underscores the idea that the constitution is a foundational document. This is especially since Dicey discussed the written aspect of a supreme constitution in the context of the creation of a federal state. The constitution needed to be written because the organisation of federal states involves a 'complicated contract',[34] which entails allocating powers and jurisdiction between federal and state authorities. The constitution is thus to be accepted as the binding supreme law because it is prior in time to the government, gives existence to and regulates the workings of the institutions.[35]

29 Bickel, ibid., at p 16–17.
30 Bickel, ibid., at pp 24–8.
31 5 US 137 (1803), at p 176
32 5 US 137 (1803), at p 178; see also Bickel, supra, note 28 at pp 4–8.
33 See Harding, supra, note 17. This chapter does not seek to repeat Professor Harding's incisive critique of the doctrine of constitutional supremacy in Singapore but to build upon it.
34 Dicey, supra, note 2, at p 79; notably however, when the United States Constitution was drafted in 1787, it was provided, contrary to the Articles of Confederation, that the constitution would be effective when ratified by conventions in nine states. The Articles of Confederation had provided that the Articles could only be amended by unanimous vote of all the states. Despite this, the new Constitution was ratified by all 13 states.
35 KC Wheare, *Modern Constitutions*, (2nd edn), (Oxford: Oxford University Press, 1966), p 52.

In Singapore however, the Constitution could not be said to be a foundational document, in the sense of being the ultimate source which validates the legal system. Harding argues that the accepted notion of constitutional supremacy under Article 4,[36] as the guiding principle in the Constitution is an illusion which rests on a fundamental misunderstanding of Singapore's constitutional history.[37] This is because the Constitution was adopted by Parliament in a legislative act.

Furthermore, the Constitution was not initially contained in a single document, as we currently know it, but was really made up of three documents, being the 1963 State Constitution (as amended by the Constitution of Singapore (Amendment) Act on 22 December 1965), the Republic of Singapore Independence Act (RSIA) and the Federal Constitution of Malaysia insofar as it was made applicable to Singapore by the RSIA.[38] The RSIA was enacted by Parliament on 22 December 1965 and dated retrospectively to 9 August 1965.[39] Harding argues that in passing the RSIA, Parliament initially 'assumed the mantle of supremacy in Singapore'. Therefore, the 'Constitution is not the grundnorm but merely a manifestation of the grundnorm, which is the supremacy of the legislature'.[40] In other words, in passing the RSIA, Parliament effectively took upon itself the right to determine the content of the new Constitution and established its own plenary competence at the same time.[41] Harding posits that '[i]f Parliament enacted a constitution by the RSIA, it can quite clearly enact another Constitution by another Act'.[42]

One way of reconciling our constitutional history (and Harding's interpretation of it) with the doctrine of constitutional supremacy is to consider Parliament's act of passing the RSIA not to be a legislative act but the exercise of plenary powers of a sovereign state, i.e. the exercise of

36 Art 4, the supremacy clause, was formerly Art 52 of Sabah, Sarawak and Singapore (State Constitutions) Order in Council S.I. 1493 (1963) (UK) during Singapore's brief merger with Malaysia: 'Any law enacted by the legislature after the coming into operation of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.' As observed by AJ Harding in 'Parliament and the Grundnorm in Singapore' [1983] 25 Mal LR 351, at p 357, Art 52 merely stated that the Constitution of a state of the Federation of Malaysia was supreme. Art 52 was subject to a higher supremacy clause, Art 4(1) of the Constitution of the Federation of Malaysia. As part of the reprint of the Constitution (dated 31 March 1980), the Attorney-General added 'This Constitution is the supreme law of the Republic of Singapore' to Art 52 and re-numbered it as Art 4.

37 Harding, supra, note 17, at p 367.

38 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410, at p 421B.

39 Ibid., at p 423D-E.

40 Harding, supra, 37, p 366.

41 Kevin Tan Yew Lee, 'The Evolution of Singapore's Modern Constitution: Developments from 1946 to the Present Day', (1989) 1 S. Ac. LJ 1.

42 Harding, supra, note 17, at p 367.

constituent power on behalf of the people of Singapore. This gains support from the sovereignty argument in *Taw Cheng Kong*. Harding assumed that the Singapore legislature is the offspring of the Malaysian legal system, and therefore the Singapore legislature will only have such powers given to it by the Malaysian legislature.[43] However, in *Taw Cheng Kong*, the Court of Appeal opined that Parliament's powers in passing the RSIA (and the Constitution of Singapore (Amendment) Act) arose from the very 'political fact of Singapore's independence and sovereignty [which] had the consequences of vesting the Legislative Assembly of Singapore with plenary powers on Singapore Day'.[44] In the Court's view, this was so, even though section 5 of the Constitution and Malaysia (Singapore Amendment) Act, 1965 which transferred legislative powers of the Parliament of Malaysia to make laws for Singapore as a constituent state to the 'Government of Singapore',[45] failed to transfer such plenary powers.[46]

Extra-constitutional documents

Another reason for a supreme constitution to be written may be that it should contain, in comprehensive and clear fashion the agreed terms of government as well as the legal authority, powers and jurisdiction of the different institutions of government.[47] A written text helps to ensure that these institutions carry out their powers effectively. It also governs how the institutions interact with one another. In the context of Singapore, the Constitution codifies certain political or constitutional conventions common within the British Westminster system. Under the Westminster system, conventions are informal and uncodified rules of constitutional practice which, while not legally binding, are generally accepted and followed. These conventions gained constitutional force by virtue of being written in the Constitution. One such convention is embodied in Article 25 of the

43 Ibid., p 362.

44 *Taw Cheng Kong, C.A.*, supra, note 19, at p 424C.

45 Section 5 states: 'The executive authority and legislative powers of the Parliament of Malaysia to make laws for any of its constituent States with respect to any of the matters enumerated in the Constitution shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Government of Singapore.'

46 Supra, note 44, at p 424C. Note that the Court stated later in the judgment that 'in passing the RSIA, Parliament took the precaution of vesting the plenary legislative powers of the Malaysian Parliament in the Singapore Parliament under s 5 so as to avoid any doubt about its legislative powers'. This should not detract from its earlier position that Parliament's power to enact the RSIA was a consequence of Singapore's independence and sovereignty. The later statement deals with the effect of the RSIA while the earlier part of the judgment addressed the issue of the source of Parliament's power to enact the RSIA: see *id.*, at p 425C–D.

47 Dicey, supra, note 2, at p 79.

Constitution, whereby the British convention of appointing the Member of Parliament likely to command the confidence of the majority of the Members of Parliament as Prime Minister is constitutionalised.

One difficulty however is the proliferation in Singapore of non-binding instruments such as white papers which seem to contain quasi-constitutional principles.[48] Such white papers are issued by the Cabinet and adopted by Parliament, and commonly set out fundamental principles suitable for organising many aspects of a society such as those usually found in constitutional preambles, which may constitute guidelines for interpreting the Constitution.[49] The White Papers issued in relation to the Elected Presidency are examples of such 'quasi-constitutional' principles or conventions.

The third White Paper on The Principles for Determining and Safeguarding the Accumulated Reserves of the Government and the Fifth Schedule Statutory Boards and Government Companies, for example, is a statement of principles drafted in consultation with the first Elected President to institute a harmonious working relationship between the President and the government, as well as to provide operating guidelines on accounting and financial principles.[50] The White Paper arose out of a dispute between the first Elected President, Ong Teng Cheong, and the government, with respect to the President's difficulties in obtaining certain fiscal information from the Cabinet.[51] Under the White Paper, parties commit to resolve all disputes in accordance with the 'spirit and intent of the Constitution'.[52] The principles in the White Paper are currently not binding. In fact, the White Paper contains an 'escape clause' which allows the President or the government to opt out of the principles for negotiation in the White Paper by simply notifying the other that 'it does not wish to abide by the principles'.[53]

After the third White Paper was tabled in Parliament on 2 July 1999, the government expressed an intention to make the principles in the White Paper legally binding in the future; this has yet to be done. As such,

48 On the idea of 'soft' constitutional law, see Thio Li-ann, 'Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' (2004) Sing JLS 414.

49 Benedict Sheehy, 'Singapore 'Shared Values' and Law: Non East versus West Constitutional Hermeneutic', (2004) 34(1) HKLJ 67, at p 73.

50 The White Paper on *The Principles for Determining and Safeguarding the Accumulated Reserves of the Government and the Fifth Schedule Statutory Boards and Government Companies*, Cmd. 5 of 1999 (2nd July 1999) [hereafter, 'Third White Paper'].

51 See President Ong Teng Cheong, 'Extended Interview "I had a job to do" Whether the government liked it or not, says ex-president Ong' (*Asiaweek*, Vol. 26 No 9, 10 Mar 2000, available at http://www.asiaweek.com/asiaweek/magazine/2000/0310/nat.singapore.ongiv.html).

52 Third White Paper, supra, note 50, at paras 4–6, and preamble.

53 'White Paper on reserves to be made binding', *The Straits Times* (Singapore), 19 Aug 1999, at p 29.

presently, the White Paper has no legal force. It can however assert 'tremendous moral pressure' on the parties involved to act according to the principles.[54] Since the issuance of this third White Paper, there has been no known or public disagreement between the Cabinet and the President. This new political convention of promoting informal and conciliatory relations between the President and the Cabinet was recently underscored by Deputy Prime Minister and then Minister for Law, Professor S Jayakumar in March 2007.[55]

This resort to setting out principles of governance in extra-constitutional or quasi-constitutional documents, rather than the constitutional text, approximates the British system of a sovereign parliament more than a system based on the doctrine of constitutional supremacy. It blurs the line between the hierarchy of laws which are fundamental or constitutional and laws which are neither fundamental nor constitutional. The lack of a marked distinction between fundamental and non-fundamental laws is characteristic of a sovereign parliament.[56] According to Dicey, the reason the British constitution has never been reduced to a written or statutory form is because each and every part of it is changeable at the will of Parliament.[57] Similarly, Parliament may alter the principles contained in quasi-constitutional documents at will.

A rigid constitution

According to Dicey, a supreme constitution must be rigid or inexpansive. This is because the law of the constitution must be either legally immutable, or capable of being changed only by some authority above and beyond the ordinary legislative bodies existing under the constitution.[58] Such a characteristic distinguishes a constitution from ordinary legislation.

In Singapore, only one institution is reposed with the power to amend the constitution as well as to enact legislation – Parliament. As such, it is crucial for there to be a distinction between the power of a legislature to amend the constitution and to enact ordinary legislation. The rigidity of the constitution consists in the absence of any power on the part of a legislature to modify or repeal constitutional or fundamental law when acting in its ordinary capacity.[59]

Presently, the Constitution stipulates three different amendment procedures, which highlight the varying degrees of importance attached

54 Ibid.
55 See generally, 82 SPR, ('Debate on Annual Budget Statement'), 15, 27 and 28 Feb 2007, and 1 Mar 2007.
56 Dicey, supra, note 2, at p 37.
57 Dicey, ibid., at p 38.
58 Dicey, ibid., at p 79.
59 Dicey, ibid., at p 65.

to different constitutional provisions. The general amendment procedure, contained in Article 5(2), requires a bill seeking to amend the Constitution to be approved by at least a two-thirds majority in Parliament before it can be passed. For more fundamental provisions, such as Part III of the Constitution which relates to Singapore's sovereignty, a more stringent amendment procedure requiring the approval of two-thirds of the electorate at a referendum exists under Article 8.[60] No national referendum has however taken place in Singapore during the last 42 years.[61] Other fundamental provisions relating to, *inter alia*, fundamental liberties under Part IV of the Constitution and the Elected Presidency, attract a separate special amendment procedure under Articles 5(2A) and 5A which are still not in force.[62] The Constitution is therefore controlled[63] in form, unlike an uncontrolled constitution which may be amended by a simple majority in legislature. This reflects the drawing of a formal distinction between fundamental or constitutional law from non-fundamental or non-constitutional law in Singapore.

Amendment procedure before 1979

However, the current distinction between constitutional and ordinary legislation in terms of amendment procedures only existed from 1979. Between 1965 and 1979, the Constitution could be amended in the same manner as ordinary statute. This poses conceptual difficulties to the doctrine of constitutional supremacy in Singapore. This is so particularly since Parliament deliberately changed the constitutional amendment procedure from special majority to simple majority when it passed the Constitution of Singapore (Amendment) Act on 22 December 1965, dated retrospectively to 9 August 1965.[64] The amending act was itself passed by a two-thirds

60 See Constitution (Amendment) (Protection of the Sovereignty of the Republic of Singapore) Act No. 25 of 1972, and *Singapore Parliamentary Debates Official Report*, vol. 32 (3 Nov 1972).

61 See Singapore National Referendum Ordinance 1961 and *Singapore Parliamentary Debates Official Report*, *Referendum on Reunification of Singapore and Federation of Malaya*, vol. 18 (6, 9–10, July 1962). Prior to Singapore's full independence, a referendum seeking the electorate's approval of the manner of its reunification with the Federation of Malaya took place in 1962. The wisdom and power of the Cabinet then is evident in its control over the crafting of the referendum issue as the mode and details of reunification instead of whether reunification should take place.

62 See discussion on the Elected Presidency, below.

63 See *McCawley v The King* [1920] AC 691 (uncontrolled constitution of Queensland).

64 *Taw Cheng Kong, C.A.*, supra, note 19, at p 420H. Clause 8 [of the Amendment Act] repeals Art 90 of the Constitution which sets out the mode by which the Constitution can be amended. Art 90 requires that there shall be no less than two-thirds of the total number of Members thereof supporting any amendment to the Constitution on the Second and Third Readings: *Singapore Parliamentary Debates Official Report*, vol. 24 at cols 432–3 (22 Dec 1965).

majority procedure.[65] From the perspective of the government, it was considered 'illusory to believe that because an amendment has to [b]e passed by a two-thirds majority, the provisions are thereby sacrosanct'.[66]

Although Parliament indicated during parliamentary debates in 1967 that it would adopt the Wee Chong Jin Constitutional Commission's recommendation to entrench the constitutional provisions by changing the general amendment requirement to a two-thirds majority, this was not done until 1979.[67] The Wee Commission also recommended that certain constitutional provisions be entrenched such that they could only be amended if they also received the affirmative vote of two-thirds of the electorate.[68] This proposal was not accepted by the government.

Frequency of amendments

The frequent and often extensive nature of the amendments to the Constitution runs counter to the underlying supposition of the doctrine of constitutional supremacy that the constitution is foundational and is intended to endure over the long-term. The frequency by which the Constitution has been amended in the last 40 years or so stands in stark contrast with the 27 amendments made to the two-century-old American constitution. The Singapore government has justified the constitutional amendments as a necessary evolution to meet the changing needs for a growing nation,[69] in particular the necessity for effective government.[70] The Constitution has been likened to an 'old shoe' by first Prime Minister and current Minister Mentor, Lee Kuan Yew, who considered it better to 'stretch', 'soften', 'resole' and 'repair' old shoes, as these were 'always better than a brand new pair of shoes.' He said, 'I believe it is better to stretch and ease an old shoe when we know that the different shape and fit of a younger generation requires a change.

65 See *Singapore Parliamentary Debates Official Report*, vol. 24, 22 Dec 1965 at cols 453–4; see also Harding, supra, note 17, at p 363–4.

66 See then Prime Minister Lee Kuan Yew in *Singapore Parliamentary Debates Official Report*, vol. 24, 22 Dec 1965, at col 433.

67 *Singapore Parliamentary Debates Official Report*, vol. 25, 17 Mar 1967, at col 1438.

68 Report of the Constitutional Commission [Singapore: Government Printer, 1966], at para 18.

69 Mr Goh point out that past changes to the Constitution were made only with a two-thirds parliamentary majority, and not done light-heartedly, as the intensive discussions and the two-year gestation period of the Elected President Bill proved. 'So to say that because the Government in power changes the Constitution, there is no Constitution, is ridiculous, to put it mildly.': PM Goh Chok Tong, *The Straits Times* (Singapore), 8 July 1991.

70 See then Prime Minister Lee Kuan Yew in *Singapore Parliamentary Debates Official Report*, vol. 44, 24 July 1984, at cols 1735–6, in relation to the creation of Non-Constituency Members of Parliament: 'There are as many constitutions as there are ingenious legal minds to translate popular will into a workable legislature and an effective Executive.'

It is a change to meet the future'.[71] Singapore has thus developed a 'repaired shoe' mentality, in contrast to Thailand which regularly drafts constitutions and whose current constitution is the 18th in a series of new charters and constitutions since 1932.

Even after the amendment procedure was changed after 1979 to require a two-thirds majority, the Constitution still does not have the rigid quality characteristic of a supreme constitution. While *de jure* rigid in that it cannot be changed in the same manner as ordinary laws, the Constitution is *de facto* flexible. The flexibility of the British constitution consists in the right of the legislature to modify or repeal any law.[72] This has effectively been the case in Singapore since 1968. The ruling People's Action Party (PAP) has commanded more than the requisite two-thirds majority of the seats in Parliament since 1968.[73] Consequently, the requirement of two-thirds majority in Article 5(2) has not significantly limited Parliament's ability to amend the Constitution. This means that the limitation on Parliament's power to amend the Constitution is formal, and rendered almost nugatory due to the political dominance of the ruling party.

The non-rigidity of the Constitution is further underscored by the fact that the constitutional amendments after 1979 were major amendments which altered the very nature of parliamentary democracy and the structure of government in Singapore. This is despite the stated intention that the amendment procedure could finally be changed in 1979 to a two-thirds majority because all 'consequential amendments that have been necessitated by our constitutional advancement have now been enacted'.[74] However, from 1984, shortly after the amendment procedure was changed, Singapore's most significant constitutional amendments were made. Three major changes were made to Singapore's parliamentary system of government: the introduction of the Non-Constituency Member of Parliament (NCMP) in 1984,[75] Group Representation Constituencies (GRC) in 1988[76] and Nominated Member of Parliament (NMP) in 1990.[77]

71 Then Prime Minister Lee Kuan Yew, ibid., at cols 1735–6.

72 See Dicey, supra, note 2, at p 65.

73 The People's Action Party held and is holding at least the super majority of all parliamentary seats since 1968. The proportion of PAP seats to total number of seats in Parliament for the relevant election/year: 2006: 82/84; 2001: 82/84; 1997: 81/83; 1991: 77/81; 1988: 80/81; 1984: 77/79; 1980: 75/75; 1976: 69/69: 1972: 65/65; 1968: 58/58.

74 Minister for Law and Science and Technology, EW Baker, *Singapore Parliamentary Debates Official Record*, vol. 39, 30 Mar 1979, at col 295; 25 out of 40 constitutional amendment bills listed in the Legislation History of the Singapore Constitution were passed by Parliament after 1979.

75 Art 39(1)(b), pursuant to Constitution of the Republic of Singapore (Amendment) Act 16 of 1984.

76 Art 39A, pursuant to Constitution of the Republic of Singapore (Amendment) Act 9 of 1988.

77 Art 39(1)(c), Art 44(1) and Fourth Schedule, pursuant to Constitution of the Republic of Singapore (Amendment) Act 11 of 1990.

The creation of the NCMP and NMP seats in Parliament substantially altered the representative or elected nature of the parliamentary chamber.[78] Article 39(1)(b) provides for NCMPs 'not exceeding 6 in number', in order to 'ensure the representation in Parliament of a minimum number of Members from a political party or parties not forming the Government'. NCMPs are Members of Parliament from the top three losers of political parties not forming the government who failed to gain a parliamentary seat first past the post; NCMPs are given 'second-past-the-post' seats, provided each candidate polled a minimum of 15% of the total number of votes.[79] Under Article 39(1)(c) and the terms of the Fourth Schedule, up to nine NMPs[80] are selected by the government to participate in parliamentary debates as Members of Parliament and to provide alternative, non-partisan views. These two innovative parliamentary schemes allow for alternative voices in Parliament, in an attempt to soften criticisms of PAP's stranglehold in Parliament.[81] While both NCMPs and NMPs are entitled to the same parliamentary privileges and immunities as the rest of the Members of Parliament, they have limited voting powers and as such they cannot vote on any bills relating to constitutional amendments, supply and money, and votes of no confidence in the government.[82]

The GRC scheme, on the other hand, substantially altered the electoral system then based on the equality of votes (one man one vote), an essential element to a democratic system.[83] It was designed, through a system of multi-member constituencies which had to have a stipulated ethnic minority, to ensure multiracial representation in Parliament under Article 39A. With the introduction of the GRC, citizens living in different constituencies

78 See Thio Li-ann, 'Choosing Representatives: Singapore Does It Her Way' in *The Peoples' Representatives – Electoral Systems in the Asia-Pacific Region*, Graham Hassall and Cheryl Saunders, eds (Australia: Allen & Unwin Pty Ltd, 1997).

79 See Section 51 of Parliamentary Elections Act (Cap 218).

80 The number of Nominated Members of Parliament was increased from 6 to 9 in 1997. See Constitution of the Republic of Singapore (Amendment) Act 1 of 1997.

81 See then Prime Minister Lee Kuan Yew's speech in *Singapore Parliamentary Debates Official Report,* vol. 44, 24 July 1984, at cols 1726–9 for the reasons justifying the NCMP scheme, including to sharpen the debating skills of younger Members of Parliament, providing a channel for venting of corruption allegations and educating the voters on the limitations of a constitutional opposition. See then Defence and Second Health Minister Goh Chok Tong in *The Straits Times* (Singapore), 21 May 1984, for the reason for NMPs – to allow more Singaporeans to participate in the political process by increasing non-partisan presence in Parliament.

82 Art 39(2) of the Constitution.

83 Art 21(3) of the Universal Declaration of Human Rights (adopted by the United Nations General Assembly (A/RES/217, *10 Dec 1948*), 'The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

have different voting powers.[84] For example, a citizen of a single member constituency votes for and is represented by only one Member of Parliament (MP) whereas another citizen of a GRC votes for and is represented by at least three MPs. Since the implementation of this scheme in 1988, the GRC teams have since been re-sized from 3 (1988) to 4 (1990)[85] to 6 (1996). Its function has also evolved and is now a mixed bag of constitutional purposes such as the representation of minority groups[86] and non-constitutional rationales like securing economic efficiency in running town councils by consolidating single ward constituencies,[87] and the vehicle through which young or inexperienced candidates may ride on the coat-tails of more experienced candidates[88] to gain seats in parliament.

Another set of major constitutional amendments concerns the transformation of the ceremonial Presidency to an elected Presidency in 1991. This again altered Singapore's parliamentary system by creating a new democratic institution with direct legitimacy from the people. Before this, Parliament was the only institution with direct links to the electorate. Now the Elected President shares that power base and the office derives its political legitimacy from the electorate directly.

These radical alterations to Singapore's political system were carried out fairly expeditiously by amending the Constitution. The call for a national referendum to approve the amendment in relation to NMPs, by Opposition MP Chiam See Tong was rejected by the government.[89] The government deemed a referendum unnecessary since PAP 'commands a majority in the House' with 'an overwhelming victory in September 1988 – 80 out of 81 seats'.[90] Similarly, Cabinet deemed it unnecessary to present the proposal

84 According to Art 39A(3) of the Constitution, the GRC scheme does not violate constitutional guarantees of equality under Art 12 and prohibitions against differentiating measures under Art 78.

85 Constitution of the Republic of Singapore (Amendment No. 2) Act 12 of 1990.

86 See then PM Goh Chok Tong, *Singapore Parliamentary Debates Official Report*, vol. 50, 11 Jan 1988, at col 178, though the number of minority members remains at one in spite of the upsizing of the GRC from 3 to 4 and to 6 members.

87 Art 39A, pursuant to Constitution of the Republic of Singapore (Amendment) Act 9 of 1988.

88 See 'GRCs make it easier to find top talent: SM without good chance of winning at polls, they might not be willing to risk careers for politics', *Straits Times Interactive* (27 June 2006): 'Senior Minister Goh Chok Tong yesterday gave a new take on the role of Group Representation Constituencies (GRCs) in Singapore politics. Their role is not just to ensure minorities are adequately represented in Parliament, he said. They also contribute to Singapore's political stability, by "helping us to recruit younger and capable candidates with the potential to become ministers". "Without some assurance of a good chance of winning at least their first election, many able and successful young Singaporeans may not risk their careers to join politics."'

89 See *Singapore Parliamentary Debates* Official Report, vol. 54, at col 736 (29 Nov 1989).

90 See the former First Deputy PM and present Senior Minister Goh Chok Tong, *Singapore Parliamentary Debates Official Report*, vol. 54, 30 Nov 1989, at cols 847–8.

for the Elected Presidency to the electorate for approval at a referendum, on the basis that the people had already given their mandate when they voted for the PAP during the 1988 elections.[91] This basis was inadequate, as astutely observed by NCMP Dr Lee Siew Choh, since the PAP received only 62% of the total votes at the general elections, which was less than the two-thirds majority votes cast at a referendum.[92]

In fact, it may be said that the existence of a written constitution actually facilitated the quick and radical modification of the parliamentary system and the presidency. The written constitutional text provides an opportunity to consciously and expeditiously set out the composition, functions, powers and duties of new constitutional institutions and to make provision for how they inter-relate within the existing government structure. It would have been impossible to swiftly modify the Presidency, detailing the scope of its powers and the limitations of the office by a slow evolution of unwritten conventions and processes. These changes were all initiated by the Cabinet whose dominant objective was to achieve and maintain an 'effective' government.[93]

The pragmatic approach in Singapore towards constitution-making was and is facilitated by the flexibility of the Constitution. Unlike the Malaysian Federal Constitution, which was 'the fruit of joint Anglo-Malayan efforts'[94] and reflects a 'tortuous forging of acceptable terms and compromises among the various racial components of the Malaysian society',[95] constitution-

91 See generally *Singapore Parliamentary Debates Official Report*, vol. 56, (4 Oct 1990).

92 See *Singapore Parliamentary Debates Official Report*, vol. 56, 4 Oct 1990, at col 495: 'The PAP has never been given a mandate on the matter. In the 1988 elections, the White Paper on the EP proposal was only one of the many issues brought before the people. And in the 1988 elections, the PAP obtained only 62% of the total votes cast, less than two-thirds and, what is more important, 1% less than in 1984. Moreover the 1988 White Paper is now outdated. Additional powers have been given to the Elected President in the 1990 White Paper. The Constitution Amendment Bill had not been published, and the voters had not been asked specifically to given an unequivocal answer of Yes or No to the Elected President proposal. In a general election, voters vote for candidates from various parties so that the party with the most candidates elected form the Government. Voters do not vote on any particular or specific issue in an election.'

93 See then PM Lee Kuan Yew in *Singapore Parliamentary Debates Official Report*, vol. 44, 24 July 1984 at cols 1735–6, in relation to the implementation of Non-Constituency Members of Parliament: 'There are as many constitutions as there are ingenious legal minds to translate popular will into a workable legislature and an effective Executive.'

94 *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, at p 73F-G: 'The first draft was put up by a Royal Commission headed by Lord Reid jointly appointed by the British sovereign and the Malay Rulers; it was published for public discussion and debate; an amended draft was agreed by the British Government and the Malay Rulers and also by the then Alliance Government; it was approved by the British Parliament, by the Malayan Legislative Council (the then federal legislature) and by the legislature of every Malay State.': ibid.

95 HP Lee 'Constitutional Amendments in Malaysia' (1976) 18 Mal LR 59, at p 59.

making in the immediate aftermath of Singapore's independence was more of a pragmatic legislative exercise.[96] The Singapore government, having been asked to leave the Federation of Malaysia due to irreconcilable political differences, was more concerned with nation-building rather than constitution drafting. The only constitutional commission appointed, the Wee Chong Jin Constitutional Commission, was charged with a narrow mandate of exploring how to safeguard the rights of racial, linguistic and religious minorities in the Constitution. The Commission was not asked to draft a new constitution. In any case, not all its recommendations were adopted.[97]

No implied limit to constitutional amendment

Furthermore, Singapore has not adopted the Indian basic features doctrine which imposes substantive or content-based limits on the power of the Indian parliament to amend the constitution.[98] Under this doctrine, legislature may not amend the constitution in a way that will adversely affect fundamental liberties and destroy the basic structure of the Indian Constitution. The rejection of the basic features doctrine may again be traceable to the weak autochthonous roots of the Constitution. In *Teo Soh Lung v Minister for Home Affairs and Ors,*[99] the High Court refused to apply the basic features doctrine by reference to the differences in the making of the Indian and Singaporean constitutions. The Indian constitution was drafted by a representative constituent assembly,[100] which has been described as not drafted by 'ordinary mortals'.[101]

96 See Kevin YL Tan, 'Towards a Bureaucratic-Authoritarian State: Consolidation in the Post-Independence Period 1965–1979' in *The Development of Constitutional Government in Singapore 1945–1995* (unpublished Dissertation, JSD, Yale Law School, 1996), at p 321.

97 See for instance, the Commission's recommendation to create the office of the Ombudsman, supra, note 68, at paras 60–72.

98 See *Kesavananda Bharati and Ors v The State of Kerala and Ors* AIR 1973 SC1461 (Supreme Court, India) where the court referred to the basic structure of the constitution such as the supremacy of the constitution, the demarcation of power between the relevant government branches, the fundamental liberties and the unity and integrity of the nation should not be 'amended out of existence'.

99 [1989] SLR 499.

100 Members of the Constituent Assembly represented the Indian people in territorial, racial and community terms: (1) Territorial: Each Province and each Indian State or group of States were allotted the total no. of seats proportional to their respective population roughly in the ratio of 1:1 000 000. (2) Racial: The seats in each Province were distributed among the three main communities, Muslims, Sikh and general, in proportion to their respective populations. (3) Community: Members of each community in the Provisional Legislative Assembly elected their own representatives by the method of proportional representations with single transferable vote.

101 *Phang Chin Hock v Public Prosecutor*, supra, note 94, at p 73H.

Proposed entrenchment and rigidity of the constitution

Recent constitutional developments appear to signify a movement towards rigidifying the Constitution. This was precipitated by the transformation of the Presidency from a ceremonial office to an elected one in 1991.

Article 5(2A) requires a Bill seeking to amend certain important provisions such as Part IV (fundamental liberties), Part V, Chapter 1 (The President), Article 93A (Jurisdiction to determine questions as to validity of Presidential elections), Article 65 (Prorogation and dissolution of Parliament) and Article 66 (General Elections) to be supported by two-thirds majority at a national referendum before it can be passed by Parliament, unless the President otherwise directs the Speaker in writing. Article 5(2A) originally covered other provisions relating to the Elected Presidency but these provisions were subsequently removed following a technical dispute concerning the interrelation between Article 5(2A) and Article 22H,[102] which produced a new constitutional amendment in Article 5A and provided for a new mechanism for addressing constitutional disputes in Article 100.

The controversy first arose in 1994. The issue was whether the failure to bring Article 5(2A) into operation conferred power on the President under the then existing Article 22H to withhold his assent to any Bill seeking to amend any of the provisions in Article 5(2A), specifically, an amendment of Article 22H which purported to reduce the scope of presidential powers. The Government then decided to move a bill to create a new Article 100 which provided for a tribunal comprising at least three Supreme Court judges to render opinions on constitutional issues.[103] Although Article 5(2A) was not in force, then President Ong Teng Cheong requested that the issue be decided by the Special Tribunal under the newly implemented Article 100. The Special Tribunal unanimously held that the President did not have the power under Article 22H to withhold his assent to any Bill seeking to amend Article 22H. Subsequently, in 1995, Parliament passed a bill which amended Article 5(2A) and Article 22H, clarifying that the former and latter apply to core constitutional amendments and legislative amendments respectively.[104]

102 See *Singapore Parliamentary Debates Official Report*, vol. 63, 25 Aug 1994, at col 430; Constitutional Reference No. 1 of 1995 [1995] 2 SLR 201. For a critique of the Special Tribunal's decision, see Thio Li-ann, 'Working Out the Presidency: The Rites of Passage' [1995] SJLS 509 and the rejoinder by Chan Sek Keong, 'Working Out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal' [1996] SJLS 1.

103 See generally, *Singapore Parliamentary Debates Official Report*, vol. 63, 25 Aug 1994; Constitution of the Republic of Singapore (Amendment No. 2) Act 17 of 1994.

104 Act 5 of 1991 – Constitution of the Republic of Singapore (Amendment) Act 1991 and Act 41 of 1996 – Constitution of the Republic of Singapore (Amendment) Act 1996.

Consequently, a new Article 5A was introduced in 1996,[105] to fill in the gap left by the amendments to Article 5(2A) by dealing with non-core constitutional amendments.[106] Unlike Article 5(2A) which rigidifies the relevant constitutional provisions by requiring a two-thirds majority approval at a referendum, Article 5A is a novel amendment procedure.

Article 5A creates a complicated scheme of checks and balances relating to the circumvention or curtailment of the Elected President's discretionary powers. Under Article 5A(1), the President may withhold assent to certain constitutional amendments which provide 'directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution'. The President's 'veto' under the new Article 5A is however not final. Article 5A(2) stipulates that the President may, 'acting on the Cabinet's advice', refer the matter to a constitutional tribunal of at least three judges of the Supreme Court pursuant to Article 100 for its opinion. If the tribunal's view differs from the President, the President shall be deemed to have assented to the bill.[107] If however the tribunal upholds the President's view that the bill has the effect of circumventing or curtailing his discretionary powers, the Prime Minister may refer the Bill to a national referendum.[108] The President's 'veto' is overruled if two-thirds of the electorate support the bill.[109] This mechanism avoids a gridlock where the Government calls for a new election to circumvent the President's 'veto'. Instead of leaving potential disputes to political resolution at the polls, it provides for a series of legal checks and balances in relation to the President, the Prime Minister and the Cabinet as the parliamentary executive. Parliamentary powers are hence limited in principle under the Constitution.

Since their respective introduction in 1991 and 1996, Articles 5(2A) and 5A remain inoperative. Article 5(2A) was not brought into force at the outset because the constitutional changes were considered 'novel arrangements unparalleled elsewhere in the world', and a 'grace period' of 'at least four years' was needed for 'adjustments, modifications and refinements' to resolve 'unforeseen problems' arising out of the 'actual implementation'.[110]

In 1994, then Deputy Prime Minister Lee Hsien Loong revealed that the 'mechanism is even more complex' than the Government 'originally anticipated', and confirmed the 'extreme difficulty' in balancing the

105 Constitution of the Republic of Singapore (Amendment) Act 41 of 1996.

106 See then PM Goh Chok Tong in *Singapore Parliamentary Debates Official Report*, vol. 66, 28 Oct 1996, at cols 763–4.

107 Art 5A(3).

108 Art 5A(4).

109 Art 5A(5).

110 See *Singapore Parliamentary Debates Official Report*, vol. 56, 3 Jan 1991, at cols 722–3.

'Government's need for operational flexibility' and the 'President's duty to exercise effective oversight'. He also acknowledged that the Government was 'still discovering implications of the provisions we had not realized'. He further predicted that 'a second and probably even a third round of amendments to fine-tune the provisions' and 'several more years' would pass before entrenchment.[111] Thereafter, another series of extensions was projected by the Government, in light of the need to 'fine-tune' the provisions.[112] Indeed, numerous amendments comprising at least one-third of all constitutional amendments, have been made to the Elected Presidency since its implementation in 1991.[113] The entrenchment provisions are still not in force as the Government views the Elected Presidency as an evolving institution in need of further operational 'refinements'.[114]

In principle, these 'entrenchment' clauses reflect a strong commitment to constitutional supremacy because the legislative powers of Parliament are subject to legal limits in the form of stringent amendment procedures. Their suspension however weakens the rigidity of the Constitution, since Parliament has the sole discretion as to when to make these provisions operative. Thus, instead of the Constitution acting as a substantive legal limit on the powers of Parliament, which is controlled by the parliamentary executive, the constitutional provisions relating to the Elected Presidency have been implemented and amended upon the initiative of the Cabinet without the legal check providing a real impediment.

If Articles 5(2A) and 5A were in force, the legislative powers of Parliament dominated by the PAP government would have been substantially curtailed. For example, the amendment in the form of new Article 151A which removed defence and security measures from the President's fiscal oversight would have required the approval of at least a two-thirds majority at a national referendum under Article 5(2A).

Parliament's legislative powers remain robust. The realities of a Westminster model of government operating in a dominant one party state show that the Cabinet is supreme in terms of political power. The Cabinet's mindset towards incremental amendments of the Constitution to accommodate changing political and social circumstances as it so

111 See Singapore *Parliamentary Debates Official Report,* vol. 63, 25 Aug 1994, at cols 421–2.

112 See Singapore *Parliamentary Debates Official Report*, vol. 64, 7 July 1995, at cols 1321–2; Singapore Parliamentary Debates Official Report, vol. 66, 28 Oct 1996, at cols 763–4; Singapore Parliamentary Debates Official Report, vol. 72, 12 Mar 2001, at cols 742–3. For a discussion on the amendments to the President's fiscal role, see Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian' [2007] Sing. JLS 290.

113 See Appendix on key constitutional amendments since 1965.

114 This position has been recently reaffirmed by Prime Minister Lee Hsien Loong in *Singapore Parliamentary Debates Official Report*, vol 85, 21 Oct 2008 during the debate on the latest constitutional amendments concerning 'net investment returns' under Article 142.

determines, is perhaps best expressed in former Prime Minister Lee Kuan Yew's words justifying his preference for a piecemeal approach over adopting a brand new constitution for Singapore: 'I may not be here, but Singapore and Singaporeans may have to pay for it if I allow a constitutional perfectionist to alter what he thought was a little unusual mote in the Constitution. I decided to leave the Constitution as it is, just incorporate all the amendments, publish a clean copy'.[115]

Review powers: The authoritative and final interpreter

The rigidity of the Constitution is guarded against unconstitutional legislation through conferring authority on the courts to adjudicate upon the constitutionality of legislative Acts. Such Acts are void where adjudged inconsistent with the letter or spirit of the Constitution.[116]

The Constitution does not expressly vest such powers to declare legislative or executive Acts invalid in the courts. Unlike countries such as South Africa whose written constitution explicitly provides that the 'Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional',[117] the Constitution is silent on the specific body which has general review powers save for specific powers given to the constitutional tribunal under Article 100.[118]

However, the judiciary has assumed the power and duty to ensure that the provisions of the Constitution are observed by necessary implication from Article 4, the supremacy clause.[119] This closely follows the American principle of judicial review as laid down in *Marbury v Madison*.[120] The courts have the duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the

115 See then PM and current Minster Mentor Lee Kuan Yew's speech in *Singapore Parliamentary Debates Official Report*, vol. 44 25 July 1984 at cols 1818–19 where he shared with the House his experience in allowing the provision (now Art 46(2)(b)) stripping a member of his seat should he move from one party to another), and proposed amending the Constitution for the introduction of Non-Constituency Member of Parliament.

116 Dicey, supra, note 2, at p 68.

117 Art 167(5) of the Constitution of the Republic of South Africa 1996 available at http://www.concourt.gov.za/site/theconstitution/thetext.htm.

118 Under Art 100, the constitutional tribunal comprises not less than three judges of the Supreme Court, has the power to render opinions on 'any question as to the effect of any provision of this Constitution'. It has the final say because the opinion given by the majority cannot be questioned by any court (Art 100(4)).

119 See the High Court decision of *Taw Cheng Kong*, *H.C.*, supra, note 18, at p 553, paras 13–14, referred to and approved by Court of Appeal in *Nguyen Tuong Van*, supra, note 11, at p 120, paras 57–8.

120 See the landmark case of *Marbury v Madison*, supra, note 110, 5 US 137 (1803) where the US Supreme Court assumed the powers of judicial review.

Constitution, or which contravenes any constitutional provision.[121] Thus, unlike the courts in England, the Singapore courts are coordinate and not subordinate to Parliament or the parliamentary executive.

Effective judicial review

Although the courts have the authority to adjudicate upon the constitutionality of legislative Acts, the enquiry into the doctrine of constitutional supremacy in Singapore should extend beyond the mere inquiry concerning the 'existence of judicial review of legislation in Singapore' as proposed by LR Penna.[122] It depends on the effectiveness of judicial review which involves an examination of the frequency with which the power to strike down unconstitutional legislative and administrative Acts has been used, and the extent to which judicial review limits legislative powers. This in turn depends largely on the prevailing judicial philosophy.

It is telling that in Singapore, only one legislative provision has been struck down by a Singapore court in the last 42 years. Even then, this decision was overturned on appeal, on separate grounds. The High Court in *Taw Cheng Kong v Public Prosecutor* considered Section 37 of the Prevention of Corruption Act[123] which provided that where an offence under the Act was committed by a citizen of Singapore in any place outside Singapore, that person could be dealt with in respect of that offence as if it had been committed in Singapore. It held, *inter alia*, that Section 37 violated the equal protection afforded by Article 12(1) since Parliament's classification based on citizenship bore no rational nexus to the object of the Act in that it was both over-inclusive and under-inclusive.[124] However, the High Court's decision was overturned by the Court of Appeal whose former Chief Justice Yong Pung How emphasised the limits of judicial review and the extra-territorial extent of Parliament's legislative powers: 'But, either way, it is not for the courts to dictate the scope and ambit of a section or rule on its propriety. That is a matter which only Parliament can decide; the courts can only interpret what is enacted'.[125]

121 See *Chan Hiang Leng Colin and Ors v PP* [1994] 3 SLR 662, at p 681C, para 50; *Taw Cheng Kong*, *H.C.*, supra, note 11, at p 953G-H, para 14, affirmed in *Nguyen Tuong Van*, supra, note 11, at p 120, para 58.

122 (1990) 32 Mal LR 207, at p 234.

123 (Cap 241, 1993 Rev. Ed. Sing.)

124 See *Taw Cheng Kong*, *H.C.*, supra, note 18 [1998] 1 SLR 943 at pp 966–7, para 64: 'However, in seeking to address this lacuna, Parliament's classification of persons on the basis of citizenship is both over-inclusive and under-inclusive, that is, the net cast by the legislature catches a class of persons not contemplated as falling within the objectives of the Act, and also does not catch a class of persons who clearly do fall within the mischief sought to be addressed . . . Lying between the two extremes are many shades of grey. What is clear is that in such cases, citizenship is not a useful criteria for determining guilt.'

125 *Taw Cheng Kong*, *C.A.*, supra, note 19, at pp 433–4, paras 71–3.

Prevailing judicial philosophy

The conversation between the High Court and the Court of Appeal in the case of *Taw Cheng Kong* reveals the weakness of the courts as an effective constraint on the legislative and executive powers. This arises largely from the courts' deference to political wisdom which impacts upon their fidelity to the Constitution, in particular, the protection of fundamental liberties. As a result, the courts have taken a legalistic view of the Constitution and adopted a strong presumption of constitutionality. For example, the Court of Appeal in *Public Prosecutor v Taw Cheng Kong* cautioned against demanding a 'seamless' and 'perfect' legislative classification[126] of Section 37(1) of the Prevention of Corruption Act, and ruled that 'if Parliament had elected to frame s 37(1) so widely as to cover all corrupt acts within and outside Singapore, irrespective of whether there were harmful consequences within the national boundaries or not, then the only question which this court could concern itself was whether citizenship provided a reasonable and intelligible basis for the differentiation against Singapore citizens – the question was strictly a constitutional one'.[127] The Court of Appeal reiterated the presumption of constitutionality of legislative provisions, and emphasised that he who alleges unconstitutionality bears the onus of furnishing evidence showing arbitrariness, beyond merely 'postulating arbitrariness'.[128]

Furthermore, although courts have generally adopted Lord Diplock's pro-individual approach in *Ong Ah Chuan v PP*, that judges should afford 'a generous interpretation, avoiding what has been called "austerity of tabulated legalism", suitable to give to individuals the full measure of the [fundamental liberties] referred to',[129] the courts have generally deferred to

126 See generally, SM Huang-Thio, 'Equal Protection and Rational Classification' [1963] Public Law 412; *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165; *Menon v Government of Malaysia* [1990] 1 MLJ 277; *Ong Ah Chuan v PP* [1981] 1 MLJ 64; *Taw Cheng Kong, H.C.*, supra, note 18; *Taw Cheng Kong, C.A.*, supra, note 19; *Public Prosecutor v Nguyen Tuong Van* [2004] 2 SLR 328; *Nguyen Tuong Van*, supra, note 11; *Ng Chye Huay and Another v Public Prosecutor* [2006] 1 SLR 157.

127 [1998] 2 SLR 410, at p 434, paras 73 and p 436, para 81.

128 *Taw Cheng Kong, C.A.*, supra, note 19 [1998] 2 SLR 410 at pp 435–6, para 80. In this case, the respondent did not adduce any such evidence, and the learned judge simply postulated examples of arbitrariness in a vacuum.

129 *Ong Ah Chuan*, supra, note 126, at 61C-D. See also Lord Hoffmann in *Reg. v Home Secretary, Ex. p. Simms* [2000] 2 AC 115 at p 131E–F '. . . in the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual . . . ', as cited by Lord Woolf in his *Singapore Academy of Law, Annual Lecture 2005:* 'Constitutional Protection without a Written Constitution' (17 Aug 2005), available at http://www.sal.org.sg/Pdf/SAL%20Annual%CC20Lecture%202005.pdf.

Parliament on matters of social policy.[130] Even in the case of *Ong Ah Chuan v PP*,[131] Lord Diplock rejected the contention that the mandatory sentence of death upon conviction for trafficking in more than 15g of diamorphine (heroin) under the Misuse of Drugs Act[132] was contrary to Articles 9 and 12. He concluded that questions of social policy were for Parliament to decide unless the 15g differentia was arbitrarily adopted by Parliament.

This judicial philosophy of deferring to Parliament was made explicit by former Chief Justice Yong Pung How in *Rajeevan Edakalavan v Public Prosecutor*.[133] The Chief Justice opined that the judiciary's duty is to ensure that the intention of parliament as reflected in the Constitution and other legislation is adhered to. In contrast, the 'members of parliament are freely elected by the people of Singapore and represent the interests of the constituency who entrust them to act fairly, justly and reasonably'.[134] Here, the court openly deferred to Parliament as having the sole authority to determine sensitive issues surrounding the scope of fundamental liberties. Yong CJ further stated that such issues should be raised through the representatives in parliament who are the ones chosen by the electorate to address such concerns, especially with regards to matters which concern the well-being in society, of which fundamental liberties are a part.[135]

While deference to Parliament on matters of social policy may not be objectionable *per se*, such deference to parliamentary wisdom may undermine the doctrine of constitutional supremacy where the question involves the balancing of fundamental liberties. In the case of *Chee Soon Juan v Public Prosecutor*,[136] former Chief Justice Yong Pung How, ruled *inter alia* that the Public Entertainments and Meetings Act[137] (PEMA) did not infringe Chee Soon Juan's constitutional right of free speech under Article 14(1)(a) because PEMA falls within the limitation in Article 14(2)(a).[138] In this case, the licensing authority had rejected the appellant's application for permission to hold a rally at the Istana on Labour Day. The appellant proceeded with the rally, was arrested and convicted of wilful trespass on government property and of attempting to provide public entertainment without a licence.

130 But see *Chee Siok Chin v Minister of Home Affairs* [2006] 1 SLR 582, at p 603, para 49 where a generous interpretation was directed to the construction of parliamentary intent to see whether a restrictive law fell within the terms of permissible constitutional derogation.

131 Supra, note 126.

132 (Cap 185, 2008 Rev. Ed. Sing.)

133 [1998] 1 SLR 815.

134 [1998] 1 SLR 815, at p 823, para 21.

135 Ibid.

136 [2003] 2 SLR 445.

137 (Cap 257, 2001 Rev. Ed. Sing.).

138 [2003] 2 SLR 445 at pp 449–50, paras 18–20.

In dismissing the appeal, the court appeared to have assumed that Parliament had struck the right balance between the freedom of speech and expression as provided under Article 14(1)(a) and the restrictions under Article 14(2)(a). Article 14(2)(a) states that Parliament may by law impose such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence. The court did not consider whether the restrictions under PEMA was necessary or expedient, neither did it specifically consider which limb of Article 14(2)(a) was engaged. There was no judicial balancing, or exposition on the scope of Article 14(2)(a). Neither was there any consideration of the terms 'necessary or expedient'.

It would be an error, however, to view the courts as uniformly and generally deferring to Parliament's and the executive's will. There have been cases where the courts have sought to flex its judicial muscle, albeit with dismal results. The most significant instance is the case of *Chng Suan Tze v Minister of Home Affairs*.[139] In this landmark case in Singapore's legal history, the Court of Appeal defended its power and duty to review executive acts and to uphold the rule of law. The court 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'. It further determined 'if the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naïve'. In seeking to uphold the rule of law embodied in the Constitution, the Court of Appeal concluded 'it is, in our view, no answer to refer to accountability to Parliament as an alternative safeguard'.[140] This display of judicial independence however prompted a series of constitutional amendments which effectively ousted the court's jurisdiction over matters concerning subversion. The High Court and Court of Appeal rejected the constitutional challenge to these amendments, which is examined below.

There however appears to be a slight shift in judicial philosophy in recent years. In *Nguyen Tuong Van v Public Prosecutor,*[141] the Court of Appeal considered the same question as had been considered in *Ong Ah Chuan v PP,*[142] i.e. whether the mandatory sentence of death upon conviction for

139 [1988] SLR 132.
140 Ibid., at 156B, 155C and 156E.
141 [2005] 1 SLR 103, at p 124, para 77.
142 Supra, note 126.

trafficking in more than 15 g of diamorphine (heroin) under the Misuse of Drugs Act was contrary to Articles 9 and 12. While generally applying the presumption of constitutionality and agreeing with Lord Diplock's conclusion in *Ong Ah Chuan,* the Court of Appeal nevertheless articulated the possibility that this presumption could be rebutted with 'comparable materials' that the legislative judgment was 'insupportable'. This would go to challenging the substantive validity of legislation against constitutional standards, as opposed to an exercise of administrative power under the Act.

In the same case, the Court of Appeal showed similar openness to accepting international law norms as part of the common law of Singapore.[143] The Court of Appeal accepted that Article 5 of the Universal Declaration of Human Rights ('No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'), constituted customary international law. It however noted that 'any customary international law rule must be clearly and firmly established before its adoption by the courts'.[144] Noting that there was insufficient state practice to form a wide international consensus, the Court did not accept that death by hanging amounted to the accepted customary human rights prohibition against cruel and unusual punishment.[145]

The court's willingness to consider customary international law in the case of *Nguyen* is significant. Customary international law, in particular in the area of human rights, will buttress a more liberal reading of the provisions concerning fundamental liberties in the Constitution in favour of the individual. This reinforces the supremacy of the Constitution since Part IV is part of the supreme law.[146] Thus, there appears to be a new judicial openness towards finding legislation unconstitutional and consequently void. Whether this will translate into concrete results in the appropriate cases in future remains speculative.

143 Singapore practises a dualist approach towards treaties which means Parliament must enact enabling legislation before such treaties take effect: see e.g. *Taw Cheng Kong, H.C.*, supra, note 18, at p 969. Concerning customary international law, unlike newly constituted constitutions such as the South African Constitution (Art 39(1)(b)) and Constitution of East Timor (Section 3(3)), the Constitution is silent on the approach to be taken by the judges.

144 *Nguyen Tuong Van*, supra, note 11, at pp 126–7, para 88.

145 Ibid., at pp 127–8, para 92.

146 However, the Singapore court also adopted the English position that where a customary international law norm conflicts with an Act of Parliament, the latter prevails over the former: ibid., para 94. This reflects the supremacy of Parliament and municipal law over international law.

Spirit of the Constitution: Protecting fundamental liberties and distilling constitutional principles

Fundamental liberties

As was evident from Dicey's pronouncement on the availability of adjudication on the constitutionality of legislative acts,[147] this does not merely involve consistency with the letter but the spirit of the Constitution, as embodied in the reasoning of Lord Diplock in *Ong Ah Chuan v PP*,[148] a Privy Council decision from Singapore, which Singapore courts have endorsed.

Under this approach, the reference to 'law' in Article 9(1) could not mean merely rules properly passed by a competent Parliament. It must refer to 'a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution'.[149] Thus, where Article 9(1) guarantees 'No person shall be deprived of his life or personal liberty save in accordance with law', laws which deprive a person of his life or personal liberty must accord with fundamental rules of natural justice. To find otherwise would be to allow legislative fiat and weaken the effectiveness of fundamental rights to protect individuals.

However, apart from *Ong Ah Chuan*, the Singapore courts have taken a more textualist approach to constitutional interpretation, at least where fundamental liberties are involved. For example, in *Jabar v Public Prosecutor*,[150] former Chief Justice Yong Pung How held that 'Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.'[151] Here, the issue was whether the appellant's scheduled execution was contrary to Article 9(1) because it was cruel and inhuman punishment to carry out the execution after a prolonged delay of more than five years since conviction.

Furthermore, even where the courts pay tribute to the spirit of the Constitution, they have generally refrained from adopting any notions of substantive due process[152] and allowing the creation of unenumerated rights.

147 Dicey, supra, note 2, at p 68.
148 Supra, note 126, at p 71B–D, para 82.
149 Ibid.
150 [1995] 1 SLR 617.
151 Ibid., at p 631B, para 53.
152 See TKK Iyer, 'Article 9 (1) and "Fundamental Principles of Natural Justice" in the Constitution of Singapore', [1981] 23 Mal LR 213.

In *PP v Mazlan*,[153] former Chief Justice Yong Pung How refused to recognise the right of silence as a constitutional right. While affirming the approach in *Ong Ah Chuan* that the word law in Article 9(1) includes the principles of natural justice, he nevertheless held that the right of silence has never been subsumed under the principles of natural justice. To his mind, the right of silence is 'an evidential rule' and should not be elevated to 'constitutional status' without explicit expression in the Constitution. To do so would require 'a degree of adventurous extrapolation'.[154]

This textualist approach translates to an overly legalistic approach to constitutional interpretation. In *Rajeevan Edakalavan v Public Prosecutor*,[155] the High Court rejected the contention that the provision under Article 9(3) that a person under arrest 'shall be allowed to consult and be defended by a legal practitioner of his choice' did not include the right to be told of such a right. The court focused on the words 'shall be allowed' in the first limb of the article and held that there was no obligation on the relevant authority to inform and advise the person under custody of his right to counsel since those words were couched in negative terms. The court further pointed out the obvious, that nowhere in Article 9(3) did it provide that there was a further right to be informed of one's right to counsel. Thus, according to the court, to read into the right to counsel in Article 9(3) an additional constitutional right to be so informed would be tantamount to 'judicial legislation'.

The Singapore approach may be contrasted with the expansive approaches taken by the American courts, where politicisation of the judiciary has led to judicial imputing of social justice into constitutional provisions, sometimes beyond the original intent of the text. For example, the US Supreme Court has interpreted the Fifth Amendment of its constitution which states 'No person shall . . . be deprived of life, liberty, or property, without due process of law' to include the doctrine of substantive due process which protects

153 *Public Prosecutor v Mazlan bin Maidun and Another* [1993] 1 SLR 512, at para 15. See generally, Michael YM Hor, 'The Privilege against Self-Incrimination and Fairness to the Accused' [1993] Sing JLS 35.

154 Ibid., at para 15. For an alternative approach towards construing 'law' under the Malaysian constitutional equivalent of Art 9(1) of the Singapore Constitution, see Gopal Sri Ram JCA's judgment in *Kekatong Sdn Bhd v Danaharta Urus Dn Bhd* [2003] 3 MLJ 1: 'It is to be noted at one that the definition of "law" in the Constitution is not exhaustive. It is open ended. Hence it is not confined to written law. It therefore refers to a system of law that is fair and just. In our judgment, Art 8(1) is a codification of Dicey's rule of law. Art 8(1) emphasises that this is a country where Government is according to the rule of law. In other words, there must be fairness of State action of any sort, legislative, executive or judicial. In simple terms, no one is above law. Since England has no written Constitution, Parliament is supreme in that country . . . But it has no relevance to Malaysia because here it is not the law made by Parliament that is supreme: It is the Federal Constitution which is supreme law.'

155 Supra, note 133.

the right of privacy. This right of privacy has been significantly expanded to include the rights of contraception[156] and abortion[157], and private sexual activity between homosexuals.[158] Such an approach in reading rights would in Singapore constitute an adventurous extrapolation or more, which approach has been emphatically rejected by the courts.

Constitutional principles

Where fundamental liberties are not involved, the courts have been willing to uphold the spirit of the Constitution and declare certain unwritten principles as part of the Constitution, such as that of accommodative secularism, separation of powers and rule of law. These principles underlying the Constitution form the theoretical basis for the component aspects of constitutionalism, whose goal is limited government.

The principle of 'secularism' is not expressed in the Constitution, but has been pronounced by the courts to be an ordering principle for Singapore's legal order. In *Nappalli Peter Williams v Institute of Technical Education,* the Court of Appeal declared that the religious liberty clause, Article 15, was based on 'accommodative secularism'.[159] This means that the protection of freedom of religion under the Constitution is premised on removing restrictions to one's choice of religious belief. The court emphasised that not every belief, even those held with religious fervour, amounted to religious belief that is protected under Article 15. It rejected the appellant's interpretation of the pledge and anthem ceremony as a religious ceremony on the basis that it was a distortion of secular fact into religious belief.

The doctrine of separation of powers as a governing principle in Singapore's constitutional order has been endorsed by the Singapore Courts in cases such as *Cheong Seok Leng v Public Prosecutor*[160] and *Nguyen Tuong Van v Public Prosecutor.*[161] As Sundaresh Menon JC confirmed in the High Court decision of *Lee Hsien Loong v Review Publishing Co Ltd:*[162] 'The doctrine of the separation of powers . . . undoubtedly informs the constitutional structure of the Westminster model of governance, on which our own constitutional framework is based'. Separating powers is crucial in providing a system of effective restraints upon governmental action.[163] It is considered that the accumulation of all powers legislative,

156 *Griswold v. Connecticut*, 381 US 479 (1965).
157 *Roe v. Wade*, 410 US 113 (1973).
158 *Lawrence v Texas*, 539 US 558 (2003).
159 [1999] 2 SLR 569. See also Li-ann Thio, 'The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v Public Prosecutor*' [1995] 3 SLR 26, at pp 34–8.
160 [1988] SLR 565, at p 575D–E, para 44.
161 Supra, note 11, at pp 126–7 para 88.
162 [2007] 2 SLR 453, at p 490, para 95.
163 Carl J. Friedrich, *Limited Government: A Comparison* (New Jersey: Prentice-Hall, 1974), at p 12.

executive and judiciary in the same hands, whether of one, a few or many, would produce tyranny.[164] Thus, powers must be separated. Ambition must be made to counteract ambition.[165]

While not expressly stated, the rule of law is widely considered to be the ordering principle in Singapore's constitutional order. In *Chng Suan Tze v Minister of Home Affairs,*[166] the Court of Appeal took a substantive view of the rule of law as a limit on discretionary power.[167] While the rule of law is a difficult ideal to express, such that judges, politicians and legal scholars alike differ on its exact content, it is commonly contrasted with arbitrary power.[168] Thus, 'the notion of a subjective or unfettered discretion is contrary to the rule of law'.[169] The courts assert the authority to pronounce legislative Acts unconstitutional for being inconsistent with not just the letter of the Constitution but also its spirit, as embodied by these principles.

Ousting judicial review

One serious attack on the doctrine of constitutional supremacy in Singapore is the ouster or exclusion of the courts' review powers over the constitutionality of legislative or executive acts.

In Singapore, a wave of quick amendments to Article 149 in 1989 ousted the courts' judicial review powers over matters concerning subversion or internal security. As highlighted above, these constitutional amendments followed close on the heels of the Court of Appeal's controversial decision in *Chng Suan Tze v Minister of Home Affairs.*[170] The court upheld its power to review the President's and Minister's satisfaction in making a detention order under sections 8 and 10 of the Internal Security Act (ISA),[171] respectively.[172] In doing so, the court declined to follow an earlier decision in *Lee Mau Seng v Minister for Home Affairs, Singapore*[173] which held that ministerial satisfaction was subjective and could not be reviewed.

164 James Madison, *The Federalist No. 47*, 30 Jan 1788, reprinted in Alexander Hamilton, *et al*., *The Federalist Papers* (New York: Bantam Classics, 2003 reissue).
165 Madison, *The Federalist No. 51*, 6 Feb 1788, ibid.
166 [1988] SLR 132.
167 Ibid., at p 156, para 86.
168 Notably, Chua J in *Teo Soh Lung v Minister of Home Affairs and Ors* [1989] 2 MLJ 449 adopted a literalist understanding of the 'rule of law' by equating it to rule-following, as opposed to an understanding of the rule of law as a fundamental substantive principle. See generally Li-ann Thio '*Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore' (2002) 20 UCLA Pac Basin LJ 1.
169 Supra, note 166, at p 156, para 86.
170 Supra, note 166.
171 Cap 143.
172 Supra, note 166.
173 [1971] 2 MLJ 137.

Within weeks after the judgment was handed down, the Executive swiftly initiated and Parliament approved the amendments to Article 149,[174] and Section 8(2) of the ISA.[175] These legislative powers are highly extraordinary in that they override 5 out of 8 fundamental liberties enshrined under Part IV of the Constitution.[176] Furthermore, under Article 149(3), they are retrospective in nature and cannot be invalidated by any exercise of judicial power granted under Article 93. The cumulative effect of these amendments and judicial interpretation is that legislation in relation to subversion made pursuant to Article 149, and preventive detention orders (except for procedural matters issued pursuant to ISA) are exempted from judicial review save for purely procedural matters. Legislative and governmental powers are thus substantially unlimited.

In a subsequent case, the High Court and Court of Appeal declined to strike down the amendments as being unconstitutional. In *Teo Soh Lung v Minister of Home Affairs*[177] the courts considered the relevant amendments were constitutional on the basis that Parliament had made satisfied the formal requirements for making the amendments under the Constitution.[178] Sitting in the High Court, Justice Chua declared that 'Parliament has done no more than to enact the rule of law relating to the law applicable to judicial review'.[179]

Formal powers and factual restraints: A comparison between judicial power of the Singapore and English courts

Notwithstanding the constraints on judicial review powers, the fact that courts have such an authority to adjudicate upon the constitutionality of legislative acts satisfies the third criterion of a supreme constitution. This is best understood by contrasting the authority of the Singapore judiciary with that of the English. Singapore courts formally have more powers than those given to British courts within a system of government where Parliament is supreme.

174 See generally *Singapore Parliamentary Debates Official Report*, vol. 52 (25 Jan 1989).

175 See *Singapore Parliamentary Debates Official Report*, vol. 52, 16 and 25 Jan 1989. See also S8(2)(B) Internal Security Act, cap 143: 'There shall be no judicial review in any court of any act done or decision made by the President or the Minister under the provisions of this Act save in regard to any questions relating to compliance with any procedural requirement of this Act governing such act or decision'.

176 Under Art 149(1), Parliament's legislative powers in relation to matters of subversion are deemed to be valid notwithstanding the fundamental liberties protected under Arts 9 (Liberty of the person), 11 (Protection against retrospective criminal laws and repeated trials), 12 (Equal protection), 13 (Prohibition of banishment and freedom of movement) or 14 (Freedom of speech, assembly and association).

177 *Teo Soh Lung*, supra, note 168, at p 515 A–C.

178 This is although the High Court judge commented that the amendments did not destroy the Constitution's basic features.

179 *Teo Soh Lung*, supra, note 168, at p 515 A–C.

Prior to 1998, the British courts have no power to review or impugn any legislation. The enactment of the Human Rights Act 1998[180] widened the jurisdiction of the British courts. It conferred limited powers on the British courts to declare legislation incompatible with the 1950 European Convention of Human Rights but not void.

Ironically, although weaker in form, the power to issue declarations of incompatibility has been robustly exercised by the English judiciary and proven to be an effective limit on untrammelled legislative powers. Thus, while parliamentary supremacy is retained, a judicial declaration of incompatibility exerts political pressure upon Parliament for legal reform.[181] As of 1 August 2006, approximately 21 declarations of incompatibility have been issued by the courts, out of which 14 were followed by legislative amendments and six were overturned on appeal.[182]

Political restraints on unconstitutional legislation

Leaving aside judicial review, the functions of the President in relation to the powers of a constitutional tribunal and the Presidential Council of Minority Rights may also safeguard the rigidity of the Constitution against unconstitutional legislation, thereby strengthening the doctrine of constitutional supremacy in Singapore. Political restraints were raised by Dicey as an alternative method for safeguarding a rigid constitution whereby unconstitutional legislation is rendered impossible, rather than inoperative. Reliance is placed upon the force of public opinion and upon the ingenious balancing of political powers for restraining the legislature from passing unconstitutional enactments.[183] This system opposes unconstitutional legislation by means of moral sanctions, which is influenced by public sentiment.[184]

President and the constitutional tribunal

Ad hoc constitutional tribunals established under Article 100 may restrain Parliament from passing legislation which seeks to, directly or indirectly, circumvent or curtail the discretionary powers conferred upon the President by the Constitution.[185] The tribunal, unlike the Supreme Court, does not

180 Chapter 42, see Section 4.

181 See Ariel L Bendor and Zeev Segal, 'Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model', (2002) 17 Am. U. Int'l L. Rev. 683.

182 See Department for Constitutional Affairs, 'Declarations of incompatibility made under section 4 of the Human Rights Act 1988', 1 Aug 2006, available at http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf.

183 Dicey, supra, note 2, at p 68.

184 Ibid.

185 Art 22H.

strike down legislation as being void as it only has the power to impugn potential legislation as being contrary to the Constitution. The tribunal's opinion that a parliamentary bill directly or indirectly circumvents or curtails the discretionary powers of the President as conferred by the Constitution is significant in supporting the President's decision to withhold his assent to such a bill.[186] Thus, the constitutional tribunal may check or inhibit the passage of legislation it considers unconstitutional.

Presidential Council of Minority Rights (PCMR)

Similarly, the PCMR has the potential to prevent any bill containing a 'differentiating measure' from being passed by Parliament.[187] Article 68 defines 'differentiating measure' as 'any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community'. A law containing a differentiating measure would also be subject to judicial review for violating the Article 12 (equal protection clause).

Articles 78 and 80 of the Constitution require Parliament to refer bills and subsidiary legislation to the PCMR for consideration and to report on whether these contain 'differentiating measures'.[188] If the PCMR issues an adverse report stating that a bill contains a differentiating measure, it must be rectified by Parliament or passed with a two-thirds majority (as opposed to the simple majority requirement for passing of ordinary legislation).[189]

Although the PCMR acts as a general check on Parliament, its jurisdiction and review powers are limited. First, a bill is referred to the PCMR only after its third reading in Parliament.[190] Notwithstanding recommendations to refer such bills to the PCMR at an earlier stage where it is being read before Parliament, it was decided that an earlier intervention by the PCMR constituted an unjustified 'encroachment' upon the 'responsibilities and privileges of Parliament'.[191] Furthermore, certain bills are excluded from the PCMR's purview, including money bills, defence or security bills and bills certified as 'urgent'.[192] Third, as is evident, the PCMR cannot entirely restrain Parliament from passing discriminatory legislation and has no

186 Art 22H(1).
187 Art 76.
188 Arts 78 and 80.
189 Art 78(6).
190 Art 78(1).
191 See then Minister for Law and Science and Technology, EW Baker, *Singapore Parliamentary Debates Official Report*, vol. 29, 12 June 1969, at col 66.
192 Art 78(7)(a)–(c).

power to render such legislation ineffective. Adverse reports issued by the PCMR in respect of any bill, whether primary or subsidiary, are merely advisory in nature and may be overridden if a two-thirds majority of Parliament approves the bill[193] or if Parliament passes a resolution affirming the subsidiary legislation.[194] The primary impact of the PCMR is merely to exert political pressure by drawing public attention, as its opinion is gazetted, to a discriminatory proposal, compelling the government to consider the 'odium it would incur publicly for enforcing majority rule to the disadvantage of a minority'.[195]

Conceptually and practically, the limited advisory role of the PCMR represents only a weak check on Parliament. To date, no adverse reports have been issued. This raises doubts about the effectiveness of the PCMR institution as a constraint on legislative power, to prevent the passage of unconstitutional legislation.[196]

Concluding observations

In conclusion, while Singapore formally adheres to the doctrine of constitutional supremacy, elements of parliamentary supremacy continue to influence constitutional law in Singapore. Once one pierces the veil of formalism, the doctrine of constitutional supremacy in Singapore rests on shaky ground. Consequently, this also means that in terms of its ultimate objective, which is to ensure a limited government, the doctrine's efficacy is somewhat neutered. Apart from the fact that the political system presumes and works on the basis of a British parliamentary system infused with traditions and mindsets of a supreme Parliament, much of the 'diceyness' of the doctrine of constitutional supremacy may be attributable to the government's pragmatic political ethos, one which is traceable to the making of the Constitution. The fact that Singapore has not experienced a change in political regime since its independence and the ruling party has consistently commanded more than the requisite two-thirds majority in parliament necessary to amend the constitution (at least from 1979) also presumably undermine the objective of a supreme constitution as a limit on government. On the other hand, one may argue that this political fact shows the success of the Constitution in creating and maintaining a successful working democracy.

193 Art 78(6)(c).

194 Art 80(4)(b).

195 See then Minister for Law and Science and Technology, EW Barker, *Singapore Parliamentary Debates Official Report*, vol. 29, 12 June 1969, at cols 62–3.

196 Note that by virtue of notwithstanding clauses, a new constitutional institution which might contain a differentiating measure could be 'immunised' from violating the constitution. See, for example, Art 39A(4) in relation to the Group Representation Constituency.

Nevertheless, it would seem that the Diceyan conception of constitutional supremacy is too formalistic in that it focuses too much on the external manifestations of a supreme constitution, and ignores important, though intangible and perhaps amorphous, notions such as self-perception and popular opinion, as well as ideas of popular sovereignty. For example, Ackerman, in his seminal work on popular sovereignty within the American constitution, describes the American constitution as 'an evolving historical practice, constituted by generations of Americans as they mobilized, argued, resolved their ongoing disputes over the nation's identity and destiny'.[197] Thus, a constitution claims allegiance as supreme law, not because it is written, more difficult to amend (in other words, rigid) or is 'enforced' by a body which invalidates all legislative and executive acts contrary to it, but ultimately because it is a manifestation of the will of the People. In truth, as Tribe puts it, '[f]idelity to the Constitution is our choice'.[198]

Ultimately, any constitutional doctrine must have as its objective, good government. As James Madison said, 'The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust'.[199] In Singapore, the obvious limitations of the doctrine of constitutional supremacy and the weakness of the political opposition have meant that the government emphasises virtuous leadership and economic success as the hallmark of good government. This idea of government by virtuous *Confucian junzi*[200] who are trustworthy and reliable rests on the pragmatic philosophy that the best safeguard for a democratic constitution is 'ultimately determined by the political temper and ideals of the community and the government in power or the kind of interest that the ruling party represents' and 'not a piece of paper'.[201]

Finally, at its heart, the doctrine of constitutional supremacy is closely intertwined with notions of legitimacy. A constitution that can be amended and shaped to reflect the aspirations and democratic will of the people may command more loyalty than one that is less responsive. It is not difficult to conceive of an overly rigid supreme constitution frustrating the democratic will of the people instead of securing it. In fact, the rigidity of

197 Bruce Ackerman, *We The People: Foundations*, (Massachusetts and England: Harvard University Press, 1991), at p 34.

198 Laurence H. Tribe, *American Constitutional Law*, (3rd edn, Vol. 1), (New York: Foundation Press, 2000), at p 24.

199 Supra, note 164, at p 347; see also Tribe, ibid., at p 20.

200 Shared Values White Paper, (Cmd 1 of 1991), para 41.

201 See *Singapore Parliamentary Debates Official Report*, 15 Mar 1967, at col 1361–162.

constitutional forms has in some cases provoked revolution.[202] Thus, as the Constitution evolves to incorporate more autochthonous elements, regardless of the motives of government, adherence to the doctrine of constitutional supremacy may become more important and natural. Ultimately, it is up to the people to work out their own constitutional salvation and, as Harding points out, 'Even grundnorms can be changed'.[203]

Appendix

Key constitutional amendments[204]

Nature of Amendment	*Article*	*Source (Amendment Act)*
Judiciary	**1. New Part A** A new provision for the Judiciary under the Constitution	Act 19 of 1969
	2. New Office for Judicial Commissioners Amended Art 95(3)	Act 10 of 1979
	3. Constitution of the Supreme Court (a) Amended Art 94(3): qualification as Supreme Court Judge	Act 16 of 1971
	(b) Amended Art 94(3): re-appointment of Chief Justice upon reaching the age of 65 years	Act 1 of 1989
	(c) Amended Arts 94 and 95: creation of a permanent single Court of Appeal	Act 17 of 1993
	4. Appeals to the Privy Council: (a) Art 100 repealed Court of Appeal to be the final court for proceedings relating to internal security and questions of interpretation of the provisions of Part XII (Special Powers Against Subversion and Emergency Powers).	Act 1 of 1989
	(b) Abolition of all appeals	Act 5 of 1994
	5. Jurisdiction to determine questions as to validity of Presidential election New Art 93A	Act 5 of 1991
	6. Advisory Opinion by Special Tribunal New Art 100	Act 17 of 1994
	7. Oath-taking Amended Art 97: Repeated oath-taking by reappointed judicial commissioners no longer necessary	Act 31/2007

202 Dicey, supra, note 2, at p 66.

203 Harding, supra, note 37, at p 367.

204 For a complete list of amendments, see Legislative Source and Legislative History of the Constitution.

Nature of Amendment	*Article*	*Source (Amendment Act)*
Presidential Council of Minority Rights	**1. New Part IVA**	Act 19 of 1969
	2. Defence or Security Bills New Art 81K (present Art 78(1)(7)(b): Exclusion of bills relating to the defence or security of Singapore from Council's jurisdiction	Act 40 of 1970
	3. Fundamental Liberties Amended Arts 81A, 81I and 81K: Exclusion of fundamental liberties issues from the Council's jurisdiction (see present Article 77)	Act 3 of 1973
	4. President's Concurrence Amended Art 69(2): Appointment of Chairman and members if the President concurs with the Cabinet's advice	Act 5 of 1991
The Public Service	**1. Amended Part IV** Qualifications and tenure of office of the Chairman and members of the Public Service Commission (PSC); delegation of powers, etc.	Act 13 of 1970
	2. Number of PSC Members (a) Amended 105: Increase from 9 to 11 (b) Amended 105: Increase from 11 to 14	Act 7 of 1981 Act 12 of 1990
	3. Sub-Commissions of PSC (a) New Arts 110A, 110B and 110C: The Education Service Commission and Police and Civil Defence Services Commission (b) Repeal of Arts 110A, 110B and 110C	Act 12 of 1990 Act 11 of 1998
	4. Key Appointments by the President: New Art 22	Act 5 of 1991
	5. Promotion to Significant Grade New Art 111A	Act 5 of 1994
	6. Devolution of powers and functions from Commissions to Personnel Boards (a) New Art 110D (b) Amended Art 110D	Act 17 of 1994 Act 11 of 1998
	7. The Legal Service Commission Amended Art 111 and new Art 111A: Prime Minister can nominate up to 2 out of 6 nominated Legal Service Commission members, with approval of President, and the constitution of new Personnel Boards of Singapore Legal Service	Act 31 of 2007

Nature of Amendment	*Article*	*Source (Amendment Act)*
Amendment Procedures	**1. General Amendment Procedure**	
	Amended Art 5: Revision of amendment procedure from simple majority to two-thirds majority	Act 10 of 1979
	2. Special Amendment Procedures	
	(a) Amended Art 5(2A): Special amendment procedure introduced pursuant to the transformation of the Presidency from a ceremonial to elected office. The amendment together with new Arts 5A and 100 and amended Art 22H, arose out of controversy relating to Art 22H	Act 41 of 1996
	(b) New Art 5A: Special amendment procedure for non-core constitutional provisions, arising out of controversy relating to Article 22H interpretation	Act 41 of 1996
	(c) Amended Art 8: Special amendment procedure for Part III (Protection of Sovereignty of the Republic of Singapore): Amendment bills to be passed only with the approval of two-thirds majority at a national referendum	Act 25 of 1972
Non-Constituency Member of Parliament	New Arts 39(1)(b); 39(2)	Act 16 of 1984
Fundamental liberties	**1. Article 9 (Liberty of the Person)**	
	(a) New Art 9(6): Exclusion of laws relating to arrest and detention in interests of public safety peace and good order	Act 5 of 1978
	(b) Amended Art 9(4): A change from 24 hours to 48 hours	Act 16 of 1984
	(c) Amended Art 9(5): Article 9(3)–(4) do not apply to a person arrested for contempt of parliament	Act 28 of 1986
	(d) Amended Art 9(6): Exclusion of laws relating to arrest and detention concerning misuse of drugs or intoxicating substances	Act 25 of 1987
	2. Part XII Special Powers Against Subversion and Emergency Powers	
	(a) Amended Art 149(1): Inclusion of Articles 11 and 12	Act 1 of 1989
	(b) Amended Art 149(3): Removal of judicial review of discretionary decision making power of the President or any Minister	Act 1 of 1989
	(c) Amended Art 150(4): Excepting Arts 22E, 22H, 144(2) and 148A	Act 5 of 1991
	(d) Amended Article 150(5)(b): Article 150(5)(a) shall not validate any provision inconsistent with Articles 5(2A)	Act 5 of 1991

Nature of Amendment	*Article*	*Source (Amendment Act)*
	(e) New Art 151(4): Concurrence of President required for detention if advisory board recommends the release.	Act 5 of 1991
	(f) New Art 151A: Arts 22B(7), 22D(6), 148G(2)–(3) and 148H shall not apply to defence and security measures	Act 17 of 1994
	(g) Amended Art 5(b)(i)–(ii): In relation to Arts 5(2A) and 5A both in abeyance	Act 41 of 1996 (not in operation)
Group Representation Constituency	**1. New Article 39A**	Act 9 of 1988
	2. Change in Group Size	
	(a) Amended Art 39A(1)(a): Increase to 4 from 3	Act 5 of 1991
	(b) Amended Art 39A(1)(a): Increase to 6 from 4	Act 41 of 1996
Nominated Member of Parliament	**1. New Article 39(1)(c); Fourth Schedule**	Act 11 of 1990
	2. Increase Number of NMPS	
	Amended Art 39(1)(c): Increase from 6 to 9	Act 1 of 1997
Elected Presidency	**1. New Elected Office – Chapter 1**	Act 5 of 1991
	2. Council of Presidential Advisors	
	(a) New Part VA	Act 5 of 1991
	(b) Amended Arts 37B(2), 37F(1) and new Articles 37L and 37M: appointment of one member as chairman by the President, appointment of staff to assist the Council members and payment of honoraria to Council members	Act 17 of 1994
	(c) Amended Arts 37B(1)(c); 37C; 37J(2A)–(2B) and 37K: Enlargement of Council from 5 to 6 members, and provision of casting vote to the Chairman.	Act 41 of 1996
	(d) Amended Art 37(B)(3): Tenure from 6 years to first term of 6 years subject to further terms of 4 years each	Act 2 of 2001
	(e) Amended Arts 37A, 37B and 37H; repealed and re-enacted Art 37C: Appointment of alternate members	Act 31 of 2007
	3. Key Appointments	
	(a) Statutory Boards and Government Companies: New Arts 22A(1A)–(1B), 22C (1A)–(1B): Subject to overriding decision of at least two-thirds majority in Parliament	Act 41 of 1996
	(b) Amended Art 22(g): Inclusion of Chief Valuer in list of protected key appointments	Act 11 of 1998
	(e) Amended Art 22: The addition of a Legal Service Commission member	Act 31 of 2007

Nature of Amendment	*Article*	*Source (Amendment Act)*
	4. Fiscal Powers	
	(a) Amended Art 144(3): President's concurrence to guarantees given by the Government under the EDB Act and the JTC Act is required	Act 17 of 1994
	(b) Fifth Schedule	
	(i) Deletion of Post Office Savings Bank	Act 36 of 1998
	(ii) Deletion of Singapore Technologies Holdings	Act 17 of 1994
	(iii) Deletion of Board of Commissioners of Currency	Act 24 of 2002
	(c) Exclusion of Defence and Security Measures: New Art 151A	Act 7 of 1995
	(d) Proposed Transfers and Transfers of Reserves	
	(i) Amended Art 22B (Statutory Boards)	Act 17 of 1994; Act 24 of 2002; Act 12 of 2004
	(ii) Amended Art 22D (Government Companies)	Act 17 of 1994; Act 12 of 2004
	(iii) New Art 148I (Government)	Act 12 of 2004
	(e) Government Budget	
	(i) New Art 148(2A)	Act 17 of 1994
	(ii) Amended Art 148A(1), (2)(a)–(b), (3), and new Art 148A(3A)	Act 17 of 1994
	(iii) Amended Art 142 – 'net investment income'	Act 2 of 2001
	(f) Net Investment Returns (i) Amended Art 21(3) (ii) New Art 142(1A)–(1C) (iii) Amended Art 142(2)(b), (3) and (4) (iv) Amended Art 144(3)	Act 25 of 2008

6 Protecting rights

Li-ann Thio

Introduction: A Bill of Rights without a rights culture?

In the 40 years of Singapore's Independence, none of the many amendments to the Constitution have altered Part IV, the Fundamental Liberties chapter. Part IV appears insulated from the developments taking place in other jurisdictions in two primary respects. First, in an age of rights,[1] the Singapore constitutional experiment has remained aloof of the trend towards constitutionally incorporating extensive lists not only of civil-political rights, but also socio-economic rights and third-generation solidarity rights.[2] The 2002 Timor Leste Constitution, for example, includes unique rights relating to consumers and the third-generation right to a healthy environment, as well as other socio-economic rights and duties.[3] Second, in relation to constitutional interpretation, Singapore courts have struck a discordant note against the chorus of voices which seek to construe rights expansively, in an age of 'transnational judicial conversations'[4] where the interlocutors are judges committed to a certain brand of western liberal values. This particularist bent is evident in judicial decisions espousing a 'local conditions' approach to adjudicating rights. The termination of appeals to the Privy Council in 1994 was driven by the view that foreign judges and foreign cases cannot or do not sufficiently take cognisance of domestic particularities.

The chief feature of Singapore public law in relation to rights is the predominant communitarian ethos extant in both judicial philosophy and the political values espoused by the ruling government as a sort of national

1 Louis Henkin, *Age of Rights* (Columbia University Press, 1990).

2 Karel Vasak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights', (1977) 30 UNESCO Courier 11.

3 Sections 53 and 60, *Timor Leste Constitution* (2002) – text available at http://www.etan.org/etanpdf/pdf2/constfnen.pdf

4 Christopher McCrudden, 'Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) OJLS 499–532.

ideology.[5] The heightened judicialisation associated with certain constitutional courts in protecting rights is not apparent here.[6] Foreign decisions which support the largely formalistic reasoning apparent in constitutional adjudication and which are sympathetic to statist values receive judicial endorsement. For example, the High Court in *Chan Hiang Leng Colin v PP*[7] approvingly cited the wartime Australian High Court decision of *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth*.[8] Here, the restriction on the religious freedom of this sect, whose religious convictions were thought to impede the prosecution of war, was upheld.

The adoption of a justiciable constitutional bill of rights is a legal tool designed to be 'a noble expression and shield of human dignity'.[9] This positivisation of basic rights elevates constitutional law as a framework for reviewing government action and increases the constitutional responsibilities of the judiciary. As a constitutional constraint on legislative and executive powers, its mere existence does not guarantee the actual enjoyment of rights. This requires a constitutional culture which clearly apprehends the aims of a bill of rights and is receptive to its purposes. Where absent, the potential for the robust legal protection of individual freedoms is somewhat diminished. It is argued that Singapore has a bill of rights without a rights culture, which may be defined as 'an attitude among the people that the government cannot do to them as it wishes'. This translates into the people knowing about and insisting on their rights and demanding that the body responsible for constitutional review 'perform their designated functions in the face of opposition from political powers'.[10] Compared to commercial law, relatively few constitutional law cases are heard, an overwhelmingly majority of which have been won by the state.[11]

This chapter explores the theory and practice of protecting rights in Singapore, as derived from domestic instruments such as the constitution, statute law, the common law, as well as international legal obligations. The Singapore constitutional experiment as it relates to the protection of civil liberties is a fascinating case study, as it demonstrates how a legal transplant in the form of constitutional liberties, formulated in individualist

5 Shared Values White Paper (Cmd 1 of 1991, Singapore Parliament).

6 See Anne-Marie Slaughter, 'Judicial Globalisation' (2000) 40 Va. JIL 1103; on the problem of judicial review and democracy, see Sanford Levinson, *Our undemocratic constitution: when the constitution goes wrong (and how the people can correct it)*, (Oxford University Press, 2006).

7 [1994] 3 SLR 662.

8 (1943) 67 CLR 116.

9 William J Brennan Jr., 'Why have a Bill of Rights' (1989) 9(4) OJLS 425–40, at p 425.

10 RP Pereenboom, 'What's wrong with Chinese rights? Towards a Theory of Rights with Chinese Characteristics' (1993) 6 Harv. Hum. Rts. J. 29.

11 Cf: *Chng Suan Tze v MHA* [1988] SLR 132; *PP v Bridges Christopher* [1998] 1 SLR 162; *Taw Cheng Kong v PP* [1998] 1 SLR 943.

terms, and the mechanism of (potentially) rights-oriented judicial review plays out within a non-liberal or communitarian legal-political culture. Singapore was notably one of the chief proponent of the 'Asian values' school which dominated international debates over the universality of human rights and the cultural relativist challenge in the 1990s. These values may be distilled to include a preference for strong political leadership and an interventionist state over political pluralism, a responsibilities rather than rights discourse and for consensus-seeking rather than adversarial politics. Additionally, the prioritisation of collective welfare over individual concerns and of basic needs over civil-political rights informs the rights balancing process, as does the view that economic growth precedes democracy such that social harmony is deemed essential to the economic imperative, at the expense of civil liberties. While this view was espoused by the political elites and even stipulated in the non-binding shared values white paper,[12] which may be considered 'soft' constitutional law[13] insofar as it affects rights interpretation, it is worth noting that judicial reasoning frequently reveals a bias towards communitarian concerns and other non-constitutional competing interests such as reputational interests.[14]

Courts typically adopt a deferential approach towards executive assessments of when a public good should qualify a right. While the courts have affirmed the power to strike down a statute for unconstitutionality, this has never once taken place.[15]

What role then does judicial review have in protecting rights in a country like Singapore with an inherited common law tradition, where the forms of parliamentary democracy have been imported, but where a 'communitarian' national culture is espoused? Culture of course is dynamic rather than static; judicial review can transform local practices, and itself be hybridised or altered by local factors. [16]

Additionally, judicial review has, through constitutional and statutory provisions, been specifically ousted in areas considered un-amenable to legal supervision, particularly, security and religious harmony.[17] Other checks and

12 Cmd 1 of 1991.

13 Thio Li-ann, 'Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' [2004] SJLS 414–43 at pp 434–40; Benedict Sheehy, 'Singapore 'Shared Values' and Law: Non East versus West Constitutional Hermeneutic' (2004) 34(1) HKLJ 67

14 On the reputations of politicians and public institutions, see *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310; *Chee Siok Chin v MHA* [2006] 1 SLR 582.

15 The High Court purported to do so in *Taw Cheng Kong v PP* [1998] 1 SLR 943 but this was overturned by the Court of Appeal [1998] 2 SLR 410, on a separate point.

16 Tom Ginsburg, 'Confucian Constitutionalism? The Emergence of Constitutional Review In Korea And Taiwan' (2002) 27 Law and Soc. Inquiry 763 at pp 763–98.

17 Internal Security Act (Cap 143); Maintenance of Religious Harmony Act (MRHA) (Cap 167A).

balances have been emplaced, political checks like the elected presidency and apolitical bureaucratic advisors. Specifically, the Presidential Council for Religious Harmony and the Advisory Board to the Internal Security Act (ISA) under Articles 22I and 151(2) of the Constitution respectively. While Article 69 establishes the Presidential Council of Minority Rights to review legislation which potentially discriminates against racial and religious minorities, this is a weak institution, especially since its recommendations are only advisory. It is by no means a complaints procedure for individuals with rights-related grievances, and has not, since its inception in 1969, issued a single adverse report identifying a legal provision as containing a 'differentiating measure'.[18] Unlike other Asian constitutions, the Singapore Constitution has not established any specific rights-oversight body such as an ombudsman or national human rights commission.[19] The government has also demonstrated reticence towards proposals for such rights-protective institutions as a board of equal rights,[20] equal opportunity commission,[21] ombudsman,[22] or a constitutional court,[23] manifesting an anti-institutionalism in relation to protecting rights. Instead, what is advocated is the channelling of rights-related concerns through informal means, such as directing complaints to members of Parliament or government feedback channels, or to address issues like race discrimination in the workplace through education rather than legal compulsion. Part II examines the genesis and incipient modifications to the Singapore bill of rights, and whether the

18 Art 68 defines this as measures likely to be 'disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities'.

19 Philip Eldridge, 'Emerging roles of National Human Rights Institutions in Southeast Asia' (2002) 14(3) Pacifica Review 209–26.

20 This was proposed by, among others, Opposition MP JB Jeyaretnam, as a forum where any citizen suffering unfair discrimination or rights deprivation could complain. This was considered unnecessary since Art 12 guaranteed equal protection under the law and was justiciable. In response to the need for a 'cheap quick remedy', the Law Minister of State suggested that recourse could be had from Members of Parliament at meet-the-people sessions. Such appeals were taken 'very seriously' and MPs wrote in on behalf of aggrieved citizens to the relevant department: 69 SPR, 30 June 1998, col 380–1.

21 Irene Ng proposed this, suggesting mediatory or conciliatory working methods. She also called for a Women's Affairs Ministry or a Women's National Council chaired by a Cabinet minister, underscoring the importance of institutionalising foundational principles as 'Leaders may come and go, but institutions stay.' 74 SPR 2 April 2002, col 158, at 179–80.

22 In rejecting the Ombudsman, the Law Minister of State stated 'every society must determine the way in which its laws and legal mechanisms operate. Other countries, unlike Singapore, do not have so many feedback channels such as the SIU, meet-the-people sessions, or, for that matter, NMPs and NCMPs, who can bring up their constituents' grievances in this House.' 69 SPR 30 June 1998, col 380, at 383.

23 70 SPR 4 Aug 1999, col 1977.

constitutional text indicates any rights hierarchy and limits on the scope of rights. It considers whether Part IV is exhaustive and if there are other non-constitutional rights or interests, including human rights, which attract judicial protection. Part III examines the philosophy and method underlying the judicial interpretation of rights and how robust a mechanism of rights protection this is, against a general tendency to prioritise public order or communitarian concerns as trumps in rights adjudication. Part IV offers concluding observations.

Constitutional Bill of Rights and Westminster Constitutions: From residual liberty to entrenched right

Professor de Smith identified fundamental human rights guarantees as a characteristic feature of 'modern Commonwealth constitutions'.[24] Writing in 1963, he noted that until recently, the predominant 'Anglo-Saxon attitudes' towards constitutional bills of rights was that of 'disapprobation, with the temperature ranging from the frigid to the lukewarm'.[25] Such bills of rights lacked 'any great practical value' absent 'the will and means to make them effective'[26]. Given the predilection of English constitutional lawyers to 'shy away from a general proposition like a horse from a ghost', they presumed constitutional bills of rights were 'unnecessary'; ideal constitutions would contain only a few declaration of rights while 'the ideal system of law would define and guarantee many rights'.[27]

Thus, the move to invest rights with constitutional stature and status in the Indian and Pakistan constitutions was a product of autochthony; even the Malaysian constitutional bill of rights, the root of the Singapore Constitution, while 'drafted by English lawyers in England'[28] was made pursuant to the recommendations of the Reid Constitutional Commission whose members hailed from England, Australia, India and Pakistan, accompanied by demands for judicial protection of human rights.

The constitutional elevation of certain rights departs from the English common law approach which recognises residual liberties rather than rights, where 'everything is lawful unless it is specifically prohibited'.[29] In other

24 SA de Smith, 'Westminster's Export Models: The Legal Framework of Responsible Government' (1961–63) 1 Journal of Commonwealth and Political Studies 2–16.

25 SA de Smith, *The New Commonwealth and its Constitutions* (London: Stevens and Sons, 1964), at p 166. He identified the historical reason for 'the new vogue for bills of rights in Commonwealth constitutions' as the 'desire to afford concrete assurance to minority groups in Nigeria': at 21 (hereafter 'de Smith').

26 *Report of the Simon Commission on the Indian Constitution* (Cmd, 3569, 1930), at 22–3, quoted in de Smith, ibid., at p 164.

27 KC Wheare, *Modern Constitutions* (Oxford University Press, 1951) 1st edn, at p 71.

28 De Smith, supra, note 25, at p 162.

29 Michael Arnheim, *Principles of the Common Law* (Duckworth, 2004), at p 165.

words, a right is 'the obverse of the rules of civil, criminal and administrative law',[30] and the contour of a right was determined by legal restrictions. Faith was not placed in 'rigid legalism and paper guarantees of written constitutions' but by the 'benevolent' exercise of discretion by public officials acting as 'Platonic guardians of the public interests, accountable through their political masters to the Legislature and the people'.[31] Conversely, constitutionalising a right makes it the rule and derogations from it the exception, such that the right theoretically governs the restriction. Entrenching rights in a law higher than ordinary law is considered incompatible with parliamentary supremacy.[32]

Before the powers of British judges was expanded by the coming into force of the Human Rights Act (HRA) in 2000, the supreme Parliament was considered the primary protector of civil rights; judicial review was confined to supervising administrative action. Unlike the American distrust of government which defines its vision of constitutionalism and authorises judicial review of primary legislation,[33] the British do not 'possess an inherent suspicion of the political authorities'[34] such that Parliament could be trusted 'to act reasonably and with self-restraint, in relation to individual rights, to safeguard common morality' and to act fairly.[35] This explained the prevalent 'Government-Parliament Oriented Model for Protecting Human Rights'.[36]

Part IV Liberties: Origins, theory and formulation

Genesis: Malaysian origins, Singapore modifications

Singapore departs from the practice of other Commonwealth constitutions which modelled their bills of rights after the 1950 European Convention of Human Rights (ECHR).[37] Part IV is derived, with significant modifications, from Part II of the 1957 Federal Constitution of Malaysia, sharing the same

30 W Ivor Jennings, *The Law and the Constitution* (University of London Press, 1956), at p 247.

31 Lord Lester and Lydia Clapinska, 'Human Rights and the British Constitution' in *The Changing Constitution,* Jeffrey Jowell and Dawn Oliver eds, 5th edn (Oxford University Press), at p 64.

32 Lord Lester and Lydia Clapinska, ibid., at pp 62–87.

33 *Marbury v Madison*, 5 US 137 (1803).

34 Ariel Bendor and Zeev Segal, 'Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model' (2002) 17 Am. U. Int'l L. Rev. 683, at p 686.

35 Bendor and Segal, ibid., at pp 700–2.

36 Ibid., at p 705.

37 See Anthony Lester, 'The Overseas Trade in the American Bill of Rights' (1988) 88 Colum LR 537, at p 541, estimating about 26 commonwealth countries with such constitutions.

genealogy.[38] It contains eight articles the Privy Council considered 'identical with similar provisions'[39] in the Malaysian Constitution, a product of Anglo-Malayan drafting, and 'drew substantially from English Constitutional traditions and to a lesser extent, from the Indian, Australian and American constitutions . . .'[40]

The Reid commission recommended a chapter on fundamental individual rights considering this to be 'essential conditions for a free and democratic way of life'.[41] The protection afforded resided in the supremacy of the Constitution and 'the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action'.[42] The inclusion of non-justiciable directive principles and policy objectives were expressly rejected as it would be 'unenforceable' and couched so generally as to afford 'no real security'.[43]

Content of rights: Singapore modification

Apart from the right to property,[44] Part IV generally adopted the Malaysian constitutional catalogue of rights, which were predominantly civil-political liberties: these are the right to life and personal liberty, freedom of movement, prohibition against forced labour, freedom of speech, assembly

38 After seceding from the Malaysian Federation in 1965, Singapore selectively retained and adopted parts of the Malaysian Constitution, through the 1965 Republic of Singapore Independence Act (RSIA) No. 9 of 1965. See Kevin YL Tan, 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day', (1989) 1 S.Ac. LJ 1, 6–17. Contrary to the Solicitor-General's opinion, the Attorney-General apparently considered that Malaysian constitutional rights provisions ceased to apply to Singapore and while reinforced by the RSIA as part of the law 'the constitutional purist might regard them as more in the nature of directive principles than as constitutional provisions.' 'Minority Rights', *The Straits Times* (Singapore), 16 Mar 1966.

39 *Ong Ah Chuan* v. *PP* [1980–81] SLR 48 at pp 61–2.

40 Joseph M Fernando, *The Making of the Malayan Constitution* (MBRAS Monograph 31, 2001), at p 212. The Indian Constitution has 'negative' American influence insofar as the phrase 'due process of law' was excluded from it and replaced with 'procedure according to law' on the advice of Justice Frankfurter, borrowing from art 31, Japanese Constitution. Frankfurter considered the due process clause undemocratic in allowing a few judges to veto legislation enacted by elected representatives, unfairly burdening the courts: Lester, supra, note 37, at p 544.

41 Federation of Malaya Constitutional Commission, 1956–157 Report chaired by Lord Reid, reproduced in Appendix A, Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore* (Asia: Butterworths, 1997), at p 966, para 161. (hereafter 'Tan and Thio').

42 Ibid., para 161.

43 Reid Commission Report, para 161.

44 The 1966 Constitutional Commission chaired by Wee Chong Jin recommended the inclusion of a modified version but this was rejected: Wee Report, Tan and Thio, supra, note 42, paras 41–2; Lee Kuan Yew, 25 SPR 15 Mar 1967 at cols 1295–7.

and association, freedom of religion, equal protection prohibiting discrimination on stipulated grounds and educational rights. Proposals to include socio-economic rights were rejected as these were not considered justiciable.[45] The government addresses socio-economic welfare not through rights which entail promotional duties, but through discretionary programmes, e.g. the provision of public housing through the Housing and Development Board.[46] The Constitution does not list any individual duties.

From the outset, Singapore stamped its developmentalist priorities and its vision of state-society relations with respect to religious freedom and race relations by tailoring its rights provisions.

The 1966 Constitutional Commission's proposal to include a modified property rights clause requiring the acquisition of property on 'just terms' was rejected because of the 'special situation' of land which required an erosion of 'sanctity of property', a chief English law tenet. The government desired unhindered compulsory acquisition powers to enable it to acquire land, such as the fire sites in 1961, without having to appear before a tribunal or go to court; to accept the phrase 'just compensation' would entail 'endless litigation'; hence, it decided to follow the Indian constitutional model of allowing Parliament to decide principles of compensation.[47] Landowners could address issues arising from state acquisition before the Appeals Board established by the Land Acquisition Act,[48] as it was considered undesirable to allow landowners 'to raise constitutional issues when disputes over the quantum of compensation arise'.[49] Years later, this approach was characterised as placing 'communitarian interests over those of the individual' after Singapore 'shook ourselves free' from the English doctrine that individual rights were the 'paramount consideration', in favour of the 'customs and values of Singapore society'. Thus fire sites were acquired on the basis of compensation as without vacant possession, and so too, the rights of individual seafront landowners to compensation for loss of sea-frontage was cancelled.[50] Property rights were sacrificed at the altar of the needs of a developing nation.

45 An Indian group making representations before the Wee Commission asked that a list of constitutional social-economic rights akin to the European Social Charter be included. These included the right to work, to organise, collective bargaining, social security, social and medical assistance, family rights to special protection and migrant workers' rights. 'Indians ask for seven basic rights in S'pore Charter' *The Straits Times* (Singapore), 3 Mar 1966, at p 5.

46 On Singapore's approach towards socio-economic rights, see Thio Li-ann, 'Pragmatism and Realism do not mean abdication: A Critical Inquiry into Singapore's Engagement with International Human Rights Law' (2004) 8 SYBIL 41 at pp 79–85.

47 Lee Kuan Yew, 25 SPR 21 Dec 1966, col 1051, at 1295–6.

48 Cap 152.

49 EW Barker, 25 SPR, 14 Mar 1965, col 1258, at 1054.

50 Proceedings at the Opening of the Singapore Academy of Law: Address by Prime Minister Lee Kuan Yew, [1990] 2 S.Ac.LJ 155 at pp 155–6.

In relation to race, Singapore declined to adopt Malaysian constitutional provisions relating to the special rights and privileges of *bumiputeras* (sons of the soil) to land reservations, job quotas and scholarships etc . . .[51] Reflecting the prevalent ideology of rights instruments crafted in the 1960s, it contains no minority group rights as it was assumed that by protecting the rights of all, the rights of individual members of racial and religious minorities would be secured.[52] Nevertheless, the Article 152 recognises the 'special position of the Malays' as indigenous peoples whose interests the government was duty-bound to safeguard.

To give effect to the principle of secularity, a departure from Article 3 of the Malaysian Constitution which recognised Islam as the official religion of the federation,[53] the Article 15 religious freedom clause[54] was modified from the outset. It declares the right of every person to 'profess and practice his religion and to propagate it'. Article 11 of the Malaysian Constitution allows state legislatures to enact laws prohibiting the propagation of other faiths to Muslims. The Singapore Constitution does not recognise an official religion. A 1963 ministerial statement declared that Singapore had no intention, after entering the Federation 'to introduce legislation to control or restrict the propagation of any religious doctrine or belief',[55] The Wee Commission considered an anti-propagation clause inappropriate as singling out a religion for special treatment was 'inconsistent' within a 'democratic secular state'.[56]

Implied constitutional rights?

The government did not adopt the Wee Commission recommendations for a right to vote, a right not to be tortured and a right to a judicial remedy,[57] in the absence of a clause providing for the judicial enforcement of rights.[58]

51 Art 153, Federal Constitution of Malaysia. See 'Minority Rights in Malaysia' and 'Minority Rights in Singapore' in Castellino and Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford University Press, 2006), pp 147–236.

52 S Rajaratnam, 25 SPR, 16 Mar 1967, col 1329, at 1353–72.

53 LA Sheridan, 'The religion of the Federation' [1988] 2 MLJ xiii; Li-ann Thio, 'Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution' in *Constitutional Landmarks in Malaysia: The First Fifty Years: 1957–2007*, Andrew Harding and HP Lee eds, (Lexis Nexis 2007) pp 197–226.

54 See Li-ann Thio, 'Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State' (2006) 33 Hastings Const. LQ 197.

55 'Religious Freedom in Singapore after Malaysia', SPR 29 July 1963, col 261, at 262.

56 Wee Report, supra, note 44, para 38.

57 Art 19 of the *Guyana* Constitution was proposed as a model. The High Court would have jurisdiction to hear and determine applications and to give appropriate enforcement orders: Wee Report, para 44, Tan and Thio, supra, note 44, at 1026.

58 Ibid., Wee Report, paras 40–4.

Over the past 40 years, there have been developments suggesting that the scope of Part IV is not exhaustive and that there may be unenumerated or implied fundamental liberties or at least that the protection of certain human rights could be imported through expansively construing an existing right.

For example, a judicial remedy for rights violations has been judicially acknowledged as falling within the ambit of judicial power as entrenched in Article 93.[59] The High Court in *Colin Chan v PP* stated: 'the court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides'.[60] However, judicial review is limited by the presence of 'notwithstanding' clauses,[61] such that it is largely excluded in relation to legislation against subversion even if inconsistent with various liberties, including the right to life and personal liberty, prohibition against retrospective laws, the equality clause, freedom of movement and freedom of speech, assembly and association.[62] Neither can legislation relating to the Group Representation Constituency (GRC), where it violates the Article 12 equality clause, be judicially challenged.[63]

The Wee Commission on examining other written constitutions considered it beneficial to include a new article relating to the 'fundamental human right' that 'No person shall be subject to torture or to inhuman or degrading punishment or other treatment'.[64] This is substantially similar to Article 5 of the 1948 Universal Declaration on Human Rights (UDHR)[65] which received judicial consideration in *Nguyen Tuong Van v PP*[66] such that this norm may enjoy constitutional protection as part of Article 9 which states that 'No person shall be deprived of life and liberty save in accordance with law.' It was argued that the mandatory death sentence was unconstitutional as a form of cruel and inhuman punishment not 'in

59 Drawing from English case law, some Malaysian courts have declared a constitutional right of access to justice, drawing from the common law principle of the rule of law and the equal protection guarantee: *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1, citing Steyn J in *R v Secretary of State for the Home Department ex parte Leech* [1993] All ER 539.

60 [1994] 3 SLR 662, at p 681C.

61 This insulates political judgment from judicial review, allowing the majority to override judicial interpretations concerning individual rights in exceptional circumstances with which they reasonably agree: see Jeffrey Goldsworthy, 'Judicial Review, Legislative Override and Democracy' in *Protecting human rights: instruments and institutions*, Jeffrey Goldsworthy and Adrienne Stone, eds (Oxford University Press 2003), at 263–79.

62 Art 149(1).

63 Art 39A(3).

64 Wee Report, supra, note 44, at p 10, para 40.

65 General Assembly resolution 217 A (III) of 10 Dec 1948.

66 [2005] 1 SLR 103 at pp 127–8, paras 89–94.

accordance with law', as the norm was part of Article 9 by dint of having customary international law status. While agreeing that this norm was customary international law, the Court of Appeal found insufficient state practice to hold that the particular form of execution, death by hanging, was part of the norm. Furthermore, even if hanging violated the norm, where this was clearly legislated, domestic statute law would prevail against the international norm in the event of inconsistency.

The Commission also recommended recognising the right of citizens 'to elect a government of their choice as expressed in general elections held at reasonable periodic intervals by secret vote'.[67] It expressed concern about the secrecy of the vote as the relevant Ordinance regulating parliamentary elections required placing a serial number on the back of a ballot paper and a counterfoil.[68] This right was never accorded constitutional status. However, in 2002, a parliamentary debate over its status erupted, whether voting was a 'right' or 'privilege'. Much of the discussion was confused and confusing though it yielded an opinion from the Attorney-General which Minister Wong Kan Seng averred to in the House:

> While the Constitution does not contain an expressed declaration of the right to vote . . . the right to vote at parliamentary and presidential elections is implied within the structure of our Constitution. We have a parliamentary form of government. The Constitution provides for regular general elections to make up Parliament and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy . . . and that is why we have the Parliamentary Elections Act to give effect to this right.[69]

This suggests that one can derive by inference, a constitutional right, which is implemented by statute. The method of deriving rights by implication resonates with the Indian 'basic features' doctrine[70] in associating the right to vote as a necessary corollary of a representative democracy. This may be viewed as an implicit constitutional principle inferred from the parliamentary form of government, inferred from Article 66 of the Constitution which regulates general elections. The Privy Council has deduced constitutional principles of government from the structure of Westminster Constitutions

67 Wee Report, supra, note 44, at para 43.

68 See Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) Sing JLS 328–73 at pp 340–8.

69 73 SPR 16 May 2001, col 1720, at 1726.

70 *Kesavananda Bharati v State of Kerala,* AIR 1973 SC 1461. See David Gwynn Morgan, 'The Indian "Essential Features" Case' (1981) 30(2) ICLQ 307–37. This was rejected in *Teo Soh Lung v MHA* [1989] 2 SLR 499 but notably, Yong CJ derived by implication a 'paramount' constitutional mandate: *Colin Chan v PP* (1994) 3 SLR 662, at p 684F.

as in *Liyanage v pp*[71] Although the occasion for drafting a documentary constitution allows for the explicit statement of normative principles, English law trained draftsman did not take advantage of this, as they considered it unnecessary given prevailing assumptions or understandings,[72] which might be an alien tongue to subsequent generations of constitutional interpreters.

However, the final authoritative interpretation belongs to the courts. In the absence of constitutional litigation on this point, it is desirable to have a constitutional amendment to entrench the constitutional status of the right to vote and to remedy this gap in civil liberties. This is particularly important as Karthigesu JA, speaking *obiter* in *Taw Cheng Kong v PP*,[73] while noting that constitutional rights were 'inalienable' rather than 'stick and carrot privileges', also referred to a distinct category of non-constitutional interests: 'Other privileges such as subsidies or the right to vote are enjoyed because the legislature chooses to confer them – these are expressions of policy and political will'. One might read this as viewing the right to vote as a statutory right. Jennings underscores the importance of protecting the right to vote in free elections insofar as a government is compelled not to abuse its powers as 'there is an Opposition to draw attention to abuses and to persuade the electorate that because of those abuses . . . the Government should be turned out. An opponent of a dictator is an enemy of the State; for the dictator is the State, and he can be dethroned only by revolution. The fundamental liberty is that of free elections, and the others . . . follow from it'.[74] Of course, an equal right to vote may cause problems to existing institutions insofar as the GRC scheme accords equal rights but differential voting powers, as the power of one vote varies according to whether one lives in a single member constituency or a GRC.[75]

Singapore courts have not been as adventurous as certain Malaysian judges who, influenced by Indian developments, have expansively construed the right to life as transcending 'mere existence' and implicating 'all those facets that are an integral part of life itself', and those matters affecting 'quality of life' including the right to live in a 'reasonably healthy and pollution free environment' and 'gainful employment'.[76] To avoid appearing

71 [1967] 1 AC 259.

72 E.g. in *Liyanage*, [1967] 1 AC 259, although the Ceylon Constitution did not expressly vest judicial power in the courts, it was assumed there was no intention to share this with the legislature since the silence on this 'is consistent with its remaining, where it had lain for more than a century in the hands of the judicature'.

73 [1998] 1 SLR 943, at p 965D–E.

74 Jennings, supra, note 30, at p 264.

75 Thio Li-ann, 'The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of "Asian" Democracy' (2002) 6 Sing JICL 181 at pp 203–5.

76 *Tan Tek Seng v Suruhanjaya Perkhidmaan Pendidikan* [1996] 1 MLJ 261, at p 288.

over-activist, Gopal Sri Ram JCA located the finding of a right to quality of life in the 'copious and continuous stream of beneficial legislation' passed by Parliament to 'improve the quality of life of the masses' through the provision of 'housing, water, electricity and communication systems to the far flung areas of our country'.[77] That is, such a right was consistent with existing socio-economic legislation. One may read this as the fulfilment by the elected government of an implied constitutional duty to make active provision for social welfare. Neither have Singapore courts been ready to further develop the constitutional principles of fundamental rules of natural justice, which the Privy Council held was part of the meaning of 'law' in Article 9(1)[78] to include rights such as the right of silence. In *Mazlan bin Maidun v PP*[79] the Court of Appeal stated:

> To say that the right of silence is a constitutional right would be to elevate an evidential rule to constitutional status despite its having been given no explicit expression in the Constitution. Such an elevation requires in the interpretation of Art 9(1) a degree of adventurous extrapolation which we do not consider justified. It is not a mere matter of balancing the prejudice to the administration of justice resulting from depriving the court of relevant and important evidence against the interest protected by this right.

In subsequent cases, the Courts have refused to find ancillary rights associated with enumerated rights, such as the right to be told of the Article 9(3) right to counsel.[80]

Human rights and constitutional rights

A vocal proponent of the cultural relativist school which challenges the universality of human rights, under the banner of 'Asian values', Singapore nonetheless took the seminal step in 1995 of acceding to three United Nations human rights treaties. These were the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention for the Rights of the Child (CRC) and the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW).[81] Neither the CRC nor CEDAW has been domestically incorporated, as the general working

77 *Tan Tek Seng*, ibid.
78 *Ong Ah Chuan v PP* [1980–81] SLR 48; *Haw Tua Tau v PP* [1980–81] SLR 73.
79 [1993] 1 SLR 512, at p 516C–D.
80 *Rajeevan Edakalavan v PP* [1998] 1 SLR 815; *Sun Hongyu v PP* [2005] 2 SLR 750.
81 Thio Li-ann, 'The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW' in (1997) 1 Sing JICL 248–350.

assumption is that municipal law comports with international legal obligations.[82] While Malaysia has amended its constitution to list 'gender' as one of the prohibited grounds of discrimination,[83] the Singapore government considers that this basis of prohibition is included within the broad scope of the Article 12 equality clause.[84] Unlike Malaysia,[85] CEDAW has not been invoked before a Singapore court although the CRC has, if only to underscore that Singapore laws reflected CRC values.[86] CEDAW has been raised before Parliament in relation to the medical quota for female medical students. However, when finally abolished in 2002, the decision was framed as a change in policy, rather than in terms of vindicating a gender equality claim under Article 12 or CEDAW.[87]

Singapore has deliberately chosen not to ratify the more muscular Optional Protocol to CEDAW, which allows the CEDAW Committee to hear complaints from citizens, presumably because it does not wish to be subject to some form of external quasi-legal control. The official view is that 'the Government ministries, the Courts and ultimately Parliament are well able to investigate complaints of discrimination, provide redress, and ensure a legislative and policy framework that ensures that women enjoy full and equal rights'.[88]

A rights hierarchy? The status of fundamental liberties and non-constitutional rights or public law interests

To reflect the status of Part IV liberties as part of the supreme law, the Constitutional Commission had recommended that Part IV should be subject to the deepest entrenchment by the most onerous amendment

82 Foreign Affairs Minister S Jayakumar noted that CEDAW provisions 'are in accord with existing laws, regulations and policies and I do not see any imminent need to take any further measures'. 65 SPR 18 Jan 1996 col 443, at 444.

83 Malaysia, Combined Initial and Second Periodic Report before the CEDAW Committee, CEDAW/C/MYS/1–2, para 45, p 11.

84 Paras 4.3, 4.11. Initial Report (Singapore) before the CEDAW Committee, CEDAW/C/SGP/1: 'The foundation for the principle of equality for women is entrenched in Article 12 . . .'. Para 4.11 states Article 12 'by virtue of its generality necessarily encompasses the non-discrimination of women'. This view was reiterated in paras 1.1–1.2, Third Periodic Report (Singapore) CEDAW/C/SGP/3.

85 Beatrice Fernandez v Sistem Penerbangan Malaysia [2005] 3 MLJ 681.

86 *CX v CY (minor: custody and access)* [2005] 3 SLR 690: 'This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women's Charter (Cap 353, 1997 Rev Ed) (the Charter) exhorts both parents to make equal co-operative efforts to care and provide for their children. Art 18 of the United Nations Convention of the Rights of the Child 1989, to which Singapore is a signatory, also endorses the view that both parents have common responsibilities for the upbringing and development of their child.', at para 26.

87 75 SPR 1 Oct 2002, col 1098; 75 SPR, 5 Dec 2002, col 1963, at 1969.

88 Minister of State (MCYS) Mrs Yu-Fu Yee Shoon, 83 SPR, 22 May 2007.

procedure suggested, that is, the requirement of a special parliamentary majority and two-thirds of registered voters in a national referendum.[89] Such a procedure would protect a constitutional right against routine legislative abridgement. The latter proposal was not adopted, although Part IV has been slated to fall under the new amendment procedure embodied in Article 5(2A), which was introduced in 1991 but has yet to come into effect, which involves a referenda requirement, subject to a presidential veto.[90] The governing norm embodied in Article 5(2) requires a special two-thirds parliamentary majority to pass a constitutional amendment.

The fundamental status of Part IV liberties is reflected in liberal rules towards standing to bring a legal action in public law. This was adopted in *Colin Chan v MITA,*[91] where a prohibition order issued under the Undesirable Publications Act[92] infringed the Article 15 right to religious liberty by prohibiting the sale and importation of publications by the International Bible Students Association (IBSA), the publishing arm of the Jehovah's Witnesses. This sect was deregistered in 1972 under the *Societies Act*[93] for threatening public welfare through its opposition to compulsory military service. Karthigesu JA rejected the High Court's treatment of standing on a 'private rights model', confining this to the ISBA office bearers whose interests were specifically affected in facing prosecution for possessing banned materials. In recognising the citizen's role in holding public officials accountable, the Court of Appeal adopted a citizen action view of standing in finding they possessed sufficient interest to challenge the legality of the prohibition order. Karthigesu JA declared 'if a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it', even if every other citizens would be affected by said violation. Thus, the basis of standing flowed from Article 15 rather than their status as specially affected ISBA office-holders, as a breach of Article 15 'would affect the citizen *qua* citizen'.[94] This affirmed the importance of constitutional rights and of giving citizens access to a judicial remedy.

There are other public law rights and interests not of a constitutional rank which have received judicial attention such as statutory rights. For example, under the Criminal Law Temporary Provisions Act in 1967, there is a right to strike with 14 days notice, save for the ban on strikes in

89 Wee Report, supra, note 44, at para 81.

90 This new procedure was primarily designed to entrench the novel institution of the elected presidency in 1991 but has not yet been brought into force as the government is still modifying the institution.

91 [1996] 1 SLR 609 at pp 613G–H, 615F–G.

92 Cap 338.

93 Cap 311.

94 [1996] 1 SLR 609, at p 614C–F.

'essential services' i.e. water, gas and electricity.[95] Statute also regulates collective bargaining[96] and provide for the right to appeal to tribunals or to receive compensation for state acquired land.[97] The High Court imported the English notion of residual liberty in *Cheong Seok Leng v PP*[98] in affirming that 'the common law is the basic law of Singapore and is the foundation of its legal system'. Further, 'under our legal system, a person is at liberty to do as he wishes except that which is prohibited by law or which encroaches upon the rights of others'. Singapore courts have found that common law protected interests have not been overridden by constitutional liberties. For example, in *X Pte Ltd v CDE*[99] the High Court held that the common law of confidence and tort of conspiracy to injure were preserved as limits on the free speech guarantee.

In contrast, there have been attempts in England to ground and intensify judicial review over cases involving fundamental rights such as a right to work, on the basis of the gravity of the interest involved. Malaysian courts have followed this in recognising a judicial role to supervise the exercise of powers by non-government bodies with licensing powers, the denial of which could deprive an applicant of his livelihood,[100] which was analogous to the fundamental English common law right of property. Drawing from an English case which lamented the 'serious blot of jurisprudence' caused by the absence of a tort of interference with privacy, which could be remedied by guaranteeing an individual's right to privacy in his home and correspondence, through the then soon to be incorporated ECHR,[101] Lee JC recommended that Singapore recognises a common law tort of harassment, a kind of common law privacy right.

95 'Strike Ban in 3 Jobs' *The Straits Times* (Singapore), 3 Mar 1967, at 4. See Part III (Illegal Strikes and Lock-Outs in Essential Services), Criminal Law Temporary Provisions Act (Cap 67). In 1996, Nominated MP and trade union leader John de Payva asserted that Singapore workers had the right to strike: 'What kind of rights have been denied to our workers? The right to employment, the right to free association, the right to strike – these rights are there for workers to exercise, but our workers have chosen to seek fulfillment through hard work and to settle industrial disputes through negotiation, conciliation or arbitration. So there is no basis for anyone to pass judgment on us where human rights are concerned.' 66 SPR, 28 Oct 1996, at cols 800–1. See Anthony Woodiwiss, 'Singapore and the possibility of enforceable benevolence' in *Globalisation, Human Rights, and Labour Law in Pacific Asia: On the Possibility of Enforceable Benevolence* (Cambridge University Press, 1998), at 216–43.

96 Part III, Industrial Relations Act (Cap 136).

97 Part III, Land Acquisition Act (Cap 152).

98 [1988] SLR 585 paras 57–9.

99 [1992] 2 SLR 996.

100 *Woon Kwok Cheng v Hochstedt* [1997] 2 MLJ 795, at p 802, applying *Nagle v Feilden and Ors* [1966] 1 All ER 689.

101 Lee JC in *Malcolmson Nicholas Hugh Bertram v Naresh Kumar Mehta* [2001] 4 SLR 454, at para 57, citing Millet LJ, *Fine Robert v McLardy Eileen May* [1998] EWCA 3003 (6 July 1998).

Singapore courts have accorded protection to other public law interests like reasonable or legitimate expectations. In *Abdul Nasir bin Amer Hamsah v PP*,[102] the Court of Appeal clarified that 'life imprisonment' under the Penal Code meant the duration of the natural life, despite prevailing executive practice which equated the term with a 20 years tariff. While noting that the issue involved 'the fundamental matter of a person's liberty for the rest of his life',[103] the Court had to decide whether its judicial pronouncement was to operate retrospectively or prospectively, which might disrupt the legitimate expectation of offenders who had arranged their lives according to such expectations. Drawing inspiration from the *nullum crimen nulla poena sine lege*[104] (no crime without the law making it so) principle entrenched in Article 11(1), the Court held that this rationale applied to first time judicial pronouncements and that those who conducted their affairs on the basis of reasonable expectation should not be penalised. It declared it wanted to 'extrapolate and emphasise' that the legitimate expectations principle may sometimes warrant protection even though it was not a legal right.[105] This was based on the 'analogous reasoning'[106] that where a first-time judicial interpretation of a legally prescribed punishment would result 'in an expanded meaning', contrary to legitimate expectation, the judicial pronouncement would operate prospectively to avoid injustice to the accused.

Limits on constitutional rights in the constitutional text

The utility of bills of rights as 'bills of liberties' which define circumstances where the state will not interfere with and will permit 'free, spontaneous individual activity'[107] may be diminished if these are easily subject to amendment, suspension or broadly construed exceptions, the latter being a function of interpretation and textual formulation. Any government commanding a two-thirds parliamentary majority could legally abrogate Part IV, though this may entail political costs.

The constitutional text contains exceptional provisions permitting the restriction of fundamental liberties in the form of 'notwithstanding' clauses in relation to national security-related legislation and by emergency

102 [1997] 3 SLR 643.
103 [1997] 3 SLR 643, at para 56.
104 [1997] 3 SLR 643, at para 51.
105 Ibid., at para 55.
106 Ibid., at para 58.
107 Roscoe Pound, *The Development of Constitutional Guarantees of Liberty*. (Greenwood Publishers, 1957), at p 92.

legislation.[108] By curtailing judicial review,[109]the state is effectively placed above law. This contravenes the rule of law which recognises that 'All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power'.[110] This exception rests on the belief that security issues fell within the executive province. In 1966, JB Jeyaretnam expressed concern before the Wee Commission that preventive detention laws could be misused against persons who were not a security threat but merely a 'political embarrassment'. In addition to proposals to restrict arbitrary arrest, he proposed that a Minister make a referral to a committee of three, comprising a High Court judge, Commissioner of Police and a representative from the security force, before making a detention order. Mr CC Tan rebutted this by commenting that such a set-up would remove from the Minister the responsibility for security matters while leaving him open to blame when things went wrong. Furthermore, he considered it undesirable to bring judges into confrontation with the executive in matters where only one side of the evidence was presented, as in detention cases.[111] This same reasoning about the non-justiciability of security issues pervades contemporary debates; in the case of the ISA, the elected President has since 1991 been positioned as a political check against ministerial discretion,[112] affirming the government view that security matters are political and involve no legal questions, precluding robust judicial supervision. Indeed, the Court noted that the ISA's underlying philosophy was 'prevention is better than cure', being a 'precautionary measure' designed to secure national security. It was 'common sense' that such issues were not amenable to the judicial process such that the 'last word' belonged to those 'responsible for national security'.[113]

Notably, the freedom of religion, unlike other liberties including free speech and equality under the law, cannot be curtailed by both emergency and preventive detention legislation against subversion under Articles 150

108 Robert Alexy 'The Limits of Constitutional Rights' in *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford University Press), at p 178.

109 Judicial review of personal liberty is limited by the terms of Section 8B(2) Internal Security Act (Cap 143) only to 'any question relating to compliance with any procedural requirement of this Act governing such act or decision'. It is ousted under Section 18, *MRHA* (Cap 167A) which potentially infringes Article 15 although notably, no restraining order has ever been issued: 82 SPR, 12 Feb 2007 (MRHA: Number of restraining orders issued).

110 *Chng Suan Tze v MHA* [1988] SLR 132, at p 156B.

111 'Guarantee freedom from arbitrary arrest', *The Straits Times* (Singapore), 10 Mar 1966.

112 Thio Li-ann, 'The Elected President and Legal Control: Quis Custodiet Ipsos Custodes' in *Managing Political Change: The Elected Presidency of Singapore*, Tan and Lam, eds (Routledge, 1997) 100–44 at pp 115, 125–32.

113 *De Souza Kevin Desmond and Ors v Minister of Home Affairs* [1988] SLR 517 at p 524E–F.

and 149 of the Constitution respectively, suggesting the paramountcy of the values it embodies.

Interpreting rights

The judicial protection of rights

Judicial review originated in the higher law idea associated with the Judeo-Christian tradition; this provides a foundational basis for limited government in ascribing final value to the individual given the 'transcendental importance of each man's soul'.[114] Patterson notes that 'only a limited state can be constitutionalised' and that natural law theory deposits final authority in the people. Apart from this principle, 'bills of rights against the state would be mere pretense and utterly without validity'.[115] Prima facie, where rights are given positive expression as justiciable entitlements, this denotes a two-tier shift in power. First, between the state and citizen; second, from the political to judicial branches, from consensus-seeking democratic deliberation to the possible judicialisation of politics through enforcing constitutional rights which may 'trump' policy considerations. This alters the public law landscape. Notably, even with the advent of the HRA, which empowers English courts to declare a law incompatible with an applicable ECHR provision, parliament remains supreme and bears the final responsibility to alter legislation to resolve rights disputes.[116] In the English scheme, 'Judicial rulings present important perspectives rather than final answers'.[117]

It is through the lens of the judicial interpretation of Part IV that one analyses the impact of rights discourse on contemporary public law. However, this presupposes the centrality of courts in handling rights issues. It may be self-evident to scholars well-versed with American constitutionalism that the judiciary should have the final say in adjudicating constitutional rights, applying principles of rationality and proportionality to ascertain the constitutionality of legislation or government action. However, countries lacking a written bill of rights, like Australia and the

114 Carl J Friedrich, *Limited Government: A Comparison* (New Jersey: Prentice Hall, 1974), pp 12–13.

115 C Perry Patterson, 'The Evolution of Constitutionalism' (1948) 32 Minnesota LR 427–57.

116 Given the political costs of abolishing the UK Human Rights Act, Lord Hoffmann noted in *R. v Secy. of State for the Home Department ex p. Simms* (2000) AC 115, at 131, there is no practical difference between how a UK and a constitutional court applies principles of constitutionality. See Lord Woolf, 'Constitutional Protection without a Written Constitution' (2005) 17 S.Ac.LJ 518.

117 Janet L Hiebert, 'Parliament and Rights' in *Protecting Human Rights: Instruments and Institutions*, supra, note 62, 231, at p 240.

UK, have relied on their traditional respect for civil liberties and democratic freedom of citizens. Where Parliament is supreme, faith is reposed in parliamentary representatives to safeguard civil liberties and judicial review confined to administrative action. As Lord Diplock noted, Malaysian and Singapore judges have a larger role to play compared to their British counterparts in protecting fundamental liberties, except where review is limited or ousted by constitutional mandate.[118] In such an event, the decision leaves the realm of law to politics, where the parliamentary executive's decision, subject to other political checks, is final.

The Singapore Constitution does not create any dedicated human rights body, such as the Malaysian National Human Rights Commission.[119] The PCMR is a body with weak powers to make recommendations where legislation potentially discriminates on the basis of race or religion. It is not a general human rights body. Until amendment in 1973, the Presidential Council had the role of drawing attention to legislation which was not only discriminatory but also 'otherwise inconsistent with the fundamental liberties of the subject'. This latter phrase was deleted to allow the restyled Presidential Council for Minority Rights 'to be concerned only with minority rights and not with fundamental liberties'.[120] Parliament still retains a rights-protective role in scrutinising legislation, although this has its limits in a dominant one party state. This is significant given the general attitude of deference judicially accorded to the legislative and executive assessment of how to strike the 'constitutional bargain'[121] between rights and public goods. Indeed, the Court of Appeal has noted that where judicial review does not apply, as to subjectively couched discretionary powers, it is no answer that a minister is accountable to Parliament as an alternative safeguard.[122]

Judicial philosophy and reasoning in rights adjudication

De Smith noted that in the process of constitutional interpretation 'the private philosophies and prejudices of individual judges will inevitably emerge'[123] and this shapes the nature of rights jurisprudence, whether rights are expansively construed and the receptivity to transnational sources as persuasive authorities. In post Independence Singapore, it is fair to say that the 'bogey of government by judges'[124] has never arisen.

118 Lord Diplock, 'Judicial Control of Government' (1979) MLJ cxl at pp cxliv, cxlvi.
119 Human Rights Commission of Malaysia Act 597 of 1999.
120 EW Barker, 32 SPR, 16 Feb 1973 col 405.
121 Lai Kew Chai J in *Lee Kuan Yew* v. *Jeyaretnam* [1990] 3 MLJ 322, at 333C–D noted that the Article 14 free speech clause, which was expressly limited by the law of defamation was 'much like the underlying concepts and constitutional bargain which are expressed by Art 10 of the European Convention on Human Rights'.
122 *Chng Suan Tze v MHA* [1988] SLR 133, at p 156.
123 De Smith, supra, note 25, at p 168.
124 De Smith, ibid.

Particularism and parochialism?

The courts have deliberately crafted a 'local conditions' rationale for rejecting rights-expansive foreign cases, in reading the Constitution 'within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia'.[125] While English cases were formerly cited as persuasive authorities, this declined when English public law jurisprudence began to weigh rights more heavily, owing to the rediscovery of common law constitutionalism[126] or the mounting influence of the unincorporated ECHR on English law.[127] This type of judicial mindset is best captured by Sinnathuray J's reasoning in *AG v Wain*[128] where he stated that the Singapore law of contempt 'is derived from the common law of England before major changes were affected to this law by statute in England'.[129] The Contempt of Court Act 1981 had 'modified' English law 'in a liberal direction'. Sinnathuray J displayed a parochialism in noting that 'the conditions local to Singapore are many and varied', alluding to 'the socio-political and economic conditions of our island nation which is markedly different from many other countries'[130] without elaborating upon them.

Thus, it is not the 'English' root of the decision that he found objectionable, but the fact English law had evolved more 'liberally' to ascribe greater weight to free speech interests in re-calibrating the common law offence of scandalising the court. So too, the Canadian decision of *R v Kopyto*[131] was summarily rejected, with counsel citing it to raise the argument that 'scandalising the court' 'is inconsistent with the written constitutional guarantee of freedom of expression'. Sinnathuray J rejected it because *Kopyto* was 'based on the Canadian Charter of Rights and Freedoms which has no parallel in Singapore.[132] He was content to say that in England where free speech had been 'guaranteed for centuries', the co-existing contempt offence 'is as old as the common law'.[133] This neglects the fact that the offence was developed at a time where there was no constitutional guarantee of free speech and the approach in *Kopyto* to calibrate upwards the value of the free speech guarantee, to recognise its central role in democratic society, could

125 *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355 affirmed in Colin Chan v PP [1994] 3 SLR 662, at p 681D–E.

126 TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1993).

127 Lord Keith of Kinkel, *Derbyshire County Council v Times Newspaper* [1993] AC 534 while noting that the Court of Appeal was influenced by Art 10 of the ECHR said the same result could be found under the common law alone.

128 [1991] SLR 383.

129 Ibid., at 393G.

130 Ibid., at 394B.

131 39 CCC 1.

132 [1991] SLR 383, at p 393G-H.

133 Ibid., at 398B–C.

reasonably have been utilised to give due weight to Article 14 of the Singapore Constitution by redefining the common law offence to meet constitutional standards. This could facilitate cultivating an authentic local understanding of this right. It appears that foreign decisions manifesting a lesser commitment to protecting rights have been selectively invoked to buttress restrictive readings of the free speech guarantee.[134] The relevant 'local condition' seems to oppose a robust reading and calibration upward of constitutional guarantees in adjudicating rights.

The Privy Council was until 8 August 1994 the final court of appeal for civil and criminal cases.[135] The motive behind severing this umbilical cord was that local legal development would be stultified if Singapore continued to rely on the Privy Council which was no longer cognizant of distinct local circumstances. Singapore also needed to develop its own laws in a manner consonant with 'the fundamental values of Singapore society'.[136] Notably, the seminal case of *Chng Suan Tze v MHA,*[137] which drew broadly from Commonwealth and UK precedents in holding that ministerial discretion under the ISA was subject to objective review was legislatively overruled by an amendment to curtail judicial review under the ISA. The Law Minister in justifying this before Parliament stated that the courts were emulating activist English judges who were increasingly influenced by ECHR developments irrelevant to Singapore. If Parliament did not reverse this tide of foreign case influence, Singapore's law on national security matters would be 'governed by cases decided abroad, in countries where conditions are totally different from others', particularly English judicial reasoning affected by the UK's 'entry into the European Community and decisions of the European Court which are factors totally alien to us . . . It will influence the UK judges and those precedents will be then imported into Singapore'.[138] Clearly, this amendment sought to terminate the brief judicial flirtation with foreign decisions oriented towards developing a rights-based jurisprudence.

This seems to have set the tenor for future jurisprudential developments. In 2004, the Court of Appeal declared that 'The common law of Singapore has to be developed by our Judiciary for the common good.'[139]

134 E.g., in relation to political libel, the pre Charter Canadian cases of *Tucker v Douglas* [1950] 2 DLR 827 and *Campbell v Spottiswoode* (1863) 32 LJ QB 185 were approvingly cited in *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310. See Li-ann Thio, 'Beyond the Four Walls in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore' [2005] 18(2) Colum. J. Asian L 428–518.

135 S Jayakumar, 62 SPR, 23 Feb 1994, cols 388–9.

136 Practice Statement (Judicial Precedent), [1994] 2 SLR 689.

137 *Chng Suan Tze v Minister of Home Affairs* [1998] 1 SLR 132; Law Minister S Jayakumar, 52 SPR 25 Jan 1989, cols 463–70.

138 52 SPR, 25 Jan 1989, cols 463ff, at 468.

139 *Nguyen Tuong Van* v *PP* [2005] 1 SLR 103, at p 126.

One might argue that safeguarding the human rights of citizens serves this common good; indeed, the Bangalore Principles[140] assert the existence of universal principles in Commonwealth Constitutions, and consider international human rights law a legitimate interpretive source. Judges seem to be influenced by a 'statist' or 'communitarian' ethos which sets itself against the individualist orientation of human rights-based jurisprudence. While there is nothing amiss in a 'communitarian' philosophy provided this is authentic, the danger is the conflation by the government of the 'community', an organic entity, with the state, which is an imposition on society and 'unless humanized and democratized', relies on sanctions rather than community consensus derived through 'mediation and persuasion'.[141]

The particularist trajectory looks set to continue but the hope is that the former brusque, unsophisticated dismissal of transnational authorities will yield to a more nuanced consideration of such authorities, either as models or anti-models, in developing an autochthonous law which aptly reconciles rights and community goods. As Phang JA put it, the export of English law to many colonies today has to be 'cultivated with an acute awareness of the soil in which it has been transplanted'. This warranted close scrutiny for 'appropriateness' on the basis of 'general persuasiveness insofar as logic and reasoning are concerned'. This would serve the 'ideal' of an 'indigenous legal system sensitive to the needs and mores of the society of which it is a part'. English law should not be 'accepted blindly' nor followed 'where either local conditions and/or reason and logic dictate otherwise'.[142]

Judicial attitudes: Philosophy and posture

The Privy Council in *Ong Ah Chuan v PP*[143] adopted a 'naturalist' approach towards constitutional interpretation, departing from the literal approach after the legal positivist tradition, in declaring extra-textual fundamental principles. It interpreted the meaning of 'law' in the constitution drafted by lawyers steeped in Westminster conventions, not merely as a collection of rules but as connoting 'fundamental rules of natural justice' forming 'part and parcel of the common law of England' operating in Singapore 'at the commencement of the Constitution'.[144] To meet this standard,

140 Concluding statement, Bangalore Principles on the Domestic Application of International Human Right Norms (1988) 14 Commonwealth Law Bulletin 1196.

141 Yash Ghai, 'Asian Perspective on Human Rights' (1993) 23 HKLJ 342, at p 352.

142 *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604, paras 27–8.

143 [1981] 1 MLJ 64; [1980–81] SLR 48.

144 See Andrew Harding, 'Natural Justice and the Constitution' (1981) 23 MLR 226; TKK Iyer, 'Article 9(1) and "Fundamental Principles of Natural Justice" in the Constitution of Singapore' (1981) 23 MLR 213. These principles have not been substantially developed since 1981: Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam*?'[1997] Sing JLS 240.

criminal procedure rules must not be 'obviously unfair'.[145] 'Law' was not to be read literally as duly enacted legislation, regardless of content, otherwise liberties would be 'little better than a mockery'. This concern with the purposes behind the rules is contrary to the amoral conception of judging positivism conceptually allows.[146]

So too, the Court assumed the mantle of guardian of fundamental rights, rather than neutral arbiter, in adopting a 'pro-individual approach' towards fundamental liberties.[147] Lord Diplock approvingly quoted Lord Wilberforce's statement that bills of rights in Westminster-based constitutions should be purposively[148] and generously rather than pedantically construed, to avoid the 'austerity of tabulated legalism',[149] ensuring individuals received the 'full measure' of liberties. Furthermore, derogating clauses warranted narrow interpretation.[150]

In the natural rights tradition, rights have been conceived as fundamental and inalienable, rather than 'licences' or reciprocal privileges which are a function of 'expressions of policy and political will'[151] hinted at in other cases.[152] Karthigesu JA in *Taw Cheng Kong v PP*[153] rejected the view that constitutional rights were 'bargained rights' whose enjoyment was contingent on behaviour, in characterising rights, contained in a supreme constitution, as 'inalienable', something beyond positive law.[154] This high view of humans, in ascribing to them inalienable rights which a person could not divest himself of, even by will,[155] traces its root to the Judeo-Christian

145 *Haw Tua Taw v PP* [1980–81] SLR 73, at p 76F.

146 Frederick Schauer, 'Constitutional Positivism' (1993) 25 Conn. L Rev. 797, at p 802.

147 While the Privy Council did adopt a 'liberal interpretation' of the constitutional provisions involved, it 'did not apply those provisions liberally'. Lester, supra, note 37, at p 543.

148 In Constitutional Reference No 1 of 1995 [1995] 2 SLR 201, the Constitutional Tribunal advocated adopting a purposive approach towards interpreting the Constitution to give effect to parliamentary intention; furthermore, section 9A Interpretation Act (Cap 1) required no ambiguity or inconsistency before resort to contemporaneous speeches and documents was permissible.

149 *Minister of Home Affairs v Fisher* [1980] AC 319, at p 329. Lord Wilberforce stated that Constitutions should be read 'with less rigidity and more generosity than any other Acts'.

150 *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

151 *Taw Cheng Kong v PP* [1998] 1 SLR 943, at p 965D, para 56.

152 *Colin Chan v PP* [1994] 3 SLR 662, at p 684, where Yong CJ appeared to suggest that the enjoyment of constitutional rights was conditioned on the discharge of citizenship duties such as performing military service, contrary to the pacifist beliefs of Jehovah's Witnesses.

153 [1998] 1 SLR 943.

154 This may not flow in the stream of the natural rights theory informing American constitutionalism, i.e. the view that fundamental rights 'antecede the constitution' and the legitimating principle of government is that it secures these rights. Louis Henkin, 'Rights: American and Human' (1979) 79 Colum. L.R 405 at pp 408–9.

155 Henkin, ibid., at p 411.

doctrine of personality. This ascribes value to man who is created in the image of God (*imago dei*). The Kantian categorical imperative of treating man as the end, never the means, is a secularised version of this normative commitment, with "Reason" in the place of God'.[156]

However, the Privy Council recognised that the judicial role did not extend to determining the appropriateness of social policy because in a constitution based on the separation of powers, such questions are 'the function of the legislature to decide, not that of the judiciary'.[157] There was 'nothing unreasonable' in the legislature stipulating more severe sentencing and stronger deterrents for illicit drug dealers at 'the apex of the distributive pyramid'.[158] Speaking extra-judicially, Lord Diplock cautioned judicial modesty, noting that judges were 'not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal'.[159]

The current predominant approach towards constitutional rights adjudication departs from this pro-individual approach. Singapore courts returned to the heights of positivism in a series of cases heard in the 1990s, as manifested in literalist, amoral interpretive approaches. In *Jabar v PP*[160] the Court of Appeal in addressing the question whether the 'death row phenomenon' deprived life in a manner 'not in accordance with law', declared:

> Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.[161]

This envisages an extremely limited role for judicial review in protecting rights, implicitly reposing faith that the people will be able to hold their representatives accountable at elections for bad laws. Judicial review is thus fixated on textual interpretation and ensuring laws are enacted following stipulated procedure, ignoring its substantive content.

While courts should not second-guess the Legislature on questions of controversial social policy, such as by deducing an open-ended 'right of privacy' from the 'penumbra' of existing guarantees,[162] which opens the

156 Raymond Guess, 'Liberalism and its Discontents' (2002) 30 Political Theory 320, at p 329.
157 *Ong Ah Chuan v PP* [1980–81] SLR 48, at p 64G–H.
158 *Ong Ah Chuan*, ibid., at p 65A.
159 Lord Diplock, 'Judicial Control of Government' [1979] 2 MLJ cxl at cxlvii.
160 [1995] 1 SLR 617. See Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam', [1997] SJLS 240–90.
161 [1995] 1 SLR 617, at p 631B.
162 *Griswold v Connecticut* 381 US 479 (1965): see Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990) at pp 101–28.

door to illegitimate social engineering by unelected judges, it is a qualitatively different thing to find ancillary or facilitative rights designed to effectuate the realisation of existing constitutional guarantees. However, even this was eschewed in *Rajeevan Edakalavan v PP*[163] where Yong CJ, following his own decision in *Mazlan bin Maidun v PP*[164] said that reading an 'additional constitutional right' to be informed about the Article 9(3) right to counsel, 'in defiance of' its clear wording 'will be tantamount to judicial legislation' as a judges was 'in no position to expand the scope of or imply into the Constitution . . . his own interpretation of the provisions' contrary to Parliament's intention.[165] He rejected the argument that this would effectively negate the right as the 'practical experiences' of the judicial system indicated such conclusion was 'wholly speculative and unwarranted'. In *Mazlan* the court refused to read into Article 9(1) a right of silence as the privilege against self-incrimination at common law was 'largely evidential' and had never been regarded as 'subsumed under the principles of natural of justice'. To constitutionalise the right to silence would 'elevate an evidential rule to constitutional status', absent any express constitutional provision. This interpretation of Article 9(1) went beyond 'a mere matter of balancing' competing interests in involving an unjustified 'degree of adventurous extrapolation'.[166] Thus, the courts are reluctant to create 'new rights' but more enthusiastic about declaring extra-textual statist principles which confirm rather than restrain state power, as in *Colin Chan v pp*[167] In relation to whether pacifist Jehovah Witness beliefs threatened public order, Yong CJ said:

> any administration which perceives the possibility of trouble over religious beliefs and yet prefers to wait until trouble is just about to break out before taking action must be not only pathetically naïve but also grossly incompetent.[168]

In this sense, the courts seem more protective of executive interests than individual freedoms, manifesting a bureaucratic ethos out of joint with judicial impartiality and rights guardianship. Indeed, Yong CJ in *Rajeevan* went so far as to assert that the issue of whether to broaden the rights of the criminal accused 'should be addressed in the political and legislative arena' as the judicial role was merely to give effect to parliamentary

163 (1998) 1 SLR 815.
164 (1993) 1 SLR 512.
165 (1998) 1 SLR 815, at p 822H.
166 (1993) 1 SLR 512, at p 516C–D.
167 (1994) 3 SLR 662, at p 684F–G.
168 [1994] 3 SLR 662, at p 683D. See Thio Li-ann, 'The Secular Trumps the Sacred: Constitutional Issues Arising out of *Colin Chan* v *PP*' (1995) Sing LR 26.

intention in the Constitution and legislation. In a populist appeal, he stated that the right lay in the people, who freely elected their parliamentarians and entrusted them 'to act fairly, justly and reasonably', to determine whether any enacted law 'goes against the principles of justice or otherwise'. The mechanism was through the blunt instrument of 'the ballot box'. Since the fairness or reasonableness of any law was a 'subjective' matter, the judiciary was not positioned to act as authoritative interpreter, because 'if anybody has the right to decide, it is the people of Singapore'. Since parliamentarians were 'chosen by us' to 'address our concerns' and societal well-being, Parliament was the proper forum for raising 'the sensitive issues surrounding the scope of fundamental liberties'.[169] This envisages a minimalist role for judicial review, if not an abdication of the judicial role in relation to Part IV, reflecting a bent of mind more suited to a constitutional order founded on a supreme Parliament.

However, this is perhaps only a marginal and over-stated judicial opinion. The courts hearing *Nguyen Tuong Van v PP*[170] demonstrated openness towards considering non-textual sources of public law such as customary human rights law. While holding that the prohibition against torture, cruel and inhumane treatment in Article 5 of the UDHR was customary and binding, it held, correctly, that there was still a lack of consensus whether 'death by hanging' fell within its ambit.[171] The Court of Appeal affirmed *Ong Ah Chuan v PP* in stating that the phrase 'in accordance with law' in Article 9(1) 'connotes more than just Parliament-sanctioned legislation'.[172] It found that the mandatory death sentence violated neither the Article 9 due process guarantee nor the Article 12 equality clause, despite having been cited various Privy Council decisions[173] to the contrary. In relation to the legislative classification in the Misuse of Drugs Act[174] whose constitutionality was challenged, the court indicated a willingness to scrutinise the legislative judgment underlying the classification and indicated the types of evidence that would inform such scrutiny.[175]

169 (1998) 1 SLR 815, at p 823D–G.

170 [2005] 1 SLR 103.

171 Li-ann Thio, 'The Death Penalty as Cruel and Inhuman Punishment before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004)', (2004) 4 (2) OUCLJ 213–26.

172 [2005] 1 SLR 103, at p 125, para 82.

173 *Watson v The Queen* [2004] UKPC 34; *Reyes v The Queen*, [2002] 2 AC 235.

174 Cap 185.

175 The appellant had made the bare assertion that it was 'axiomatic' that the 'gravity of the offence could not be gauged by the quantity of the drug alone' but failed to provide material on which to base such a conclusion. Relevant material might include legislative history and debates and possibly sociological data as in the Indian case of *Mithu v State of Punjab* AIR 1983 SC 473: [2005] 1 SLR 103 at pp 123–4.

Nevertheless, such an evaluation is to proceed on the basis of a strong presumption that the impugned law is constitutional[176] and that 'Parliament knows best for its people'.[177]

Parsimony or generosity towards rights: The court as protective guardian or neutral umpire?

It is clear from an examination of case law since 1981 that the Privy Council's admonition in *Ong Ah Chuan* to treat the construction of Part IV liberties as *sui generis* and to construe these generously has not been followed, at least substantially. The 'fundamental rules of natural justice' or standard of constitutional fairness has not spawned a list of substantive due process rights. This may be contrasted with activist Indian jurisprudence where procedural due process has been imported through deliberate judicial interpretation,[178] despite the purposeful omission of a due process clause after the American model, in favour of a narrower formulation that the deprivation of life or liberty had to be 'in accordance with procedure'. The equivalent Singapore clause requires restrictions to be 'in accordance with law', to which fundamental rules of natural justice were found integral.

This parsimony towards fundamental liberties is evident in various respects, not least the nature of the 'balancing' process, the weight accorded to non-constitutional interests or a conception of what the public good requires and the degree of rigour of judicial scrutiny evident from the formulation of tests of review.

Of interpretation and judicial deference: A balancing or categorical approach?

Karthigesu JA in *Taw Cheng Kong v PP* stated that courts had to consider two questions in reading Part IV. First, to ascertain the underlying rationale for placing a right 'on a constitutional pedestal' and second, to determine the scope of the right and requisite level of constitutional protection, which implicates the validity of an impugned statute. Such construction had to consider the entire Constitution to avoid distorting or enhancing a 'particular right to the perversion of the others'.[179] Indeed, qualifications are incorporated into the formulation of Part IV rights, providing that rights are not violated when a government acts pursuant to a public good or

176 *Taw Cheng Kong v PP* [1998] 2 SLR 410, at p 431D.
177 *Taw Cheng Kong*, ibid., at p 435G–H.
178 Lester, supra, note 37 at pp 544–6, discussing *Gopalan v State* 37 AIR (SC) 27 (1950) and *Maneka Gandhi v Union*, 2 SCR 621 (1978).
179 [1998] 1 SLR 943, at p 955F–G.

valuable social objective. This invites a 'balancing' process which lends itself to a pragmatic ethos.[180]

Most judicial decisions start off with the unexceptional statement that rights are not absolute;[181] while noting express constitutional restrictions, the analysis goes no further in discussing how to appropriately balance liberty and public goods. In *Chee Soon Juan v PP*[182] after underscoring the public order qualifications to free speech and assembly clause, Yong CJ stated:

> In any society, democratic or otherwise, freedom of speech is not an absolute right. Broader societal concerns such as public peace and order must be engaged in a balancing exercise with the enjoyment of this personal liberty.[183]

The point is, these broader societal concerns are not engaged with but are treated as conclusive trumps. Yong CJ found the legislature was 'fully within' its Article 14(2)(a) powers in enacting the Public Entertainments and Meetings Act (PEMA)[184] in the interests of public order, under which Chee was denied a licence to hold a political rally. No further enquiry was assayed about whether the PEMA regulatory scheme was valid against substantive criteria such as reasonableness, proportionality or what was 'necessary in a democratic society'. In other words, the legislative assessment of legality in relation to its enactment is deferred to by clear judicial endorsement. This gels with Yong CJ's vision of the People's primary role, through their elected representatives, to determine the scope of fundamental liberties or whether any restrictive law contravenes 'the principles of justice' since he thought courts could not decide 'very subjective' issues of whether a law was fair or reasonable.[185] His vision of democracy is remarkably restrictive, reflected in how he admonished Chee, an opposition politician, for his 'sheer arrogance' and remarkable 'impertinence' in purporting to speak on behalf of Singaporeans, as Chee only expressed his 'personal beliefs',[186] not being an elected MP.

This 'no-balancing' or categorical approach to constitutional construction is also evident in Yong CJ's decision in *Colin Chan v PP*,[187] even though the

180 See T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943.

181 In some cases, this has been a basis for rejecting case law from jurisdictions where a right such as the US First Amendment is framed in absolute terms, giving it a false veneer of indefeasibility: *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310.

182 [2003] 2 SLR 445, at pp 449–540.

183 [2003] 2 SLR 445, at p 450, para 22.

184 Cap 257.

185 *Rajeevan Edakalavan v PP* [1998] 1 SLR 815, at p 823E–G.

186 [2003] 2 SLR 445, at p 451, para 27.

187 [1994] 3 SLR 662.

rhetoric of balancing is invoked insofar as religious freedom was 'not an absolute and unqualified right' and was subject to constitutional limits in Article 15(4). Arguments that Jehovah's Witnesses did not threaten public order by refusing to perform military service were summarily dismissed as their religious beliefs contravened the legislative policy of military service, which Yong CJ idiosyncratically elevated to a 'fundamental tenet in Singapore' such that 'Anything which detracts from this should not and cannot be upheld'.[188] He stated that fundamental liberties which 'tend to run counter' to the 'sovereignty, integrity and unity of Singapore', which he judicially anointed the 'paramount mandate' of the Constitution 'must be restrained'.[189] Thus, the chief question in a 'categorical approach' focuses on questions of purpose, asking whether a legislative restriction serves a legitimate end, rather than evaluating the strength of the relevant state interest.

What is being balanced? Degrees of judicial scrutiny

Balancing refers to theories of constitutional interpretation 'that are based on the identification, valuation and comparison of competing interests'.[190] This turn to realism is a reaction to mechanical jurisprudence. In rejecting deductive logic and favouring an inductive investigation of social interests, it brings 'pragmatic instrumentalism to constitutional doctrine'.[191] The controlling question is how to assign value or 'weight' to the competing interests being balanced, and how to reconcile conflicting claims. Much turns on the contextualised scrutiny of the case facts.

There is a threefold lack of nuance in the weighing of state interests in Singapore case law. First, in failing to differentiate between the strengths of a state interest in formulating tests of review; in other jurisdictions, this has been variously characterised as 'compelling', 'important' or 'mere', with their weight adjusted accordingly. Second, in failing to substantively differentiate between the types of state interests involved, e.g. interests in efficient administration, which might be weighted less as an interest accruing to the government and public interests, such as national security, which benefits the national community. Such a distinction would prevent the conflation of state and society. Third, in calibrating the degree of threat posed to a public good. For example, in *Colin Chan v PP*, any exercise of a right that 'tends to'[192] threaten state stability warranted curtailment; in other jurisdictions, more leeway is accorded to rights through requirements to show a 'clear and present danger' or a 'reasonable foreseeability' test.

188 *Colin Chan v PP* [1994] 3 SLR 662, at p 684F–G.
189 Ibid., at p 684F.
190 Supra, note 180, at p 945.
191 Supra, note 180, at p 962.
192 [1994] 3 SLR 662, at p 684F.

This minimises the over-estimation of speculative risks. The same tendency towards a 'pre-emptive' strike approach towards threats to the public good is also evident in contempt of court laws. Sinnathuray J in *AG v Wain*[193] rejected the English test that the relevant words had to pose a 'real risk of prejudicing the administration of justice', as well as the Canadian formulation of showing a 'real, substantial and immediate'[194] danger, preferring a lesser test of 'inherent tendency'.[195]

The lack of normative theory and the non-identification or under-valuation of relevant interests

The *Wain* formulation signifies an under-valuation of the free speech guarantee, in the absence of attempts to relate permissible restrictions to the role of free speech in a democracy in putting forth opinions about how public institutions function. No attempt was made to articulate a theory of constitutional free speech and only one community interest, the need to protect judicial reputation in the interests of the administration of justice, was identified to the exclusion of the community interest in nurturing or sustaining a democratic society. This is a serious jurisprudential gap.

Furthermore, typical of a pragmatic balancing approach towards construing constitutions, the focus shifts from developing a theory behind a constitutional right, to querying whether a government power was 'reasonably exercised' considering the case circumstances, thus 'de-constitutionalising' the issue by shifting to a enquiry framed by administrative law parameters.[196]

Substantive norms informing the balancing process

While the courts formally acknowledge that democracy is part of the Singapore constitutional order,[197] they have resisted the jurisprudence of Article 10 ECHR and the UK Courts, which requires a three-stage test in ascertaining the legitimacy of restrictions on speech. The restriction must be prescribed by law, serve a legitimate social objective and be 'necessary in a democratic society'. These normative criteria, particularly the latter, enable a Court not to duplicate legislative balancing but to draw on the

193 [1991] SLR 383.

194 Cory JA, *R v Kopyto* 39 CCC (3d) 1, at p 4.

195 [1991] SLR 383, at p 397F–G.

196 See *Chee Siok Chin v MHA*, [2006] 1 SLR 582, at p 618 (discussing the exercise of the exercise of police powers to disperse an assembly).

197 'While it is axiomatic that in every democratic society those who hold office must remain open to criticism, such criticism must be founded on some factual or other legitimate basis.' Rajah J, *Chee Siok Chin v MHA* [2006] 1 SLR 582, at p 632.

idea of rights, principles and even questions of social policy to provide a reasonable understanding of a constitutional or human right.

In relation to the Article 14 free speech, assembly and association clause, the judicial enquiry does not seem to go beyond the first stage of asking whether a restriction is prescribed by law. Courts have not probed further in asking whether the social goals are sufficiently important to warrant outweighing a right or whether there a better way to achieve this legislative objective.[198]

Perhaps judges are merely taking their cue from the restrictive formulation of Article 14, which is inherited from Article 10 of the Malaysian Constitution. Following the 'dignitarian' Continental model of framing rights, this right is subject to in-built express limitations like public morality, health and order. In contrast with the 'individualist' phrasing of freedoms in absolute terms, after the US Constitution model,[199] Article 10 conceives of the individual not as 'autonomous' but 'situated', with responsibilities, within a community.[200] Thus rights need to be reconciled with competing social objectives. However, Parliament enjoys broad latitude as it can pass laws it considers 'necessary or expedient' to the interests stipulated in the derogation clause.

Unlike Article 19 of the Indian Constitution, the original wording of Article 10 of the Malaysian Constitution which allowed Parliament to enact 'reasonable' restrictions on free speech was changed to delete 'reasonable'; this was imported into Singapore. The reason was to prevent challenges against legislation on the basis of reasonableness as Parliament should have the primary role in determining 'what is reasonable under the circumstances' to avoid conflicts with a judicial interpretation and to promote legal certainty.[201] Despite the absence of the term 'reasonableness' in Article 14, the court in *Jeyaretnam JB v PP*[202] considered that a constitutional standard of reasonable restrictions on rights was applicable in the Singapore context, borrowing decisions from India and St Christopher.[203] Thus, if a statutory licensing scheme conferred absolute or untrammeled discretion on the

198 This raise issues as to whether judges are competent to engage in this sort of subjective policy analysis: Hiebert, supra, 117, at p 234.

199 Singapore courts have rejected US free speech jurisprudence, such as in the law of libel, because of the absolutist terminology of the First Amendment which provides 'Congress shall make no law ... abridging the freedom of speech': *see JB Jeyaretnam* v. *Lee Kuan Yew* [1992] 2 SLR 310 at pp 330F–I, 331A.

200 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), at p 227.

201 Note of Dissent, Justice Abdul Hamid, *Federation of Malaya Constitutional Commission 1956–1957 Report*, para 13(ii), Tan and Thio, Appendix A, supra, note 41, at p 983.

202 [1989] SLR 978, at p 989D–E.

203 *Indulal* AIR 1963 G 259; *Arthur Francis* [1973] AC 761.

licensing officer, this arguably violated the Article 14. This rationale can draw from the resources of fundamental common law principles traceable to the seminal *Dr. Bonham's case*[204] where Coke CJ held:

> the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

However, subsequent decisions have not developed a constitutional test of reasonableness and have explicitly rejected a test of proportionality at public law to evaluate the legality of laws infringing rights, such as the reasonableness of criteria governing discretionary powers or whether the adopted measure ensures the minimal rights impairment. These issues came to the fore in *Chee Siok Chin v MHA*[205] which concerned the silent 'peaceful protest' of four political activists outside a government building, holding banners which questioned the financial integrity of certain public institutions. They were charged with public nuisance under the Miscellaneous Offences (Public Order and Nuisance) Act,[206] which purported to uphold 'public order'. What is noteworthy is the judicial posture of deference to Parliament, in relation to rights adjudication, evident in the reasons for rejecting tests of 'reasonable' or 'proportionate' restraints on free speech.

First, Rajah J (as he then was) advocated judicial restraint, strangely drawing inspiration from what he characterised as the 'considerable self-restraint'[207] of Indian judges despite their broader review powers to evaluate the reasonableness of restrictions on speech.[208] While Indian judges applied a two-stage test, Singapore courts effectively applied a one-stage test, as the terms of Article 14 conferred an 'extremely wide discretionary power'[209] on Parliament to enact restrictions where 'necessary or expedient'. The two-stage test was to consider whether a restriction was reasonable and whether it served a specified constitutional purpose.[210] Singapore courts had the 'sole task' of asking whether an impugned law was within a permissible restriction as 'there can be no questioning of whether the legislation is "reasonable" '.[211] The judicial role was limited to finding a nexus, resting

204 (1609) 8 Co Rep 107.
205 [2006] 1 SLR 582.
206 Cap 184.
207 [2006] 1 SLR 582, 601, at para 47.
208 [2006] 1 SLR 582, 601, at para 46. The Indian judiciary is of course well-known for its activism and creativity: see Vijayashri Sripati, 'Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)' (1998) 14 Am. U. Int'l L. Rev. 413.
209 [2006] 1 SLR 582, 602, at para 48.
210 Ibid., p 601, at para 46.
211 Ibid., p 602, at para 48.

on a 'factual basis' between the legislative intent, to which a 'generous and not a pedantic approach'[212] should be applied, and an Article 14(2) ground. This generosity towards construing legislative intent such that the presumption of constitutionality 'will not be lightly displaced' is distinct from the generosity towards construing fundamental rights espoused in *Ong Ah Chuan v pp*

Unsurprisingly, given that the test of proportionality 'is a more exacting requirement than reasonableness',[213] it was rejected as a continental concept imported into English public law by dint of its treaty obligations. Rajah J affirmed this test sometimes requires the court to substitute its judgment for that of the proper authority, espousing a theory of jurisdictional competence based on the separation of powers. He declared that the test was never part of the common law concerning the judicial review of discretionary powers, nor of Singapore law. This resonates with the stance in prior decisions that with respect to the persuasive quality of English public law, only cases decided prior to 'the infiltration of European law into English law' which 'significantly reshaped' English public law[214] by intensifying judicial review were endorsed. The ECHR in requiring restrictions be 'necessary in a democratic society' is more exacting in terms of constraining government power than Article 14 which allows restrictions in the name of expediency and necessity, unallied with an express norm of democracy.

Public law operates on a foundation of general common law principles like rationality, necessity, reasonableness and proportionality; in Singapore, which has a supreme Constitution, there is nothing objectionable in principle to the judiciary developing a constitutional jurisprudence based on these principles, as being inherent in the concept of 'law'. Perhaps this turns on a philosophical choice. If, as Loughlin argues, public law is not an exercise of moral reasoning but one of 'political reasoning driven by prudential considerations'[215] it seems the Singapore judiciary currently deems it imprudent to evolve a more robust approach towards judicial review of legislation, if not administrative action. This attitude evinces a judicial deferentialism in according a broad margin of appreciation to another decision-maker's evaluation of interests.

Second, Rajah J construed the 'public order' clause broadly, noting that the text provided for restrictive laws 'in the interest of' rather than 'the maintenance of' public order.[216] This authorised Parliament to adopt a

212 Ibid., p 602, at para 49: This would entail examining the impugned Act, relevant parliamentary material and contemporary speeches and document: s9A Interpretation Act (Cap 1).

213 [2006] 1 SLR 582, p 602, at para 87.

214 Ibid., pp 590–1, at para 5.

215 Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003), at p 163.

216 [2006] 1 SLR 582, p 603, at para 50.

'prophylactic' or preventive approach rather than requiring it to tailor restrictive legislation to immediate or direct threats.

Rights or goods as trumps? The valorisation of public order

While casting the tension between liberty and security as entailing a 'delicate balancing exercise' between rights and 'societal values, pluralism, prevailing social and economic considerations' and the 'common good of the community',[217] the analysis in *Chee Siok Chin v MHA* was superficial in not going beyond the assertion that individual rights are not absolute or unfettered. What was clearly and correctly rejected was a 'balance' which resonated with 'a society premised on individualism and self-interest', as 'the antithesis of the rule of law'.[218]

However, in balancing the free speech against competing interests, greater if not presumptive weight was accorded the latter, such that rights were not treated as Dworkinian trumps bearing determinative weight against community or non-constitutional interests. The public good involved was that of public order while the non-constitutional interests was apparently the reputation of public institutions which is also prioritised over free speech in the law on contempt of court and political libel.[219] Here, the statutory public nuisance offence involved an attempt to 'scandalize the institutions and their management by association'.[220] One might even read the reasoning as the judicial creation of a new common law offence of scandalising public institutions, with Rajah J disavowing the existence of an 'open-ended' right of free speech which would 'undermine the very existence of public governance which in turn depends on public confidence in institutional integrity'.[221] In articulating the rationale for the primacy of this institutional reputation, he related this to the 'singularly stable and upright stature' marking Singapore's domestic and international identity, such that undermining confidence in them *sans* justification could not be a 'peaceful protest'.[222] Article 14 rights had to be 'exercised responsibly and within the confines of the law', noting that through legislation, Parliament had ascribed 'a premium on public order, accountability and personal responsibility'.[223] While acknowledging that public office-holders 'in every democratic society' must be open to criticism, this had to be based on 'some factual or other

217 Ibid., p 604, at para 52.
218 Ibid.
219 *JB Jeyaretnam v Lee Kuan Yew* [1992] 2 SLR 310; *AG v Wain* [1991] SLR 383; see Li-ann Thio, supra, note 134 at pp 464–75.
220 [2006] 1 SLR 582, p 626, at para 121.
221 Ibid., p 631, at para 131.
222 Ibid., p 631, at para 133
223 Ibid., p 631, at para 135.

legitimate basis' as disseminating false or inaccurate information 'can harm and threaten public order'.[224] The court thus confined the scope of free speech by valorising public order, broadly defined, and emphasising the need for responsibility. It apparently elevated non-constitutional interests over Article 14, such as the 'general right to be protected from insults, abuse or harassment' as 'Contempt for the rights of others constitutes the foundation for public nuisance.'[225]

Thus, rights are not 'trumps' but defeasible interests; the danger is that in the balancing process, a constitutional right is treated as a mere interest which can be overcome by other non-constitutional interests, leaving a right devoid of meaningful content and ineffective in restraining state power. Furthermore, there is no 'reconciliation' after the German principle of 'practical concordance' that informs proportionality review,[226] which tries to optimise conflicting interests in seeking to 'maximise all of the interests at stake in a case'[227] so as to preserve constitutional values and rights to the extent possible. That is, constitutional doctrine is calibrated according to the relative weight of the interests involved; no interest is overridden as all are accorded due recognition. Instead, a 'winner takes all' mentality is evident with public interests rather than rights being the trump. In other words, in a reversal of the 'pro-individual' interpretive method espoused in *Ong Ah Chuan*, there is a stream of interpretation whose bias is towards the communitarian where the Constitution is interpreted generously in favour of a state interest.

Towards a richer vision of public goods

As courts make judgment calls in deciding which interests are relevant, in characterising and weighing them, the question arises whether the courts consider the full inventory of interests and whether the weight ascribed to an interest is argued for, rather than merely asserted. Notably, balancing tends to pit individual rights against state interests, although liberties can have both a private and public dimension, for example, the individual's interest in communicating and the social interest in the plurality of ideas. This can be obscured, as in cases where free speech is restricted to protect the reputation of public persons and public institutions in political libel and contempt of court cases. The value of free speech in nurturing a democratic society is a community value rather than simply an individual

224 Ibid., p 631, at para 136.
225 Ibid., p 632, at para 136.
226 Robert Alexy, 'Balancing, constitutional review and representation' (2005) 3(4) ICON 572–81.
227 David Beatty, 'The Forms and Limits of Constitutional Interpretation' (2001) 49 Am J. Comp. L 79–120.

one and limiting free speech may thus harm a communitarian democracy. Community interests ought to be reconceptualised more broadly in favour of a priority towards promoting democracy.

So too, 'public order', which has been distinguished from the more localised conception of 'law and order' under ordinary circumstances, should be conceived more broadly than merely securing 'the tranquility and security which every person feels under the protection of the law'.[228] Public order would be imperiled by threats to human life and safety, including public health. It tends to be set in opposition to a right. However, a richer vision of public order as a constitutional norm should be evolved beyond preventing public disorder, drawing from the broader idea of *ordre public*. For example, borrowing from the Siracusa Principles[229] concerning the limits of derogating from rights, public order (*ordre public*) as used in the 1966 International Covenant on Civil and Political Rights constituted 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order *ordre public*'. Thus, it formed the basis for restricting certain rights to ensure the 'adequate functioning of the public institutions necessary to the collectivity'. To resolve its tensions, courts must be cognisant of the 'basic needs of the social organisation and a sense of its civilised values'.[230] This will promote the optimisation of all relevant interests in rights adjudication.

Limiting limits: Limits on constitutional limits

Rights can be limited by norms with constitutional status such as 'public order' or non-constitutional norms Parliament creates. The issue is to what extent can rights be limited, to the point of abrogation?

For rights to be taken seriously rather than treated as licences, a theory on the limits of constitutional limits or permissible rights restrictions is needed. This would speak to the type of public goals which can override rights for compelling reasons, or where limiting rights is for the purpose of preserving the constitutional framework, such as emergency legislation.[231]

228 Abdoolcader J, *Re Tan Boon Liat* [1976] 2 MLJ 83.

229 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), para 22.

230 Alexandre Kiss, Ch 12, Permissible Limitations on Rights' in Louis Henkin (ed.): *The International Bill of Rights* (Columbia University Press 1981) 290, at 302. See *Leung Kwok Hung v HKSAR*, Final Appeal Nos. 1 and 2 of 2005 (Criminal), paras 68–74.

231 See Alan Brudner, 'Guilt under the Charter: The Lure of Parliamentary Supremacy' (1998) 40 Criminal Law Quarterly 287.

For example, section 29 of the now defunct 1997 Thai Constitution[232] prohibits restrictive laws from depriving a right of its 'essential substance', that is, the reason for restriction must be consistent with the rationale of the right. This suggests there is some kind of inalienable core to a right which limits constitutional limits on rights.

At present, such a theory appears absent from Singapore rights adjudication jurisprudence and its balancing methodology. Aleinikoff notes that 'balancing' is a 'revolt against theory'[233] and undermines constitutional law as an interpretive enterprise drawing from text, precedents and ethical traditions. It shifts the matter from constitutional judgment to the reasonableness of government conduct and what constitutes good social policy, away from evolving a theory of rights and their limits.[234] This phenomenon is generally apparent in Singapore public law decisions. Given that rights, as part of the fundamental law, do not enjoy the status as trumps, this affects constitutional supremacy.

Conclusion

The adoption of a bill of rights as an important statement of justice-based values embodies a 'positivisation' of basic citizen rights which can potentially 'reconfigure the architecture of public law';[235] a bill of rights serves as an 'invisible fence' around individuals and courts are to map out the parameters piece by piece.[236] However, an exemplary constitutional list of rights does not *per se* guarantee fundamental liberties will be secured against state encroachment.[237] What is needed is a supportive legal-politico culture respectful of the rule of law and democratic constitutionalism, and an independent judiciary protective of citizen rights. As Wade noted, to exempt public authority from the jurisdiction of the court is 'to grant dictatorial power'.[238] Judicial review in Singapore has been truncated in

232 Vitit Muntarbhorn, 'Rule of Law and aspects of Human Rights in Thailand' in *Asian discourses of rule of law: theories and implementation of rule of law in twelve Asian countries, France and the US*, Randall Peerenbom ed (RoutledgeCurzon 2004) 346–70, at p 352 ('The restriction of such rights and liberties as recognized by the Constitution shall not be imposed on a person except by virtue of provisions of the law specifically enacted for the purpose determined by this Constitution and only to the extent of necessity and provided that it shall not affect the essential substance of such rights and liberties.')

233 Aleinikoff, supra, note 180, at p 989.

234 Ibid., at pp 989–90.

235 Loughlin, supra, note 215, at p 114.

236 Sydney Kentridge: 'Parliamentary Supremacy and the Judiciary under a Bill of Rights: Some Lessons from the Commonwealth' (1997) Public Law 96

237 See R Hughes and C Laksman, 'Fiji Islands: Failure of Constitutionalism?' (2001) 32 Victoria University of Wellington Law Review 915

238 HWR Wade *Constitutional Fundamentals* (Stevens and Son 1980), at p 66.

relation to security and religious harmony issues. This raises questions of institutional competence as well as the efficacy of substitute institutions, like the elected presidency, in protecting rights. The absence of specific rights-oriented institutions may indicate the low prioritisation of rights as a component of human welfare.

Central too is the interpretive method adopted by courts where seised of a case and the government's willingness to abide by judicial decisions, in allegiance to constitutionalism. While bills of rights have the capacity to deepen existing respect for human rights within a political community and to cultivate a rights-based approach towards social policy, Part IV has played only a marginal role in shaping state-society relations, producing no vibrant rights consciousness. It has not been a fruitful source of litigation, nor does it frame popular political activity where the preference is for informal petitionary methods of engagement with the state or mediating conflicts. For example, while ready to adhere to any judicial decision concerning the *tudung* controversy where an educational policy on uniforms restricted religious practices, the government voiced its preference for a non-legal solution such as dialogue.[239]

Staying aloof of foreign trends, there has been no attempts in the past 40 years to constitutionalise socio-economic rights or minority rights, though individual rights have been restrictively read to protect minority concerns. For example, the court demonstrated the same sensitivity the government possesses towards fears of the disruption of racial harmony. In *PP v Benjamin Koh Song Huat*,[240] custodial sentences were imposed pursuant to section 4(1)(a) of the Sedition Act,[241] for posting racist blogs. This Act limits free speech in defining a 'seditious tendency' as one which promotes feelings of ill-will and hostility between different races. Richard Magnus SDJ noted the sensitive nature of race and religion and how callous remarks in this respect had 'the potential to cause social disorder'. The right to propagate opinions on the internet was not unfettered and free expression had to be balanced 'by the right of another's freedom from offence' and other 'wider public interests considerations' such as harming the social fabric.[242]

Rights have given way to state-defined concerns associated with economic development and more recently, 'communitarian' cultural values which prioritise social harmony over contentious politics. This quenches the fire of 'rights talks' characteristic of Western liberal jurisdictions, impelled by

239 'Muslims urged to discuss tudung issue: Legal action is not the way to resolve matter', *Straits Times*, 28 Jan 2002; 'PM Firm on Tudung Issue' *The Straits Times* (Singapore) 3 Feb 2002, at p 1; see Thio Li-ann, supra, note 69 at pp 355–66.

240 Judgment of 7 Oct 2005, District Court (DAC 39443/2005).

241 Cap 290.

242 Supra, note 241, paras 7–8.

a more individualistic conception of state and society which emphasises the need to limit government authority by rights.

A culture of liberty transcends paper rights and within a developmentalist state, the vices of a justiciable bill of rights take centre stage as 'they induced uncertainty, gave an unfair advantage to the wealthy litigant, and sometimes held up indefinitely the implementation of beneficial schemes'.[243] For this reason, property rights were deliberately omitted from Part IV. Because of these statist priorities, the judicial enforcement of rights has had no major impact on the broader political culture. As de Smith noted of states in 'authoritarian climates', justiciable constitutional rights were only accepted 'insofar as they operate in non-political zones of conduct'.[244] Thus, the right of political speech has also been restrictively construed in defamation and contempt of court cases, to service political stability as being integral to economic vibrancy. Where rights-expansive foreign cases are cited in Singapore courts, these are engaged with but usually rejected as anti-models, in buttressing public order concerns.[245] The potential role of courts, which possess neither sword nor purse, in injecting rationality into decision-making through the adjudicatory process, is muted by deferentialism towards Parliament and the parliamentary executive. This judicial posture has predominated ever since the government legislatively overruled a Court of Appeal decision which found an ISA detention order invalid in 1989.[246] Since then, there has been a clear shift towards cultivating an indigenised approach towards constitutional adjudication which is broadly positivist, construes public order expansively and has been parsimonious towards individual liberties.

While the American-styled model of judicial review aims to weaken the efficiency of the legislative and executive government branches, the British model views a supreme Parliament as the primary protector of civil rights. While Singapore courts possess the same powers as the American courts based on 'the principle of parliamentary subjection to the great constitutional principles and for judicial review'[247] the dominant mindset evident in Singapore public law cases is largely English and pragmatic. While the legislature or cabinet is formally under judicial supervision, rights are not 'trumps' in the adjudicatory process but are often trumped by public goods, as an apparent expression of the communitarian culture; the

243 President Ayub Khan speaking of the 1962 Pakistan Constitution, *The Constitution: The President Addresses the Nation* (1962) at pp 8–9, cited in de Smith, supra, note 25, at p 214.

244 De Smith, supra, note 25, at p 213.

245 See Li-ann Thio, supra, note 134, at p 486.

246 *Chng Suan Tze v MHA* [1988] SLR 133.

247 RC Van Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press 1987), at p 29.

government is *de facto* treated as the authoritative interpreter of the Constitution. While courts as forums of principle are concerned with legal considerations like prioritising rights and applying tests of rationality and proportionality to restrictive laws and measures,[248] Parliament is a site of politics where accommodation, mediation and practicality are the *modus operandi*.[249]

Thus, Part IV has not generated a shift from a rules-based to a rights-based conception of law, a shift of rights disputes from Parliament to Court, from Will to Reason;[250] the legitimating basis of law resides in representative democracy and economic performance, rather than on rights and appeals to individual autonomy. Parliament as a rights protector is a blunt tool for various reasons, not least because Singapore is a dominant one-party state where the Cabinet controls 82 of 84 elected seats. Furthermore, the working methods do not lend themselves to regularised oversight. Parliament, faced with accommodating divergent perspectives, may consider rights as a relevant but not the sole factor in making decisions; it operates through consensus and compromise and often resolves disputes by reference to majority will, not rights.[251]

In the final analysis, constitutions, including their bills of rights, are only 'pieces of paper' absent 'popular acceptance and support', not being 'self-enforcing through logical or legal exercises'.[252] The Singapore Constitution has a bill of rights but lacking a supportive rights culture, rights are relegated to the periphery in terms of the forces that shape social reform.

248 Loughlin notes that this process involves prudence and politics as well: supra, note 215, at p 130.

249 Mark Tushnet, 'Non Judicial Review' in *Protecting Human Rights: Instruments and Institutions*, supra, note 62 at pp 213–29.

250 Loughlin, supra, note 215, at p 128.

251 Hiebert, supra, note 117 at pp 236–7.

252 Donald S Lutz, 'Thinking about Constitutionalism at the Start of the Twenty-First Century', (2000) 30(4) Publius 115–35, at p 125.

7 The protection of minorities and the Constitution

A judicious balance?*

Jaclyn Ling-Chien Neo

Introduction: minorities within a plural society

From the outset of independence, Singapore has had to deal with the problem of placating the Malay minority and accommodating their interests within the Chinese-majority[1] state.[2] The Malays are not the only large minority group in Singapore; the Indian minority group (7.9 per cent of the population) is only slightly smaller than the Malay minority (13.9 per cent).[3] However, the Malay minority receive the most attention because they are constitutionally recognised as the indigenous people of Singapore. The efforts directed at securing the interests of the Malay community also stem from pragmatic reasons; the Malays were in the majority until Singapore seceded peacefully from the Federation of Malaysia in 1965. This change in status naturally gave rise to anxieties that they would be marginalised in a Chinese-dominant Singapore, especially since a major reason for Singapore's departure from the Federation was to prevent an escalation of antagonism between the Chinese and Malay groups. Matters are further complicated by Malaysia's kin-state interests in their co-nationals

* Extract from speech by Wan Hussin bin Hj Zoohri: *Singapore Parliamentary Debates Official Reports* [hereafter 'SPR'] (Parliamentary Elections (Amendment) Bill), Vol. 50, 11 Jan 1988, at col 247.

1 According to the 2000 population census, the Chinese majority comprises 76.8 per cent of the population. See Singapore Census of Population 2000, http://www.singstat.gov.sg/stats/themes/people/indicators.pdf (date accessed: 21 Sept 2007).

2 Guaranteeing minority protection so as to placate minorities and manage their expectations is not a novel idea. The system of minority protection as devised by the League of Nations can be seen as an attempt to reconcile certain minorities with the fact that their claim to self-determination was not satisfied: Kristin Henrard, *Devising an Adequate System of Minority Protection,* (Hague, Boston, London: Martinus Nijhoff Publishers, 2000), at p 4.

3 See Singapore Census of Population 2000, http://www.singstat.gov.sg/stats/themes/people/indicators.pdf (date accessed: 21 Sept 2007).

and co-religionists in Singapore, as this can precipitate inter-state friction.[4] As in Malaysia, almost all Singaporean Malays are Muslims.

Considering these circumstances, some form of minority protection is necessary in Singapore. However, a strictly legal approach was not considered adequate since the pragmatic goal of minority protection is to ensure political stability and public order, conditions that the government view as necessary for economic development.[5] The concern is that a legal approach may undervalue non-legal considerations such as competing state objectives and social good; for example, it may not recognise or give sufficient regard to situations where national goals are better served by denying or minimising protection for the minorities. This often occurs where there is a need to maintain good relations between racial and religious majority and minority groups. Inter-racial and inter-religious relations are considered fragile and in need of constant management.

Consequently, incorporated into Singapore's system of minority protection is an approach which may be described as 'political management', where the government judiciously balances majority and minority interests in a manner that is seen to be fair and just to the electorate.[7] The 'judicious balancing' approach is grounded upon Singapore's pragmatic and paranoid[6] mode of governance, where nothing is left to chance. This approach does not detract from, but builds upon, the first common principle of minority protection, which is the principle of equality or prohibition of discrimination on stipulated grounds. Article 12 of the Constitution of the Republic of Singapore (the Constitution) guarantees equality to all persons. This principle of non-discrimination permeates governmental policies, where meritocracy

4 Thio Li-ann, 'Recent Constitutional Development of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' [2002] Sing JLS 328, at p 340.

5 Notably, the preamble to the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* [hereafter '*Minorities Declaration*'] considers that 'the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live': G.A. res. 47/135, 47 UN GAOR Supp (No. 49), at 210, UN Doc. A/47/49 (1992).

6 'Singapore's situation is totally different. We are a tiny, multiracial, multi-religious, one little red dot out of so many little dots in the middle of South-east Asia, lack land, lack air space, lack sea space, lack water, sometimes, also run short of sand and granite, operating in a fast changing competitive global environment against very powerful competitors. . . . Our model is 'paranoid' government – a Government which worries all the time, which plays a crucial role in this system. It is proactive and looks ahead over the horizon.': Prime Minister Lee Hsien Loong, Speech, Parliamentary Debate on Civil Service Salary Revisions, 11 Apr 2007, available at http://stars.nhb.gov.sg (date accessed: 5 June 2007).

7 Wan Hussin bin Hj Zoohri: 50 SPR (Parliamentary Elections (Amendment) Bill), 11 Jan 1988, at col 247: with specific reference to Art 152(2). Although this approach was enunciated in particular relation to the Malay minority, it is instructive as a general attitude adopted in the management of majority-minority relations.

is the governing philosophy. Under a meritocratic system, all persons enjoy equal opportunity to compete. A person's advancement depends on his ability, performance and contributions rather than on his race or religion. Policies are not designed to achieve equality of result.

The Constitution also contains elements of the second common principle in minority protection, which is the incorporation of measures designed to protect and promote the separate identity of minority groups.[8] Article 152(1) of the Constitution recognises the distinct identity and specific concerns of racial and religious minorities in providing that it is the government's responsibility to care for their interests. Article 152(2) further provides that the government 'shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore' and it has the responsibility 'to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language'.

The first principle in minority protection guarantees formal equality while the second principle is geared towards achieving substantive equality.[9] The main distinction between the Singaporean system and a full fledged minority protection system is the scope of the second principle to protect and promote the separate identity of minority groups. There are no group rights in the Constitution. The Wee Chong Jin Constitutional Commission,[10] tasked to deliberate upon and make recommendations on the question of minority rights in 1965, took the position that ensuring equal rights for all individuals and citizens would be the primary safeguard for protecting the interests of racial, linguistic and religious minorities.[11] In fact, the notion of special minority rights was abjured as unequal and undemocratic. This was in all likelihood a reaction against the Malaysian approach of entrenching special rights for the Malay majority through Article 153 of the Federal Constitution. Article 153 entrenches a quota system whereby business licences, civil service positions and university places are reserved for the indigenous Malays and natives of Sabah and Sarawak (collectively called the *bumiputra*). Notably, Article 152 of the Constitution, is often

8 The two principles were identified by the Permanent Court of International Justice in *Minority Schools in Albania* (Advisory Opinion No. 26), PCIJ, Ser. A./B., No. 64, 1935, available at http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania/ (date accessed: 21 Sept 2007); see also Henrard, supra, note 2, at p 8.

9 Henrard, supra, note 2, at p 9.

10 Named after the Chairman of the Commission, Wee Chong Jin, who was Singapore's first Chief Justice.

11 Report of the Constitutional Commission 1966 [hereafter 'Wee Report'], at para 11, in Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 2nd edn, (Singapore, Malaysia, Hong Kong: Butterworths, 1997), at p 1021 [hereafter, 'Tan and Thio'].

understood by way of contrast to the quota system entrenched by Article 153 of the Federal Constitution.

The judicious balancing of majority-minority relations is achieved through a variety of formal institutions, policies and programmes as well as informal norms and methods. The government is the key actor. The judiciary in Singapore plays a secondary role in protecting the rights of minorities, despite possessing judicial review powers to enforce constitutional liberties. Furthermore, although the problem of precisely defining 'minority' has long preoccupied the international community, minimal attention has been given to this issue in Singapore. This again means a smaller role for the judiciary since definitional issues, a legal problem, have not been raised in a constitutional case. It is noteworthy that to date, no racial minority has brought an action based on a claim for the rights of minorities as a collectivity or group.[12]

It should be further noted that the prevailing philosophy towards managing pluralism in Singapore is largely integrationist. The methodology adopted is based on a common and separate/private domain model, termed the 'mosaic model'. This lies between a 'melting pot' assimilationist model and a separationist 'salad bowl' (where cultural differences are celebrated separately) both of which have been rejected.[13] The idea is that the different communities in Singapore are mosaic pieces forming 'a harmonious whole, with each piece retaining its own colour and vibrancy'.[14] This departs from earlier state ideology which had assimilationist tendencies. The great hope was that education would eradicate the majority-minority racial divide entirely and that political and civic loyalties would supplant racial and religious allegiances.[15]

The shift to an integrationist ideology shows an appreciation that racial divides cannot be removed totally. The experience of many countries, not just Singapore, has been that suppressing tribal feelings only tends to intensify these feelings.[16] Integration differs from assimilation in that while

12 The scope of Art 152, which is the only constitutional provision directly addressing minority groups, was marginally considered in one case involving a religious minority in Singapore – *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 3 SLR 644.

13 'Soul-searching on cultural diversity', Extract of speech by Dr Yaacob Ibrahim, *The Straits Times* (Singapore) 10 Aug 2003, available at http://www.lexis.com (date accessed: 5 June 2007).

14 'Media's role in sealing social unity', *The Straits Times* (Singapore), 7 Sept 1998, at p 1.

15 Prime Minister Lee Kuan Yew, 25 SPR (Report of Constitutional Commission 1966), 15 Mar 1967 at cols 1284–5 and 1299.

16 'Principles that guide inter-tribal ties in S'pore: Excerpts from speech by Minister George Yeo, Africa Leadership Forum', *The Straits Times* (Singapore), 12 Nov 1993, at p 35.

it develops and maintains a common domain where equal treatment and a common rule of law prevails, it also allows pluralism, which assimilationist policy does not contemplate.[17] While the assimilationist ideology tends to ignore race or ethnicity as being irrelevant, integrationist ideology opens the way for race and/or religion to be taken into account in the construction of institutions and policies. The most significant constitutional arrangement in Singapore designed with a view to ensure multiracial pluralism is the Group Representative Constituency (GRC) scheme, which altered the electoral system when it was introduced in 1988.

This chapter examines the background, underlying political philosophy and impetus for Singapore's 'judicious balancing' model of ethnic management. It critically examines the methods used to achieve a judicious balance between majority and minority interests in Singapore, through law, policy and other informal methods. This is set in the context of Singapore's human rights culture, where the government tends to disfavour rights litigation, preferring unwritten rules of governance rather than institutionalised monitoring processes, and informal modes of conflict resolution.

A legal framework for minority protection

The Constitution sets out a fourfold framework for Singapore's minority protection system. These are individual rights, recognition of the special interests of minorities, institutional protection and regulation. The first element adheres to the first principle of minority protection, the principle of non-discrimination. The remaining three elements contribute to the second common principle in minority protection, i.e. they are measures designed to protect and promote the separate identity of minority groups.

Individual rights and the first principle of non-discrimination

As stated above, the first principle in Singapore's minority protection system is the principle of equality or non-discrimination. Members of racial and religious minority groups are protected against discriminatory treatment, within the framework of individual rights and freedoms.[18] The Wee Commission considered that, 'the best and most appropriate way of safeguarding the rights of the racial, linguistic and religious minorities in the Republic would be specially to entrench in the Constitution the fundamental

17 Asbjørn Eide, 'Commentary to the United Nations' 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities', at para 22: available at http://www.unhchr.ch/html/racism/minor2.doc (date accessed: 25 Oct 2007).

18 Will Kymlicka, *The Rights of Minority Cultures,* (New York: Oxford University Press, 1995*), at p 9*.

rights of both the individual and the citizen (which would include prohibition against discriminatory treatment on the ground only of race, descent, place of origin or religion)'.[19] The assumption is that if a person's fundamental rights as an individual and as a citizen (if he is one) are constitutionally entrenched and judicially enforceable, then that person's rights as a member of a racial, linguistic or religious minority would be adequately safeguarded.

Part IV of the Constitution guarantees various fundamental liberties to individuals. Most notably, Article 12(1) guarantees that all persons are 'equal before the law and entitled to the equal protection of the law'. Specifically, Article 12(2) prohibits discrimination against citizens only on ground of 'religion, race, descent or place of birth' in any law, public office or employment, property laws or in trade, business, profession, vocation or employment. Similarly, Article 16(1) prohibits discrimination on grounds only of religion, race, descent or place of birth in respect of public education. It is not clear whether Articles 12(2) and 16(1) as drafted would require discrimination to be exclusively based on one of the enumerated grounds, or whether it prohibits discrimination on other contributory or cumulative grounds. This has never been addressed in any case. It would however be perverse if discrimination on the basis of, for example, race alone is prohibited while discrimination on the basis of race and religion would not. Indeed, such a position should be strenuously rejected.

The Constitution does not grant justiciable rights to minority groups. Minority groups cannot claim special rights over and beyond what Part IV provides. The Wee Commission expressly rejected preferential treatment for minority groups in matters of education stating that that 'no group (whether majority or minority) has a fundamental right to have its members educated or instructed out of public funds in the language or the religion of that group'.[20] The Commission considered it unnecessary to retain a provision in the Malaysian Federal Constitution which enabled the enactment of valid laws providing for special financial aid for the maintenance of Muslim institutions or the instruction in the Muslim religion of persons professing that religion.[21]

Furthermore, minority groups cannot claim expansive interpretations of Part IV individual rights which take into account their minority status. This appears to be the consequence of the case of *Chan Hiang Leng Colin v Minister for Information and the Arts*.[22] *Chan* was one of a series of cases in the mid-1990s involving the Jehovah's Witnesses, a religious minority

19 Wee Report, at para 11, in Tan and Thio, supra, note 11, at p 1021; see Arts 12 and 16 of the Constitution.

20 Wee Report, at para 24, in Tan and Thio, ibid., at p 1023.

21 Wee Report, at para 39, in Tan and Thio, ibid., at p 1025.

22 [1995] 3 SLR 644.

23 There may have been other cases but *Chan* is the only reported case which refers to Art 152(1) of the Constitution directly.

in Singapore. In these cases, the Jehovah's Witnesses challenged their deregistration as a society,[24] the banning of all materials published by their publishing arm (the International Bible Students Association),[25] as violating Article 15 of the Constitution. They also relied on Article 15 in asserting their religious freedom not to bear arms,[26] sing the National Anthem or recite the national pledge.[27] This provides that all persons have the right to profess and practise their religion and to propagate it. They failed on all actions.

The Jehovah's Witnesses are the only group which, as a religious minority, invoked Article 152(1) in court.[23] In *Chan,* the plaintiffs invoked their minority status and the special recognition given to religious minorities pursuant to Article 152 in seeking to persuade the court to give a liberal interpretation to Article 15 of the Constitution in their favour. The High Court rejected their contentions, holding that a banned organisation could not lay claim to being one of the 'religious minorities' which the government had to care for. The Court of Appeal did not address this aspect of the High Court's judgment.

Constitutional recognition of minority interests

In addition to fundamental rights, the Constitution recognises the interests of racial and religious minorities and creates institutions to protect such interests as well as guarantees some measure of religious autonomy. Although these measures were initially considered secondary to the principle of non-discrimination and equal fundamental rights in protecting minorities, they have become more important in the later half of Singapore's 40 years of independence. This largely follows developments in international law.

Despite the post World War Two optimism that universal human rights on a non-discriminatory basis would be adequate protection for minorities,[28]

24 The constitutionality of the deregistration was also raised in criminal proceedings where Jehovah's Witness members were prosecuted for being members of an unlawful society in *Kok Hoong Tan Dennis and Others v Public Prosecutor* [1997] 1 SLR 123, *Chan Cheow Khiang v Public Prosecutor* [1996] 3 SLR 271, and *Lim Hon Fong and Ors v Public Prosecutor* [1995] SGHC 192.

25 *Chan Hiang Leng Colin and Others v Minister for Information and the Arts* [1995] 3 SLR 644, appeal dismissed in *Chan Hiang Leng Colin and Others v Minister for Information and the Arts* [1996] 1 SLR 609; the constitutionality of the publication ban was also raised when Jehovah's Witness members were prosecuted for being in possession of banned materials in *Chan Hiang Leng Colin and Others v Public Prosecutor* [1994] 3 SLR 662, *Liong Kok Keng v Public Prosecutor* [1996] 3 SLR 263, *Ang Cheng Hai v Public Prosecutor* [1995] SGHC 97.

26 *Pte Chai Tshun Chieh v Chief Military Prosecutor* [1998] SGMCA 3.

27 *Peter William Nappali v Institute of Technical Education* [1997] SGHC 279, appeal dismissed in *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR 569.

28 Patrick Thornberry, 'The League of Nations, the United Nations and the Question of Minorities' in UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations, Occasional Paper, (London: Minority Rights Group, 1993), at p 4.

the rise of aggressive group identity politics and proliferation of ethnic conflict after the Cold War around 1989, has shown such optimism to be somewhat misplaced.[29] Education and globalisation cannot create a homogenous world nor eradicate the awareness of the 'Other'. There was a need to address the problem of minorities more specifically in order to protect them from majority oppression (or obliteration) and to manage ethno-cultural diversity within these heterogeneous societies. Against this backdrop, the United Nations General Assembly adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) in 1992.[30]

Article 152: Judicious balancing of majority and minority interests

As a starting point, in Singapore, the Constitution recognises that racial and religious minorities have distinct identities and interests. It however stops short of granting them group rights. Article 152(1) of the Constitution speaks in terms of government obligations, rather than in the language of rights. Similarly, Article 152(2) speaks in terms of recognising the status of Malays as indigenous people and the responsibility of the government to protect or safeguard their interests.

Because the drafting of Article 152 emphasises the functions and responsibility of the government, it would be difficult to invoke it to ground any justiciable right. Furthermore, even if a Singapore court was minded to 'enforce' Article 152, the court is likely to be limited to examining the process of decision-making, that is, whether the government gave sufficient 'care' to the interests and concerns of the minorities in formulating a certain governmental measure.

The Constitution does not specifically guarantee linguistic rights to the minority groups. Instead, Article 153A designates Malay and Tamil as official languages, alongside English and Mandarin.[31] This means that Malay and Indian minorities may use their native languages in public settings, for instance during parliamentary debates.[32] The Malay and Tamil languages are also used in road signs in areas or buildings of special significance to the Malay and Indian minorities, for example, mosques or temples. While there are no constitutionally guaranteed rights, minority linguistic interests are protected by a policy of compulsory bilingualism, established since 1966. Under this bilingual policy, adopted in response to

29 See supra, note 16.

30 Minorities Declaration, supra, note 5.

31 Art 153A is not a brand new provision but a re-enactment of an identical provision (section 7) under the Republic of Singapore Independence Act.

32 See Art 44 of the Constitution: All members of Parliament must be able to speak, read and write proficiently in at least one of the official languages, i.e. English, Malay, Mandarin and Tamil.

political and ethnic pressures, students learn English as their first language and their mother tongue.[33] This enables students from minority groups to learn their native languages.[34]

One problem however is the state's simplistic categorisation of race into Chinese, Malay, Indian and Others (or CMIO).[35] This ignores internal heterogeneity within each category and has been problematical in application. For instance, state usage of the term 'Indian' and the official linking of this 'race' to the Tamil language meant that it was compulsory for all categorised as 'Indian' to learn Tamil, regardless of whether Tamil was their mother tongue. Other Indian languages were only introduced to the school curriculum through a change in education policy in the 1990s.[36] This implicitly recognises minorities within an identified ethnic minority in Singapore.

As may be seen, the constitutional safeguards for racial and religious minorities *qua* groups are political, and not legal. This paves the way for and incorporates the political management approach of judiciously balancing majority and minority interests. The emphasis on political safeguards resounds with the philosophy of the colonial administration. The Rendel Constitutional Commission had stated in its 1954 report that it was better to rely on the Governor as well as the 'good sense, fair-mindedness, and sense of responsibility of the legislative and administrative authorities of the State' to safeguard against any arbitrary or unjustified curtailment of the rights of minorities.[37] The genesis of Article 152, the Preamble of the 1958 *Order-in-Council* for Singapore (the constitution for self-governing but not yet independent Singapore), also adopted the language of responsibility, interests and policy:

> That it shall be the responsibility of the Government of Singapore constantly to care for the interests of racial and religious minorities in Singapore. It should also be the deliberate and conscious policy of the Government of Singapore at all times to recognise the special position

33 'English-educated but more at ease with Chinese', *The Straits Times* (Singapore), 20 June 1992, at p 30.

34 This accord with article 4(3) of the Minorities Declaration which obligates States to 'take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue'.

35 See generally Andreas Ackermann, 'They Give Us the Categories and We Fill Ourselves in: Ethnic Thinking in Singapore', (1997) 4 Int'l Journal on Minority and Group Rights 451, at p 456.

36 Mary Rose Gasmier, 'Mother tongue in PSLE', *The Straits Times* (Singapore), 24 May 1993, at p L2.

37 1954 Report of the Constitutional Commission Singapore, at para 167, in Tan and Thio, supra, note 11, at p 1018.

> of the Malays, who are the indigenous people of the Island and are most in need of assistance, and within the framework of the general good of Singapore, to support, foster and promote their political, economic, social and cultural interests, and the Malay language.[38]

This preference for political rather than legal safeguards departs from the initial enthusiasm for justiciable constitutional rights for the minorities. Then Prime Minister Lee Kuan Yew envisaged in 1965 that Singapore will draft a new constitution which will grant minority rights whereby '[i]f anybody thinks he is being discriminated against either for a flat or a scholarship or a job or for social welfare relief because of race, or language or religion, he can go to the court, take out a writ; and if he proves that it was because of discrimination on the ground of race, language, religion, culture, then the court will have to enforce the Constitution and ensure minority rights'.[39]

In fact, there is today a clear official aversion towards litigation as the mode of resolving differences concerning minority interests. Persuasion and conciliation is preferred. For instance, when the parents of the schoolgirls expelled for wearing the *tudung* (Muslim headscarf) to school threatened to challenge the *tudung* ban in court, the government urged them to be cautious and not to alienate themselves from general society.[40] The worry was that if the case went to court and the petitioners lost, this may spark a Maria Hertogh-type riot.[41] In seeking to persuade, the government frequently enlists the help of community leaders. In the *tudung* issue, the

38 This was modified from the clause proposed by then Chief Minister David Marshall during the 1956 Constitutional Talks in London: 'Heads of Agreement' as appended to the *Memorandum to Colonial Government, Report of the All-Party Constitutional Conference, 1956,* para 8(8). The declaration of Malays as being 'most in need of assistance' and the need to balance the 'general good of Singapore' against recognising their special position and protecting their interests was left out of Art 89 of the Constitution of the State of Singapore when Singapore became part of the Federation of Malaysia in 1963. Art 89 is identical to the current Art 152 of the Constitution: see Kevin YL Tan, 'The Legal and Institutional Framework and Issues of Multiculturalism in Singapore' in Lai Ah Eng (ed.), *Beyond Rituals and Riots: Ethnic Pluralism and Social Cohesion in Singapore* (Singapore: Eastern Universities Press, 2004) at pp 98–113.

39 PM Lee Kuan Yew, Speech, Sree Narayana Mission in Sembawang, 12 Sept 1965, available at http://stars.nhb.gov.sg/stars/public/ (date accessed: 24 Oct 2007).

40 'Singapore bars headscarf row lawyer' 13 Sept 2002, *BBC News* (Asia Pacific), available at http://news.bbc.co.uk/2/hi/asia-pacific/2255234.stm (date accessed: 23 Oct 2007).

41 Seah Chiang Nee, 'Fears rise as PAS butts in', *The Star (Malaysia)*, 16 June 2002, available at http://www.singapore-window.org/sw02/020616st.htm (date accessed: 24 Oct 2007); see also 'Echoes of French Muslim headscarf debate heard in Singapore', AFP, 15 Feb 2004 http://www.wwrn.org/article.php?idd=7507&sec=43&con=28 (date accessed: 8 June 2007).

Islamic Religious Council (MUIS) indirectly supported the government's stance and took the position that education is more important than wearing the *tudung*. MUIS drew support from the chief *mufti* (who is Singapore's highest Islamic authority), stating that it had consulted him in formulating its position.[42]

The value of the judicious balancing approach is clearly its flexibility. Where there is conflict between the specific interests of racial and/or religious groups, it is open to the government to seek to reconcile those differences through a process of consultation and conciliation in order to maintain racial and religious harmony. This is so, even if the reconciliation would deprive one group or all groups from their strict legal rights. For example, as early as the 1960s, the government persuaded the Muslim minority to stop their practice of using loudspeakers to summon adherents to prayer while the Buddhist majority was denied their application for permission to do the same for their religious services. Government intervention was necessary to avoid accusations of discrimination, i.e. that some denominations or religions received favoured treatment.[43] After consultations, religious groups agreed on a common principle that all electronic devices should be confined, so far as possible, to the precincts of a religious place.[44]

The strength of Article 152 is also its weakness. Actual adherence to Article 152 depends heavily on the good faith and diligence of the Government of the day.[45] Article 152 entitles the government to adopt policies which would protect the interests of racial and religious minorities, even if this contravenes the Article 12 equality clause. For example, the government is free to adopt policies which would help Malays improve their educational levels, skills and capabilities.[46] However, the government may also disregard Article 152 and suffer the political consequences of so doing. Thio argues that this is an extremely tenuous system of protection for such an important objective as successfully balancing majority-minority interests.[47]

42 'Mufti puts school over scarves', 6 Feb 2002, *BBC News* (Asia Pacific), available at http://news.bbc.co.uk/2/hi/world/asia-pacific/1804470.stm (date accessed: 23 Oct 2007).

43 PM Lee Kuan Yew: SPR, supra, note 15, at col 1286.

44 Ibid.

45 Thio Li-ann, 'The Secular Trumps the Sacred: Constitutional Issues Arising From Colin Chan v Public Prosecutor' (1995) 16 Sing LR 26, at p 38.

46 Rahim Ishak (Senior Minister of State for Foreign Affairs), Speech, MAB Hari Raya Party at Penthouse Negara on 21 Aug 1980, Singapore Government Press Release, at p 6, available at http://stars.nhb.gov.sg (date accessed: 12 Sept 2007).

47 Thio, supra, note 45, at p 38.

Malay as indigenous peoples: Legalising a political claim to special status

Apart from giving constitutional recognition to the group status of racial and religious minorities and declaring the government's responsibility to care for their interests, Article 152 plays a further significant function in expressly recognising the special position of the Malay minority as the indigenous people of Singapore. Article 152(2) of the Constitution further imposes a governmental duty to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language. Furthermore, Article 153A(2) of the Constitution gives the Malay language special status as Singapore's national language.

While there is no comprehensive jurisprudence on the scope of Article 152(2), it is commonly understood by way of contrast to Article 153 of the Federal Constitution. Parliamentary debates consistently assert that the constitutional status of the special position of the Malays in Singapore is not similar in intent, interpretation and in its implementation with Article 153 of the Federal Constitution.[48] In other words, whatever the scope of Article 152(2) is, it is not the same as what Article 153 encompasses.

The technique of using Article 153 to understand what Article 152(2) is not, directly arises from Singapore's ideological fallout with Malaysia. This was in relation to the policy of the federal government in granting special privileges to the Malay majority, to the detriment of the Chinese and Indian minorities in the Malaysian Federation. During Singapore's brief membership in the Federation, the Singapore government, under the leadership of Lee Kuan Yew, championed the cause of meritocracy and a 'Malaysian Malaysia'. This means that all persons are equal regardless of race and no one race could claim the right to rule over another,[49] thus rejecting the orthodoxy that the Malays had the authority to rule Malaysia by virtue of their race.

The idea that persons from a racial group would legally and politically have more rights, privileges and opportunities than persons from other groups was offensive to the Singapore political leadership. Even as a constituent state of the Federation, Singapore refused to implement a quota system for Malays. Lee Kuan Yew said in Parliament that if the Malay minority in Singapore wished to enjoy special privileges, for example in having priority to business licenses, they should go to the neighbouring

48 Wan Hussin bin Hj Zoohri: SPR, supra, note 7, at col 247.

49 Albert Lau, *A Moment of Anguish: Singapore in Malaysia and the Politics of Disengagement*, (Singapore: Times Academic Press, 1998), at p 109. This was stated as the long-term objective of the PAP in their 1964 election manifesto.

state of Johor.[50] Upon Singapore's secession from Malaysia, it was again stated clearly that '[t]here shall be no reservation for Malays in accordance with Article 153 [of the Malaysian Constitution] of positions in the public service'.[51] It is against this context that Singapore adopted the policy of meritocracy.

While critics have argued that the commitment towards meritocracy in Singapore is merely rhetorical and a charade for insidious discrimination,[52] the key policy of meritocracy has facilitated Singapore's nation-building. In contrast, Article 153 of the Federal Constitution opened the door to the controversial New Economic Policy (NEP), which encompasses wideranging affirmative action plans to benefit the *bumiputra*. Today, the NEP and the *bumiputra* varsity quota are major sources of contention and hostility between the Malays and non-Malays in Malaysia.[53]

Although lacking in substantive legal content in comparison to Article 153 of the Federal Constitution, the value of Article 152(2) lies in legally resolving a potentially controversial claim. It reassures the Malay minority group that their interests will not be overridden or completely ignored by the majority. Moreover, a constitutional provision which singles out the Malay minority in addition to a general clause protecting racial and religious minority groups reinforces the political statement that the Malay minority are a special group deserving of special attention within Singapore's constitutional order. This is further supported by other constitutional provisions, not least Article 153A, which designates Malay as the national language. While the learning of the Malay language is not a requirement in schools, the National Anthem, *Majulah Singapura,* is in the Malay language which all schoolchildren are required to sing during

50 PM Lee Kuan Yew, 24 SPR 16 Dec 1965, (Debate on Yang Di Pertuan Negara's Speech) 202, at col 238.

51 Lee Kuan Yew, *The Battle for Malaysian Malaysia*, Vol. 1 (Singapore: Ministry of Culture, 1965), at p 29, cited by Wan Hussin bin Hj Zoohri: SPR, supra, note 7, at col 246.

52 See generally Lily Zubaidah Rahim, *Singapore Dilemma (Political and Educational Marginality of the Malay Community)* (Kuala Lumpur: Oxford University Press, 1998) and Michael D Barr, 'The Charade of Meritocracy' October 2006, Far Easter Economic Review, available at http://www.feer.com/articles1/2006/0610/free/p018.html (date accessed: 27 May 2007).

53 The Chinese are most aggrieved, particularly those of the middle class, who have struggled against the discriminatory policy and whose children find it hard to get into college because quotas allocate up to 70% of the places to other races, the bulk of which, 55%, goes to the *bumiputra*: see Jay Branegan, 'A Working Racial Bias' *Time Asia* magazine, originally published in 20 Aug 1990, available at http://www.time.com/time/asia/2003/mahathir/mahathir900820.html (date accessed: 19 June 2005); Patrick Sennyah, 'PM on varsity intake quota', *New Straits Times* (Malaysia), 7 May 2001, at p 2; 'Doubts rise about ethnic-based school policies' Inter Press Service English News Wire; 14 May 2001, available at www.highbeam.com (date accessed: 15 June 2005).

school assemblies. This is however largely symbolic as there is no requirement for all Singaporeans to be conversant in the national language.

Furthermore, because most Malays are Muslims, protection of their interests under Article 152(2) also extends to some privileging of Islam. Article 153 provides that the 'Legislature shall by law make provision for regulating Muslim religious affairs and for constituting a Council to advise the President in matters relating to the Muslim religion'. This allows for a pluralistic legal system. The Muslim minority has a system of religious courts (the *Syariah* court and the *Syariah* Appeal Board) which administer and adjudicate upon Islamic family, marriage and inheritance laws. Furthermore, the Muslim Religious Council or Majlis Ugama Islam Singapura (MUIS), administers religious activities like collection of tithes, management of Islamic schools, Mosque Building Fund and Mosque building projects. The Administration of Muslim Law Act (AMLA), enacted pursuant to Article 153, not only forms the statutory bases for the courts and MUIS, it also codifies some religious offences.[54]

While Singapore privileges Islam over other religions, Islam does not enjoy the same status as in Malaysia. The Constitution does not designate Islam as the official religion, unlike Article 3 of the Federal Constitution which provides that 'Islam is the religion of the Federation'. Article 3 has been controversially interpreted to mean that the government is responsible for promoting and developing Islam, which includes ensuring that places of worship of other religions do not overshadow national or state mosques in terms of size, location and majesty.[55] Singapore consciously did not retain Article 6(1) of Singapore's State Constitution which establishes Malaysia's constitutional monarch, the Yang di-Pertuan Agong as the 'Head of the Muslim religion in the State' after separation from Malaysia. This is significant since the legitimacy of AMLA, as well as the government's supervision over Muslim affairs, has been doubted by Muslim scholars because Singapore is not a Muslim state.[56] Some Muslim theologians argued

54 For instance, section 139(1) provides that 'Whoever shall teach or publicly expound any doctrine or perform any ceremony or act relating to the Muslim religion in any manner contrary to the Muslim law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 12 months or to both.'

55 This would include building mosques and religious centres, sponsoring events to promote the reading of the Quran, restricting acts forbidden by Islam like drinking alcohol and gambling, as well as making laws to ensure that religious places of other religions do not overshadow national or state mosques in terms of location and prominence, size and majesty: *Meor Atiqulrahman bin Ishak vs. Fatimah bte Sihi* [2000] 5 MLJ 375, at p 386A–D; see Li-ann Thio and Jaclyn Ling-Chien Neo, 'Religious Dress in Schools: The Serban Controversy in Malaysia' (2006) 55 ICLQ 671 for a critique of the case.

56 Dato Abdul Hamid Bin Haji Jumat, 14 SPR (Administration of Muslim Law Bill), 29 Dec 1960, at col 915.

that only a Muslim Government can enforce the laws of the Koran, like the Government of the Malaysian Federation,[57] where Islam is constitutionally designated the religion of the Federation, albeit with symbolic effect.[58] To broaden AMLA's legitimacy, the government consulted the Muslim Advisory Board, local and Muslim scholars in England and the United Arab Republic,[59] as well as other Muslim individuals (including the then President of the Syariah court[60]) and organisations extensively for six years during the drafting of AMLA.[61]

Despite the obvious political weight of Article 152, the government in 1966 did not adopt the Wee Commission's recommendation that this article (referred to in their Report as Article 89(1), following the numbering in the Singapore State Constitution) be entrenched such that it could only be amended by a special parliamentary majority and popular referendum.[62] The Wee Commission considered this article to be fundamental and vital if 'multiracial, multi-cultural, multi-lingual and multi-religious peoples of Singapore are to continue to live in mutual peace and harmony and in an equal, just and democratic society'.[63] Nevertheless, at present, Article 152 can only be amended by a special parliamentary majority under Article 5(2). As the ruling People's Action Party (PAP) controls 82 of 84 elected seats in Parliament, it technically could amend Article 152 or abrogate it entirely. The only barrier to such a move, which is not insignificant, is political, rather than constitutional.

Institutional protection of minorities

Presidential Council of Minority Rights

The Wee Commission's main departure from the non-discrimination principle (which de-emphasises racial and religious differences) lies in their recommendation to create the Council of State. The Council of State was to serve as an advisory body charged with the primary responsibility of

57 Ibid.

58 For a discussion on the position of Islam in Malaysia with reference to primary constitutional documents, see Joseph M. Fernando, 'The Position of Islam in the Constitution of Malaysia', (2006) 37(2) *Journal of Southeast Asian Studies* 249–66.

59 The Bill was referred to a number of Muslim scholars in England and the United Arab Republic: Othman Bin Wok: 25 SPR, 17 Aug 1966, at col 239.

60 Ibid., at col 239.

61 The Administration of Muslim Law Bill was referred to a Select Committee in January 1966 which received written representations and oral evidence: ibid., at col 239; see also SPR, supra, note 56, at col 914.

62 Wee Report, para 78, in Tan and Thio, supra, note 11 p 1033.

63 Wee Report, para 78, in Tan and Thio, ibid. p 1033.

ensuring that no legislation passed would discriminate against minorities.[64] This was not immediately adopted by the government but emerged in later years as the Presidential Council of Minority Rights (PCMR).

Like the proposed Council of State, the PCMR is an extra-Parliamentary body whose objective is to ensure that laws passed by Parliament are not discriminatory of racial and religious minorities.[65] Pursuant to Articles 78 and 80, Parliament is obliged to refer bills and subsidiary legislations to the PCMR for consideration. The PCMR will report on whether any provisions of the bills or subsidiary legislations, if enacted, would constitute 'differentiating measures' which Article 68 defines as 'any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by prejudicing persons of that community or indirectly by giving advantage to persons of another community'.

The efficacy of the PCMR institution is limited. The PCMR does not have powers to initiate investigations into alleged infringement of the rights of minorities. Neither does the general public have the right to initiate or complain to the PCMR.[66] This differs from complaints mechanisms in other countries like Hungary where a Parliamentary Ombudsman for the Rights of National and Ethnic Minorities is empowered to initiate and investigate alleged infringement of the rights of minorities.[67] The Wee Commission's recommendation to create a similar Ombudsman office to investigate executive policies and decisions allegedly discriminatory on racial, linguistic or religious grounds was not adopted.

At present, the PCMR only has the power to recommend and cannot veto any legislation. Any adverse reports issued by the PCMR are advisory

64 EW Barker, 29 SPR (Constitution (Amendment) Bill), 12 June 1969, at col 61; see also Wee Report, at para 16, in Tan and Thio, supra, note 11 at pp 1021–2.

65 The PCMR was at first empowered to also consider whether Bills or subsidiary legislation would 'violate any fundamental liberties of the individual set out in the Constitution'. By a 1973 constitutional amendment, the Council was renamed PCMR and its scope was restricted to only minority rights and not with fundamental liberties. The PCMR wanted to confine 'its principal function to be the examination of legislation with a view to ascertaining whether any provisions therein may be discriminatory against racial or religious communities'. 32 SPR, 16 Feb 1973 at cols 405–7.

66 Art 32B(3), 1949 Constitution of the Republic of Hungary: 'Everyone has the right to initiate proceedings by the Parliamentary Ombudsmen in the cases specified by law'; available at http://www.minelres.lv/NationalLegislation/Hungary/Hungary_Constitution_excerpts_English.htm (date accessed: 6 Nov 2006)

67 Art 32B(2), 1949 Constitution of the Republic of Hungary: 'The Parliamentary Ombudsman for the Rights of National and Ethnic Minorities is responsible for investigating or initiating the investigation of cases involving the infringement of the rights of national or ethnic minorities which come to his attention and initiating general or specific measures for their remedy': ibid.

in nature and Parliament can override the PCMR's recommendations by a two-thirds majority vote.[68] At most, the PCMR can delay the passage of a Bill for a period of one month and prompt further parliamentary deliberation of the Bill.

Thus, the primary impact of the PCMR is confined to exerting political pressure by drawing public attention to a discriminatory proposal and compelling the government to consider the 'odium it would incur publicly for enforcing majority rule to the disadvantage of a minority'.[69] Even then, this is diminished by the fact that PCMR proceedings are conducted in private. Only their reports (and not the notes of proceedings) are published. To date, the PCMR has never issued any adverse reports, giving rise to further doubts about its efficacy.

Group Representation Constituency: Effective political participation by racial and religious minorities

The introduction of the Group Representation Constituency (GRC) in 1988 signifies the decisive departure from Singapore's primary reliance on the principle of non-discrimination to a more protective regime. It also reflects the government's move towards an integrationist policy and the rejection of an assimilationist philosophy that ignores racial differences and seeks to eradicate them.

The constitutional amendment introducing group representation constituencies into the mix of single-member constituencies in Singapore's electoral system in essence creates a quota system which ensures minority representation in Parliament.[70] Article 39A of the Constitution provides for two types of multiple member constituencies, one with at least one person belonging to the Malay community and the other with at least one person belonging to the Indian or other minority communities.[71] This means that at any given time, post-1988, Parliament should always be multiracial. The term 'should' is used because the opening words of Article 39A of the Constitution – 'The Legislature may, in order to ensure the representation in Parliament of Members from the Malay, Indian and other minority communities, by law make provision for' – empower Parliament to pass legislation providing for GRCs but does not obligate them to do so.

68 Art 78 of the Constitution.

69 EW Barker: SPR, supra, note 64 at cols 62–3.

70 Chandra Das: SPR, supra, note 7, at col 217.

71 The number of candidates in a GRC was initially three; this was subsequently increased to four and then to six on grounds completely unrelated to the initial rationale of ensuring a minority representation in Parliament. These amendments have been justified as needed to achieve economies of scales in terms of town council management or community development council welfare programmes. However, these objectives detract from the central rationale for the GRC scheme, which is to ensure the representation of racial minorities in Parliament.

Furthermore, the number of GRCs is not fixed; the Constitution delegates the authority to decide the number of GRCs to Parliament. As such, the percentage of minority representation fluctuates according to the will of Parliament in relation to how many GRCs to have and what size the GRC team sizes should be, as these may vary from three to six candidates as provided by Article 39A(2). Section 8A(2) of the Parliamentary Elections Act[72] provides that the number of parliamentarians from GRCs 'shall not be less than one-quarter of the total number of Members to be returned at a general election'.

Leaving aside questions on the effectiveness of Article 39A in giving Parliament final say in the implementation of such a crucial objective, the GRC scheme is at least an official concession that the political interests of racial minorities require specific legal protection.[73] Prior to the GRC scheme, the political interests of racial minorities, including the Malays, were treated without distinction from the interests of the majority. In fact, the Wee Commission had in 1966 rejected recommendations for racial representation as 'inappropriate and retrograde'.[74] The legal protection chosen by the government did not take the form of constitutional guarantees of justiciable rights to political participation. It is evident from how Article 39A is formulated that the adopted solution fell somewhere between law and politics. The Constitution legalises a racial quota for parliamentary representation but reserves to Parliament legislative discretion whether and how to implement it. No minimum number of minority legislators is stipulated.

Clearly, the introduction of the GRC system departs from the non-discrimination principle; by singling out the Malays, Indians and other minorities on the basis of race alone, Article 39A arguably violates Article 12(2) of the Constitution, though any legal challenge is precluded by the immunising effect of Article 39A(3). Article 39A is justified on the basis of Article 152, which arguably creates an exception to Article 12(2) as being 'expressly authorised by [the] Constitution'. Notably, the GRC scheme is only concerned with the political interests of racial minorities and not that of religious minorities (which are also referred to in Article 152(1) of the Constitution).[75]

72 Cap 218.

73 See Art 2(3) of the Minorities Declaration: 'Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.'

74 It was proposed that specific minority groups be allowed to nominate or elect members to represent their interests in Parliament: Wee Report, at para 46–9, in Tan and Thio, supra, note 11, at p 1027.

75 Goh Chok Tong (then First Deputy Prime Minister) emphatically stated that the 'aim of this [GRC] Bill . . . is to ensure multi-racial and not multi-religious representation.': SPR, supra, note 7, at col 336.

Consistent with the underlying instrumental nature of Singapore's minority protection system, the introduction of the GRCs was considered necessary to counter concerns that 'free market' voting would lead to decreased or lack of racial minority representation in Parliament. The government was concerned that this may cause racial minorities to feel marginalised,[76] thus threatening Singapore's social-political order. Again, the emphasis was on the Malay community.

The GRC scheme was initially proposed as a twinning scheme whereby Malay candidates would be paired up with other candidates (presumably Chinese candidates) to run for elections. The scope of the GRC was only broadened to include other minorities because Malay Members of Parliament considered the twinning scheme an 'affront'[77] as it implied that they would not (and could not) be voted into Parliament on merit.[78] Ironically, after the GRC scheme was widened to include other minorities, a sector of the Malay community argued that the scheme effectively equated them with other minorities and would diminish their special position under Article 152 as indigenous peoples.[79] On the flip side, there were concerns that by imposing a quota for parliamentary representation, this would lead to Malays demanding for more quotas in civil service, statutory boards, schools and universities à la Article 153 of the Federal Constitution.[80] Thus far, no further quotas have been imposed in favour of the Malays.

The GRC scheme has been fairly effective in elevating the status of racial minorities in the political arena and institutionalising power-sharing between the minority and majority.[81] Political parties now have to give more attention to recruiting candidates from racial minority groups as well as on gaining popular support from minority groups, when in the past there was less compulsion to do so. For example, in the 1991 elections, the Workers Party had to persuade a well-known Malay opposition candidate, Jufrie Mahmood, to switch from the Singapore Democratic Party to campaign on the Workers' Party team in order to satisfy the GRC quota.[82] In the 2006 elections, Workers Party's secretary general Low Thia

76 Ibid., at col 212–13.

77 Ibid., at col 284.

78 Member of Parliament, Dr Ahmad Mattar, wrote on 30 Sept 1982, 'I am not in favour of the idea. We should avoid it if we can. As a Malay, I don't think I would like to contest in any Elections where my victory is guaranteed – not because I am a 'strong' candidate but because I have a so-called 'strong' twin brother to lean on': ibid, at cols 180–1.

79 Ibid., at cols 313–14.

80 51 SPR (Parliamentary Elections (Amendment) Bill (as reported from Select Committee)) 18 May 1988, at col 33.

81 Ibid., at col 52.

82 Kevin Tan Yew Lee, 'Constitutional Implications of the 1991 General Elections', (1992) 13 Sing LR 26, at p 47.

Khiang conceded that his party did not perform better because it failed to engage minority communities and would have to work harder to secure their votes in future.[83] Besides that, political parties which traditionally campaigned along racial lines or which tended to neglect minority groups have been compelled to realign themselves ideologically and structurally. For example, the *Pertubuhan Kebangsaan Melayu Singapura* (PKMS or the Singapore Malay National Organisation) had to shift from only focusing on Malay-Islamic interests[84] to adopting a more multiracial outlook; it joined the opposition alliance, Singapore Democratic Alliance in 2001.

Religious autonomy and assistance for Muslims

Because of the coincidence between the Malay race and the Islamic religion, there is a need to accommodate Islamic law as part of the government's responsibility under Article 152(2) of the Constitution to 'protect, safeguard, support, foster and promote' the Malay minority's religious interests. This goes beyond mere non-interference in their religious affairs, which is guaranteed under Article 15(3) of the Constitution to all religious groups.[85]

Consistent with the overarching framework for the protection of minorities, the Constitution does not grant the Malay minority special religious rights such as allocation of public funds for their religious instruction or restricting the propagation of religious doctrine or belief among them. Provisions in the Federal Constitution of Malaysia providing for these rights were not adopted. The Wee Commission was of the view that 'no group (whether majority or minority) has a fundamental right to have its members educated or instructed out of public funds in the language or the religion of that group'.[86] Furthermore, to protect the Muslim minority from religious propagation as provided under Article 11(4) of the Federal

83 Tor Ching Li, 'Studying the election report card', 10 May 2006, *Today* (Singapore), available at http://www.todayonline.com/articles/117540.asp# (date accessed: 29 July 2006).

84 PKMS was the first established as the Singapore arm of the Malaysian United Malay National Organisation (UMNO), which forms part of the ruling alliance in Malaysia, and was forced to sever connections with UMNO Malaysia at separation. It changed its name to PKMS on 5 May 1967. PKMS' objects include to 'safeguard and work for the implementation of the special rights of the Malays in Singapore as enunciated in the Constitution of the Republic Of Singapore', to 'take whatever steps as may be necessary for the advancement of the Malay language and culture' and to 'safeguard and to promote the advancement of Islam without interfering in the affairs of other religions': PKMS website: http://www.geocities.com/pkms218/

85 Art 15(3) guarantees that all religious groups have the right to manage their own religious affairs as well as to establish and maintain institutions for religious or charitable purposes. This is as long as they comply with general laws relating to public order, public health or morality.

86 Wee Report, at para 24, in Tan and Thio, supra, note 11, at p 1023.

Constitution was inappropriate and inconsistent with the ethos of a democratic secular state.[87]

Sphere of religious autonomy

The Muslim minority however enjoys a sphere of religious autonomy which includes a separate system of courts through which some aspects of Islamic law, particularly in the area of family, marriage and inheritance laws, can be practised. Currently, Muslim parents also have the option of sending their children to Islamic religious schools or *madrasah*, as an exception to the Compulsory Education Act[88] (CEA), enacted in 2000. *Madrasah* are privately funded religious schools which teach Quranic studies and use Arabic as the medium of instruction.[89] Under the CEA, it is compulsory for all children to attend national primary schools. This exception to the CEA is significant. National education is commonly regarded as being critical for national unity and integration.[90] That was why vernacular schools previously administered by clans or religious organisations were absorbed under central control in the 1960s and 1970s in order to build up a national education system quickly.[91] There are some conditions attached to exempting children attending *madrasah* from the CEA, discussed below.

While the government is willing to accommodate the Muslim community's religious demands outside the national education system, it is less willing to accommodate religious particularism within the system. One example is its firm refusal to exempt Muslim schoolgirls attending national schools from a Ministry of Education policy[92] which bans them from wearing the *tudung*[93] with their uniforms. Public schools are considered important common public domains which are crucial to nation-building and zealously guarded by the government.[94]

The sphere of autonomy extends to insulation from egalitarian norms, especially in the area of gender equality. It was recognised during the reading of the bill introducing AMLA that the provisions therein did not

87 Wee Report, para 38, in Tan and Thio, ibid., at p 1025.
88 Cap 51
89 There are six *madrasah* in Singapore offering primary and secondary Islamic education in Singapore, in addition to other *madrasah* attached to mosques and offering part-time or night classes: Rose Ismail, 'Reforming Singapore's 'madrasah'', *New Straits Times (*Malaysia*),* 19 May 2000, at p 2; see also supra, note 16.
90 SPR, supra, note 15, at col 1285.
91 Warren Fernandez, 'Schools: What price autonomy?', *The Straits Times* (Singapore), 15 Aug 1992, at p 32.
92 Section 61, Education Act (Cap 87).
93 'PM firm on tudung issues' *The Straits Times* (Singapore), 3 Feb 2002, at p 1; 'Third tudung girl suspended', *The Straits Times* (Singapore) 12 Feb 2002 at p H3.
94 Supra, note 13.

conform to the protection accorded women in the 1961 *Women's Charter*.[95] On the international arena, Singapore entered reservations to Articles 2 and 16 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by reference to Islamic laws.[96] Singapore was concerned that certain provisions under AMLA may be inconsistent with CEDAW or may appear to be discriminatory against Muslim women.[97] For example, a Muslim man may marry up to four wives but a Muslim woman does not enjoy similar rights to polyandry.[98]

Such insulation may also extend to some cultural practices which are commonly associated with the Islamic religion. For instance, female circumcision (which is related to the abhorrent problem of female genital mutilation) commonly practiced by Malay-Muslims has been highlighted by the Committee on the Convention on the Rights of the Child (CRC) as being inconsistent with the Convention. The Singaporean delegation admitted that there are no legal provisions criminalising acts of female genital mutilation.[99] They however sought to convince the Committee that female circumcision practised in Singapore only involved a minor procedure,

95 For instance, unlike in the past, Muslim women no longer lose their property upon marriage and have the right to dispose property without the concurrence of their husbands: Section 119(1) of AMLA provides 'All the property belonging to a woman on her marriage, whether movable or immovable and however acquired, shall after marriage to a Muslim husband continue, in the absence of special written contract to the contrary, to be her own property' and section 118 of AMLA provides 'Subject to section 111, Muslim married women may, with or without the concurrence of their husbands, by will dispose of their own property.'; It was contended that AMLA already 'restored to Muslim women their rights of which for long they have been deprived': SPR, supra, note 59, at col 242.

96 Arts 2 and 16 impose wide-ranging obligations on States Parties to take all appropriate means including legislation to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.

97 Although the reservation referred generally to the freedom of 'minorities', Singapore's initial report submitted in January 2001 clarified that the reservations to Arts 2 and 16 were primarily aimed at protecting the right of Muslim citizens to practise their personal and religious laws: Singapore's Initial Report to the UN Committee for the Convention on the Elimination of All Forms of Discrimination Against Women [hereafter 'Initial Report'], CEDAW/C/SGP/1, Jan 2001, at p ii, available at http://www.mcys.gov.sg/MCDSFiles/download/CEDAW_ initial_report.pdf (date accessed 19 Sept 2006).

98 Islamic inheritance laws are also discriminatory to Muslim women. Male relatives receive twice the share of female relatives, i.e. a wife is entitled to one quarter of her late husband's estate while a husband is entitled to half of his late wife's estate, a son will get twice the share of the daughter and the father will get twice the share of the mother; see Initial Report, at p 50.

99 'Committee on the Rights of the Child Considers Initial Report of Singapore', United Nations Press Release, 26 Sept 2003; CRC 34th Session: Initial report of Singapore, 29 Sept 2003; available at http://www.hrea.org/lists/child-rights/markup/msg00227.html (date accessed: 16 July 2006).

was not harmful and there have been no reported incidences arising from female circumcision. Notably, Singapore has previously declared that its accession to the CRC was on the basis that the child's rights under that Convention (in particular the rights defined in Articles 12 to 17) shall be exercised in accordance with the 'customs, values and religions of Singapore's multiracial and multi-religious society regarding the place of the child within and outside the family'.[100]

Judicious balancing

The mechanics of Article 153 and its progeny, AMLA, leaves the door open to indirect governmental intervention with the affairs of the Muslim minority, as part of the government's judicious balancing approach. MUIS comes under the direct purview of the Minister-in-charge of Muslim affairs, a Cabinet Minister. Members of the MUIS Council, the highest governing body in MUIS, are appointed by the President of Singapore. The Minister has a large say in the nomination of members to the MUIS Council.[101] Former Prime Minister Lee Kuan Yew has also openly exhorted leaders of the Muslim community to 'interpret Islam in a way which will be to the benefit of its followers and to the general good of the community'.[102] Notably, such intervention is possible in Singapore because, in contrast to the United States, there is no anti-establishment clause in the Constitution.[103] MUIS formulates policies and is considered the official voice of the Muslim community in Singapore.

Generally, the government will accommodate the demands of the Muslim minority for autonomy or exemptions unless it considers such demands inimical to nation-building or if it will cause segregation of the Malay-Muslim minority from the general society. A balance has to be drawn and compromises made. In relation to the *madrasah* issue, although *madrasah* students are exempted from the CEA, this exemption is subject to the condition that the *madrasah* must prepare their students to sit for the Primary School Leaving Examination by 2009, which is a national examination. This is to ensure that the Malay-Muslim students will also receive mainstream education which is necessary to improve their social

100 Declarations and Reservations to the Convention on the Rights of the Child, available at http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm (date accessed: 21 Sept 2006).

101 See section 7 of *AMLA*.

102 PM Lee Kuan Yew, Speech, Holy Qu'aran Conference organised by the Tamil Muslim Union, National Theatre, 17 July 1966, available at http://stars.nhb.gov.sg (date accessed: 19 July 2006).

103 The First Amendment of the United States Constitution provides 'Congress shall make no law respecting an establishment of religion . . . '

economic status.[104] As evident from Lee Kuan Yew's speech in 1965,[105] the educational levels of the Malay minority is a significant area of concern for the government. The *madrasahs* must also ensure that their students match the average score aggregate for Malay students in the six lowest-performing national schools who sit for the PSLE in the same year.[106] If full-time *madrasahs* are unable to achieve the stipulated minimum standards, they must transfer their students to other *madrasahs* at which the PSLE benchmark is achieved or to national schools.

Concluding observations

As is evident, the accommodation of minority interests and management of their expectations, especially those of the Malay-Muslim minority, have been crucial in shaping Singapore's constitutional order. Notably, the Constitution does not recognise other vulnerable categories of people which have been singled out for protection by the international community like workers, refugees, women,[107] prisoners, children, disabled persons and migrant workers[108] as minorities meriting special protection.

Article 152 is particularly significant. Although it cannot be legally enforced, it is paradigmatic, i.e. it is a statement of principles to which government action should adhere and which act as guidelines rather than legally enforceable rules.[109] Article 152 declares clearly the intention of the Constitution's framers to ensure that future governments continue to respect the interests of racial and religious minorities in Singapore. As such, government action or forbearance should give regard to minority interests. This would include informing the structuring of institutional arrangements,

104 Note that in order to do that, *madrasah* must teach 'secular' subjects like Science, Mathematics and English: Rose Ismail, 'The madrasah changes in Singapore', *New Straits Times* (Malaysia), 1 Nov 2000, at p 2.

105 Transcript of the Proceedings (Slightly edited) When Singapore and Malaysian PAP leaders met followed by a press conference at Cabinet Office, City Hall, on 12 Aug 1965, at p 21, available at http://stars.nhb.gov.sg (date accessed: 19 July 2006).

106 Ismail, supra, note 104.

107 Despite Singapore's accession to CEDAW, women are also not considered to be a special interest group subject to special protection but treated as part of the mainstream and subject to general scheme of protection under Part IV of the Constitution: see Initial Report, supra, note 97, at p 6.

108 Hurst Hannum, 'The Rights of Persons Belonging to Minorities', in *Human Rights: Concepts and Standards*, Janusz Symonides (ed.), (Ashgate, Paris: UNESCO, 2000), at p 277.

109 This is contrasted with a definitive constitution (or constitutional provisions) which establishes rules for the operation of institutional structures and their procedures, or sets out substantive government powers subject to some legal control.: David Jenkins, 'From Unwritten to Written: Transformation in the British Common-Law Constitution', (2003) 36 Vand. J Transnat'l L. 863, at p 908, 910–11.

exercise of government powers and the process of the formation of democratic values, civic virtues and communitarian attitudes in Singapore.[110]

The necessity of a flexible political management approach, as opposed to a strict rights approach, cannot be understated in light of Singapore's multiracial and multi-religious society. By precluding rights-based protection, Singapore avoids the potential fallout of adversarial and confrontational litigation. Instead, the judicious balancing approach allows the government to rely on non-adversarial methods of engagement, such as persuasion and conciliation to resolve differences and diffuse hostilities between different racial and religious groups, or with the government. For example, when the Malay community reacted negatively to then Senior Minister Lee Kuan Yew's statement in 1999 that Malay soldiers were not in charge of machine-gun units because of their religious, familial and ethnic bonds with Malaysia, Malay Members of Parliament successfully diffused the tension by urging conciliation. Minister-in-charge of Muslim Affairs Abdullah Tarmugi issued a statement urging Malays to take the comments in its proper context and perspective as well as to focus on improving their community.[111]

Ironically, the publicity of court proceedings may be exploited to reassure minority groups, especially the Malay minority, that their interests are being protected. This was most notable when two Chinese bloggers were charged and convicted under the Sedition Act[112] for posting inflammatory anti-Malay and anti-Muslim remarks on the internet in 2005.[113] District Judge Richard Magnus opined that their conduct must be taken seriously and is *mala per se* due to the especial sensitivity of racial and religious issues in Singapore's multiracial society.[114]

To be sure, the judicious balancing approach has the potential to draw the proper balance between a state's ideals of national unity, typically manifested by a centralisation of power, a common language, dominant culture and religion, on the one hand, and the interests of the minority groups, on the other. This is especially since the ideals of national unity

110 See for example parliamentary debates on free tertiary education for Malays in 56 SPR, 12 June 1990, in particular at cols 125–6 and 156–7.

111 'SM's remarks "must be seen in right light"', *The Straits Times* (Singapore), 30 Sept 1999, at p 28.

112 Cap 290.

113 Section 4(1)(a) read with section 3(1)(e) of the Sedition Act punishes acts which have tend to promote feelings of ill-will and hostility between different races and classes of the population of Singapore.

114 One was jailed for one month and the other was fined and given a 'nominal' jail term of one day: *pp v Benjamin Koh Song Huat and Lim Yew Nicholas* (DAC 39440/2005, DAC 39441/2005 and DAC 39442/2005, and DAC 39443/2005 and DAC 39444/2005), 7 Oct 2005, Subordinate Courts of Singapore, grounds of decision available on www.subcourts.gov.sg (date accessed: 2 July 2006).

have the tendency to result in intolerant attitudes and repression of those who are perceived as 'others'.[115]

However, the effectiveness of the political management approach in protecting minorities depends largely on the goodwill and existence of a *junzi* government.[116] This leaves open the door for a rogue government to ignore or even undermine minority interests, an inherent risk where safeguards are political, rather then legal. Such a risk may be more pronounced in the context of Singapore where the ruling party has been in charge since independence. Although Singapore's strong government and soft authoritarian style of governance has been propounded as being necessary to protect minorities, guarantee religious tolerance, and to suppress extremist tendencies,[117] such a government can equally, if not more effectively, oppress minority groups.

There is no simple uniform solution to protecting minorities, especially in a multiracial and multi-religious society like Singapore. In the final analysis, although the Constitution does not grant judicially enforceable minority rights, it is hoped that the very existence of provisions such as Article 152 serves as a constant reminder to governments that the interests of minorities are crucial considerations in Singapore's quest for 'happiness, prosperity and progress for our nation'.[118]

115 See Patrick Thornberry, *International Law and the Rights of Minorities,* (Oxford: Clarendon Press, 1991) at p 1.

116 Government by honourable men.

117 S. Rajaratnam, Speech, 75th Anniversary Celebration of the Singapore Ceylon Tamils' Association, 10 Feb 1985, Singapore Government Press Releases, Release No. 11/FEB 02–2/85/02/10, at p 3, available at http://stars.nhb.gov.sg (date accessed: 16 Mar 2006); Prime Minister Lee Kuan Yew, *Singapore Parliamentary Debates Official Reports*, Vol. 25, 15 Mar 1967, at col 1299 (Report of Constitutional Commission 1966).

118 Extract from the Singapore pledge.

8 Constitutionalism and subversion

An exploration

Michael Hor

Norm and exception

Modern constitutions exist to order and organise the exercise of governmental power. A major aspect of constitutionalism is the limitation of that power. This explains the often elaborate procedures prescribed for the exercise of a particular power. This is also why constitutions normally contain 'human rights' provisions, called 'Fundamental Liberties' in the Singapore Constitution,[1] against which governmental[2] power should not prevail. However, it is not this restrictive aspect of constitutionalism that has found favour with Singapore officialdom.[3] Instead, it is the aspect of empowerment that dominates official discourse and action – the Constitution exists to give power to the government to do what is necessary or expedient[4] for the good of the country. Nowhere is this more pronounced than in the existence and use of 'Special Powers Against Subversion'.[5] Article 149 gives the government near plenary powers to deal with activities

1 Part IV, Constitution of the Republic of Singapore (The Constitution).

2 Technically, the 'Government' constitutionally embraces also the Judiciary, but it is used in this chapter in its more popular sense of the elected government – i.e. the Executive-Legislative conglomerate familiar to Westminster political systems.

3 It is perhaps overly crude to ascribe a single view to all key governmental players, but on an issue as sensitive as the one in discussion, the *public* stance is fairly consistent.

4 The language is inspired by that of Art 14(2) of the Constitution which is used to describe the power of the government to abridge the free of speech, assembly and association.

5 It is found in Part XII of the Constitution, which also includes the even more drastic 'Emergency Powers'. This chapter does not deal with that as there has not been any development or discourse thereon. Yet the official view is that the Emergency which was declared in 1964 (when Singapore was part of the Federation of Malaysia) as a response to the Indonesian Confrontation is still in force, and this is evidenced by the existence of emergency legislation in the statute books: Emergency (Essential Powers) *Act*, Cap 90. Fortunately, those powers have never, to the knowledge of the author, been used in independent Singapore.

'prejudicial to the security of Singapore'[6] – and this it has done through the Internal Security Act (ISA),[7] a piece of legislation which has seeped much more deeply into the national consciousness than any or all of the 'Fundamental Liberties', or even the Constitution itself.

Conceptually, it is the observance of the 'Fundamental Liberties' which ought to be the norm, and the Internal Security Act the exception.[8] However, the reality has been the reverse – liberty is not as of right but a result of governmental sufferance. How did this come to be?[9] It is the purpose of this modest discussion to look at the reasons for the evolution of the dominant 'empowerment ethic' in Singapore constitutionalism. It is also the intention of this piece to ask if any contemporary justification grounds the continued attraction to this ethic, and to try to predict if there is likely to be a rise of the 'limitation ethic' in the near future. At the heart of these issues is what is perhaps the most fundamental constitutional question of all – does the Constitution mean anything at all in Singapore, and whether we really want it to mean anything.

Conceived in conflict

There is no doubt that these 'special powers' originated in a package of extraordinary measures which the colonial authority, and later the independent governments, felt were necessary to do battle with the forces of communism. Indeed, they pre-date constitutionalism in Singapore.[10] The nation and its constitution were brought forth, as it were, in the arms of the Internal Security Act. There was indeed an armed insurrection in British

6 The article contains other alternative triggering activities. The manner of drafting of the provision is not the most fortunate, with phrases like 'excite disaffection against the President or the Government' capable of attracting the most trivial of harms, if the authority interpreting it were in a literalist mood.

7 Cap 143. Originally a piece of Malaysian legislation which has remained in Singapore after Separation from the Federation. Singapore has had preventive detention powers since the Emergency in the late 1940s.

8 The ISA has a number of other provisions (over 80 sections in all), but those which remain in popular consciousness are the ones which provide for what has been variously called preventive detention, detention without trial, and executive detention. That recourse flatly contravenes (were it not for express exceptions) any number of fundamental liberties: e.g. the 'due process' clause of Art 9, the 'equal protection' clause of Art 12, and more ancillary liberties like the freedom of speech, assembly and association in Art 14.

9 Another way of looking at it is to ask why, when most of the rest of the ordered world has been moving firmly in the direction of a stronger conception of constitutionalism since the Second World War, Singapore has retained its studied agnosticism.

10 See RH Hickling, 'Law and Liberty in Singapore' [1979] Mal LR 1 at pp 14–17. Professor Hickling has been credited with having a hand in drafting the original ISA for Malaysia.

Malaya, or in the graphic words of Article 149 'action taken . . . by [a] substantial body of persons . . . to cause [fear of] organized violence'. That race was a major factor is also not controversial. The insurgents were predominantly of Chinese extraction, encouraged by the success of communism in China and Indo-China, and disillusioned by what appeared to have been a betrayal by the colonial authority of its promise to grant equal rights to them.[11]

In Singapore, there was no insurgent *military* action, but the anxiety was no less intense because of its largely Chinese population. Instead, the battle lines were, except for a brief period of uneasy alliance, drawn between Chinese who were Chinese-educated and sympathetic to communism, or at least more radical forms of socialism, and Chinese who were English-educated and who desired the continuation of the 'capitalistic' system after the departure of the British colonial authority.[12] Indeed, the seismic events of the early Federation of Malaysia were propelled by the need, from the perspective of the English-educated faction, to dilute the power of the pro-communist Chinese-educated faction. Bluntly, the English-educated Chinese of Singapore needed the Malays of the Peninsula to outnumber the Chinese-educated Chinese of Singapore. Things did not work out, for the addition of the large number of Singapore Chinese to what was Malaya, and the ambitious and charismatic Lee Kuan Yew, soon upset the Malay leaders there. The native populations of Sabah and Sarawak, which had been expected to preserve the non-Chinese majority, proved insufficient to mollify the Peninsula Malays. Singapore was cut from the Federation and left to fend for itself.

The recourse of successive governments of the day to the power of 'preventive detention' tracks these broader historical upheavals. The British colonial authority, still fresh from the trauma of Japanese occupation, introduced it as emergency legislation in Singapore soon after the communist insurgency erupted in Malaya in 1948.[13] It was a colonial weapon against

11 This unforgivably brief description cannot of course do sufficient justice to the complexity of motivations behind this and perhaps any major historical movement. For a rare collection of personal accounts of ex-insurgents see, Agnes Khoo, *Life as the River Flows – Women in The Malayan Anti-Colonial Struggle*, (Kuala Lumpur: SIRD, 2004).

12 The story is told most engagingly by founding, and eventually victorious, Prime Minister Lee Kuan Yew himself: Lee Kuan Yew, *From Third World to First – The Singapore Story 1965–2000*, (Singapore, Times Editions, 2000). *Cf* an account of the same period from the perspective of 'the vanquished': *Comet In Our Sky: Lim Chin Siong in History*, Tan Jing Quee and KS Jomo, eds, (Kuala Lumpur: INSAN, 2001).

13 Singapore fell to Japan in 1942, was re-taken in 1945 and placed under the British Military Administration until 1946 when Singapore became a Crown Colony. Barely two years of 'normalcy' was to elapse (since the passing of military rule) before the Emergency Regulations of 1948 came into force.

anti-colonialism in the form of a pro-communist and Chinese insurrection. Naturally, the British employed the model they knew best – the regime of wartime detentions in Britian itself, which was used against alleged Nazi spies sympathisers.[14] In 1955, on the establishment of the first locally-elected government of Singapore led by David Marshall, the emergency laws were repealed, but the power of preventive detention itself was preserved in the form of the Preservation of Public Security Ordinance (PPSO).[15] Marshall's, and later Lim Yew Hock's, English-educated political base had to contend with the Chinese-educated faction, led by Lim Chin Siong, and surprisingly, another English-educated but more radical faction, led by Lee Kuan Yew. The governments of Marshall and Lim Yew Hock were to use the power of detention under the PPSO against its rivals. There is evidence that these governments were fundamentally liberal in inspiration and saw the PPSO as a necessary and temporary evil to deal with labour unrest and disturbances stirred by its opponents.[16] Lee Kuan Yew, then in opposition, in a famous speech in the Legislative Assembly, castigated the government of the day for being hypocritical and cowardly.[17] He was then of the view that preventive detention was not the answer to the government's problems, but that solid economic development was. The Peoples Action Party (PAP) had fallen in with the pro-communists and its leaders were probably themselves in danger of being the target of preventive detention.[18]

The PAP wrested power in the pivotal Elections of 1959. The pact with the pro-communists, now organised as the Barisan Socialis, was not to

14 Curiously, material concerning the famous (or infamous) Regulation 18B of wartime Britain, which Singapore and Malaysian scholars had for some time thought was something which nobody else, but the most hardcore historians, was interested in has now again come to the fore – see e.g., Lord Steyn, 'Guantanamo Bay: The Legal Black Hole', http://www.fcnl.org/civil_liberties/guantanamo.htm, and especially the contrasting assessments of Professor AWB Simpson and Lord Denning.

15 Something for which Dr Marshall still felt a 'tinge of guilt' in a speech to the Academy of Law in 1992: (1992) 4 S. Ac LJ 7.

16 For example, there was a life-span of three years, and Chief Minister Marshall said, in moving it, that it was 'not intended to be permanent': Legislative Assembly Debates, Vol 1, 21 Sept 1955, col 703.

17 Legislative Assembly Debates, Vol 1, 21 Sept 1955, cols 695–755. The entire session is riveting reading. Marshall's government was hypocritical, according to Lee Kuan Yew, because the measures, meant to preserve democracy, were most undemocratic; and cowardly because it did not have the courage to try to make freedom succeed.

18 That then opposition leader Lee Kuan Yew's antipathy towards preventive detention might have been motivated by self preservation and the need at least to appear to fight for the freedom of his then pro-communist allies, cannot be discounted, but the interesting question is whether that was the *only* reason. See what is probably his most sustained defence of preventive detention, said in the context of the 'Marxist Conspirators': 51 SPR 27 May 1988, cols 187–201. Note also in this speech the revelation that the then Head of Special Branch had recommended the detention of Lee Kuan Yew (col 188).

survive this success. The PAP saw it as a 'kill or be killed' situation and it took steps to neutralise its own Barisan Socialis allies. Formal ranks broke over the issue of merger with Malaysia – not surprisingly, as merger appeared to have been primarily motivated, on the part of the PAP, by the desire to dilute the power of the Barisan Socialis and its Chinese-educated power-base. Its leaders in the Legislative Assembly were now on the opposition benches and eventually in 1966 resigned from official political processes altogether. But the struggle against the PAP continued in other ways, deemed by the PAP to be clandestine and employing 'communist united-front tactics'. The power of preventive detention, since 1963 (and merger with Malaysia) had undergone yet another reincarnation, this time into the Internal Security Act.[19] The PAP government both during merger and after separation, put the ISA to effective use, essentially wiping out the Barisan Socialis from the political map of Singapore.[20]

Indispensable in peace and prosperity?

The long and continuing period of PAP dominance soon settled in,[21] and with it, the entrenchment of preventive detention. Independent Singapore dates from 1965 with its separation from the Federation of Malaysia.[22] The ISA and its enabling constitutional provision, both introduced during federation, were preserved intact. Matters began to turn very favourably indeed to the PAP government. Effective opposition ended with the departure of the Barisan Socialis in 1966, and it literally died out completely in the 1970s with the PAP clean-sweeping election after election.[23] Political stability went hand in hand with economic success beyond anyone's wildest dreams. The government of Lee Kuan Yew was true to his word – the solution to civil unrest was economic development and this was what it plunged into. Yet, contrary to what appeared to be the implication of Lee Kuan Yew's 1955 speech, the ISA and its regime of preventive detention was not, at least according to what the PAP government now thought, rendered unnecessary by a marvellously successful economic and social programme.

19 The PPSO and the ISA have technically separate origins. The PPSO, which had a sunset clause, was allowed to lapse because the ISA had come into force in Singapore during merger.

20 Its leader, Dr Lee Siew Choh, was to return to Parliament in 1988 as the first Non-Constituency Member (NCMP) (see http://www.wp.org.sg/party/history/1987_1990.htm0), but neither Dr Lee nor the Barisan, which had by then merged with the Worker's Party, was to become the force that it was again.

21 Opposition presence in Parliament peaked at an all time high of four out of 81 seats after the 1991 General Election: http://www.pap.org.sg/abt_history_mem_8th.shtml.

22 Republic of Singapore Independence Act, Act 9 of 1965.

23 Parliament was without opposition from 1968 to 1984: http://www.singapore-elections.com/.

While the number of detentions does seem to have fallen significantly since pre-independence and early post-independence days, the ISA has always been very much in use since.[24] The bulk of these latter day detainees were targeted for communist-related reasons, the appellation changing from Communist to Marxist. Important attitudinal changes had occurred in officialdom. Long gone was the conviction that preventive detention was only to be a temporary measure to meet a pressing and nation-threatening phenomenon.[25] This was foreshadowed by the very permanent form of Article 149, the Constitutional provision in which the ISA is rooted, and by the absence of a sunset or renewal clause in the ISA.[26] In its place emerged a philosophy of employing the ISA, not so much because anything needed to be done at that point in time, but to pre-empt possible trouble, sometimes years before anything is likely to happen, if it happens, by 'nipping it in the bud'. Thus people like Lee Mau Seng, famous amongst the legal profession for lending his name to that case which now states the law on

24 See the figures from 1965 to 1998 in 69 SPR 20 Jan 1999, col 1991. The only significant use of the ISA since has been with respect to the Jemaah Islamiah in 2001–02: Singapore Government Press Release, 5 Jan 2002 and 16 Sept 2002, available on http://www.sprinter.gov.sg/.

25 Note the sentiments of then Chief Minister Lim Yew Hock in (Legislative Assembly Debates, Vol 7, 8 Oct 1958, col 796) that the power of detention under the PPSO was '*extraordinary* . . . to deal with the dangers to security which, *in the present circumstances*, the ordinary processes of law are an inadequate defence'; and the colourfully expressed rationale of Chief Minister David Marshall (Legislative Assembly Debates, Vol 1, 21 Sept 1955, col 754, that the PPSO was only to to last '*until such time as the tender growth of democracy in this territory is sufficiently strong* and flourishing that the forces of evil and their vitriolic hatred, which pours out of them like sap out of a rubber tree, cease to have the vicious effects they have in blinding the people of the country to their true welfare'. Compare this with the terse reply of Home Affairs Minister Wong Kan Seng to a suggestion to review the ISA – 'The ISA is still required. There is no question of repealing it': 63 SPR 25 July 1994, col 201; and the explanation of then Home Affairs Minister, Professor Jayakumar, 54 SPR 29 Nov 1989, cols 686–7, as to why the ISA was still need after the dissolution of the Communist Party of Malaya – 'it still remains to be seen whether this necessarily means the end of all forms of communist subversion. Second, the problems posed by the CPM are not our only security threat. There are also *other security threats* such as communalism, religious extremism, international terrorism, espionage and subversion from sources other than the communists.'

26 The PPSO had a definite expiry date – see the debate over whether it ought to have been 1 or 3 years: Legislative Assembly Debates, Vol 1, 12 Oct 1955, cols 823–56. The existence of a fixed term does not, of course, stop the government from extending the legislation indefinitely – see the contemporaneous Criminal Law (Temporary Provisions) Ordinance (now Act), which has been faithfully renewed, now for periods of 5 years, from 1955 until the time of writing: see the latest renewal in Parliamentary Debates, Vol 78, 1 Sept 2004, col 387. This piece of legislation gives the government a parallel system of preventive detention to deal with rather more mainstream criminality.

judicial review of preventive detention, was detained for 'glamourising Communism' and 'stirring up communal and chauvinistic sentiments over Chinese language, education and culture' in his editorial control of the Chinese daily Nanyang Siang Pau.[27] There was no suggestion of incitement of violence, nor was the possibility of public disorder to be found in the grounds of detention or the allegations of fact. The prediction that national security would be ultimately implicated must lie firmly in the realm of speculation. Yet this was the early 1970s and perhaps the mortal combat with communism in the 1960s was still fresh in memory. Even more striking is the case of Chia Thye Poh, famous internationally for rivaling Nelson Mandela in longevity of detention,[28] who was kept in detention, not because he posed any *specific* threat to national security or to anything else, but because he refused (in as late as 1990) to admit that he ever was a communist, and to 'renounce the use of force to overthrow the Government' (as he had never, he claims, believed in the use of force for such purposes in the first place).[29] Putting aside the factual disputations, even if he had advocated the use of force over 20 years before, and had refused to renounce violence, it is difficult to see how he could be a threat to national security in 1990 even if he resumed his activities. Nor was it explained, if he had been released and started to incite unlawful violence, why the normal criminal process was insufficient to deal with it in 1990.

The expansive and expanding official view of what constitutes a threat to national security justifying preventive detention was most remarkably demonstrated in the detention of the alleged 'Marxist Conspirators' in 1987.[30] Here was a loosely associated group of English-educated professionals of Catholic persuasion who chose to spend their time championing the causes of those they felt were marginalised in Singapore

27 *Lee Mau Seng v Minister for Home Affairs* [1967–71] SLR 28. Detainee alumnus Francis Seow has alleged that Lee Mau Seng's detention was in error and that it was his brother they ought to have been after: http://www.radioaustralia.net.au/media/ontherecord/prog2.htm.

28 Mandela was imprisoned from 1962 to 1990, 5 years longer than Chia (1966 to 1989).

29 Chia was detained in 1966. In 1989 he was 'released' to the offshore island of Sentosa on condition that he had to return to the island every evening (56 SPR 4 Oct 1990, col 438). He was permitted to leave Sentosa in 1992, but only in 1998 were all restrictions on him lifted: http://www.asiaweek.com/asiaweek/magazine/2000/1201/lookingback.html. Minister for Home Affairs, Professor Jayakumar said (*Singapore Parliamentary Debates Official Report,* Vol 46, 31 Aug 1985, col 482) that 'he will be released if he gives a simple undertaking to renounce the use of force as a means of overthrowing the constitutionally elected government and not to assist the CPM or its related organizations'.

30 Both the Court of Appeal decision on habeas corpus proceedings, *Chng Suan Tze v Minister for Home Affairs* [1988] SLR 132, and Prime Minister Lee Kuan Yew's description, *Singapore Parliamentary Debates Official Report,* vol 61, 1 Jun 1988, cols 324–51, make fascinating reading.

society. They were motivated by Catholicism, albeit one which stressed the here and now as opposed to what is to happen after death, and perhaps by elements of liberation theology and class perspectives.[31] They were critical of governmental policies and sought to promote their way of thinking through various organisations and activities – nothing even faintly illegal.[32] Perhaps the authorities realised how inappropriate it was to call them 'communist' – these people were far removed from the 'communists' of the 1950s who were held responsible for rabble rousing and labour unrests.[33] They were dubbed 'Marxists', no doubt with the intention of drawing on the emotional baggage attached to the 'communists' of several decades before.[34] The government's fear was simple, and is perhaps best expressed by words which came out of the mouth of the principal 'conspirator' in a chilling television interview recorded in detention:[35]

> I would foresee that the building up of pressure groups would develop to a stage where they would come into open confrontation with the Government. This confrontation with the Government would start off with peaceful protests, public mass petitions, which could lead further to more mass events like mass rallies, mass demonstrations, strikes, where more people are mobilised. And leading to public disorder and maybe even rioting, bloodshed and violence.

The 'bloodshed and violence' was very far down a very speculative road, if there is such a road, if it leads there, if we go down it, if the traveller does not choose to stop, and if no one else stops him. The problem

31 Whether or not they were influenced by Marxist ideology is not an easy question to answer for a number of reasons – e.g. while it might seem to be an 'open and shut' matter because of Marx's famous declaration that 'religion is the opiate of the masses', thinking along the lines of economic classes and the ideal of the sharing of wealth is, of course, not the exclusive preserve of Marxism. One need only look at passages such as Luke 6: 20–5 and Acts 2: 44–5 (King James Bible).

32 If indeed there was activity bordering on criminality, it has never been explained why the ordinary criminal processes were insufficient to deal with the situation.

33 Prime Minister Lee Kuan Yew had this to say about the 'leader' of the 'Conspiracy': 'Vincent Cheng is a newcomer to the game. He is English-educated, does not know Chinese. He is learning. His models are the Filipino models – Father Torres [an exponent of Christian liberation theology] – his links are there.' 61 SPR 1 Jun 1988, col 348.

34 Quoting again from Prime Minister Lee Kuan Yew, 'When I met the young lady, Miss Teo Soh Lung and the other young lady, Tang Fong Har, [both detained in the operation] all they needed were two pigtails and we go back to 1950s, 1960s, because they have got determination. They want to change the world.' 61 SPR, 1 Jun 1988, cols 348–9.

35 49 SPR, 29 July 1987, col 1512. The accuracy of these assertions perhaps need to be understood in the context in which the statement was recorded, and especially so in view of the allegations of coercion which later emerged with respect to other detainees. This discussion will nonetheless assume, *arguendo*, that the statement was reliable.

is that any activity critical of governmental policy might possibly lead to 'bloodshed and violence' in this fashion.

Perhaps the incident of the 'Marxist Conspirators' represented the high-water mark in the expanding official perception of threats to national security related to Communism or Marxism. There has not been, to date, a similar round of detentions – a quiescence of about 18 years. Indeed one might possibly sense an admission of official over-reaction in Parliamentary speeches justifying the need for the Maintenance of Religious Harmony Act[36] – the prohibition orders prescribed were needed, because otherwise the ISA would have to be used – the implication being that prohibition orders, later renamed restraining orders, might well have sufficed for the 'Marxist Conspirators'.[37] Instead, official attention increasingly began to focus on an entirely different phenomenon – the rise of terrorism inspired by a fundamentalist form of Islam. The ISA was used twice the 1980s in relatively small-scale operations, to detain suspected members of fringe Malay-Muslim groups bent on fomenting racial and religious disharmony through destruction by fire and bombs, and the spreading of inflammatory rumours of race riots.[38] But the threat of terrorism assumed centre-stage with the post 9–11 detention of, in all, 38 suspected members of the Jemaah Islamiah between 2001 and 2003.[39] At the heart of the government's concern was three 'relatively well developed' plans to bomb places and things associated with the United States or its allies in the Iraq war. There appeared to have been detailed evidence in the form of reconnaissance videos[40] and active arrangements to procure explosives.

The use of the ISA and preventive detention in the JI incident revealed another facet of official conceptions of the kind of threats to national security warranting the use of its 'special powers against subversion'. A natural line of inquiry is to ask why the government could not try the

36 Cap 167A.

37 See Professor Jayakumar's statements: 54 SPR 22 Feb 1990, col 1047–56 ('It is extremely important therefore that priests and other religious leaders do not mix religion and politics and mount political campaigns', col 1051), and 54 SPR 23 Feb 1990, cols 1204–12 ('Instead of resorting to more severe measures which we already have at the disposal – either ISA or prosecution in the court – we are proposing *a more limited, proportionate measure* and we say let us deal with the troublemakers with this more circumspect measure. In fact, our approach is more liberal than either the ISA or court prosecution,' cols 1205–6). Although the Minister does not actually say it, the implication is likely that had there been such legislation in place, a prohibition order against the alleged Marxist Conspirators would have been more appropriate in the circumstances. If so, it follows that detention under the ISA was perhaps not a proportionate measure.

38 http://www.mha.gov.sg/isd/ct.htm#communalchallenge.

39 *The Jemaah Islamiah Arrests and the Threat of Terrorism*, Government White Paper, Cmnd 2 of 2003, http://www2.mha.gov.sg/mha/detailed.jsp?artid=667&type=4&root=0&parent= 0&cat=0&mode=arc.

40 Excerpts available: http://www2.mha.gov.sg/mha/detailed.jsp?artid=167&type=4&root = 0&parent=0&cat=0&mode=arc.

detainees in a court of law instead. The simple answer, for the 'Marxist Conspirators' appears to be simply that none of them had committed any crime – indeed the ground rules of the criminal law were nowhere near being transgressed.[41] Preventive detention action was taken against them, to 'nip it in the bud'. Yet one can possibly discern another different, yet not unrelated, rationale exists – that of deterring others from similar activity. It has not so much to do with stopping these particular individuals from threatening national security – indeed it is difficult to imagine why the well-oiled and amply-supplied machinery of government should find it impossible to prevent them from doing real harm if the need should arise – but with the delivery of a public lesson to all and sundry that there are not only legal, but political lines which are crossed only at the risk of being detained indefinitely. The JI detentions reveal a rather different dynamic. Even from what has been released into the public domain, it is fairly clear that criminal convictions for any number of relevant offences, or the abetment thereof, would have not been unlikely. It might be argued that witnesses will be reluctant to testify for fear of being victimised, or that valuable intelligence sources might dry up if certain details were made known. But these do not convince. There is the option of trials *in camera*. More significantly, the rules of criminal evidence and procedure enable successful prosecutions without the revelation of sensitive identities or information.[42] This apparently happens routinely in drug cases.[43]

So what motivated the choice for preventive detention over the very real probability of a criminal conviction? Here, it is my turn to enter into the realm of speculation, but such is the nature of this inquiry. The detention of the 'Marxist Conspirators' might have involved the moderately sensitive matter of state and church relations,[44] but the JI detentions had the potential

41 Prime Minister Lee Kuan Yew has said that one of the reasons why trials were not possible was that 'the possibility of prosecution assumes that participation in communist conspiratorial activities is a legal offence, which it is not in most countries': 51 SPR 27 May 1988, col 193. This of course begs the question why it could not be made a criminal offence.

42 Regular criminal prosecutions make heavy use of incriminatory statements given by the accused person to investigating officers – it appeared that just such statements were available for the JI detainees.

43 See e.g. *Chew Seow Leng v PP* [2005] SGCA 11, where evidence was adduced that the police acted 'on information received', and where his statements to the police 'went into significant detail as to how he carried out drug trafficking activities'.

44 The 1990 Census had Singapore's Christian population, at 12.7 per cent, but far less were Catholic, and even less are sympathetic to 'liberation theology'. On the other hand, Singapore's Malay population (13.9 per cent, 99.6 per cent Muslim) is rather more homogenous and influenced by the peculiar history of Singapore which initially had the Malays as the majority (when Singapore was in Malaysia), and now in the minority: http://www.singstat.gov.sg/keystats/c2000/handbook.pdf. There are a number of serious sensibilities: Lily Zubaidah Rahim, *The Singapore Dilemma: the political and educational marginality of the Malay community*, (Kuala Lumpur: Oxford University Press, 1998).

to touch upon the most sensitive of sensitivities in Singapore – that of the feelings of the Malay-Muslim community who form a significant minority of the population. Unlike the high-publicity tactic employed for the 'Marxist Conspirators', the strategy here was to be as low-key as possible and this is precisely what a criminal trial would have run up against. There was not to be televised 'confessions' of one detainee after another 'admitting guilt'. There was instead a desire to handle it quickly, quietly, and perhaps even 'humanely'[45] – for one detained under the ISA does not acquire a criminal conviction.

Conceptions of constitutionalism

It is sometimes remarked jokingly, or half-jokingly, in 'coffee-shop talk' that in Singapore the Constitution is not worth the paper it is printed on. This sentiment is one which constitutional lawyers and, I would urge, politicians, in Singapore ought to take very seriously. It is simpler for constitutional lawyers – if this is true, and if that is the way it is going to be, then they would do well to switch to some other area of law. It is rather more nuanced for politicians – for them, the Constitution is a source of legitimacy, that intangible but real basis of lasting popular support. There are of course other sources of legitimacy, and in the context of Singapore, the ability to 'deliver the goods' economically has been prominent. But with each succeeding generation, the assurance of a developed economy, or the perception thereof, might well cause the people to look elsewhere for legitimacy.[46] Indeed, the government has been scrupulous about preserving the technical integrity of the Constitution,[47] which is certainly not to be under-rated. Yet we must ask if the Constitution really means anything *substantive* to politicians and to the courts, and if so, what does it mean to them?

Does what I, perhaps sweepingly, call 'officialdom' have a conception of what the Constitution is supposed to be or do in the context of the 'special powers against subversion', the centerpiece of which is preventive detention under the ISA? First, what is the official feeling about the need for such powers at all. There have been numerous calls for the repeal of the ISA

45 Minister of Home Affairs, Wong Kan Seng, said 'we decided that we must engage our people openly but *sensitively* on this issue. We needed to ensure that the public revelations of the case did not lead to knee-jerk reactions by Muslims or non-Muslims which would impair our social cohesion': 75 SPR 20 Jan 2003, col 2036.

46 The 'Asian Values' movement, with Singapore at the forefront, has emphasised the 'primacy of economic development' (Yash Ghai, 'Asian Perspectives on Human Rights', http://www.ahrchk.net/hrsolid/mainfile.php/1993vol05no03/2061/) – the question is whether this will survive periods of prolonged affluence.

47 The government has assiduously taken the trouble to make constitutional amendments according to the prescribed procedure whenever it is felt that it might be inconsistent with something it wants to put in place.

both inside and outside Parliament.[48] The official response is a consistent and resounding 'no', but what are the reasons? The original attitude of the champions of the ISA (and its predecessors) that it was only a temporary measure to deal with a very present and pressing problem has morphed into a belief that good governance, nay, the very survival of Singapore, is not possible without the ISA. That there is a dissonance between this political article of faith and the sense of the Constitution itself cannot really be denied. The power of preventive detention is a '*special* power against subversion' – not a routine 'everyday' sort of power. It does seem to be in the spirit of the Constitution that such powers are to be granted and evoked to deal with threats in the nature of a significant emergency – when 'action [prejudicial to the security of Singapore] has been taken or threatened by any *substantial* body of persons'. These 'special powers' are to deal with such situations. But how long after the neutralisation of the threat ought these powers to remain? It would perhaps be unduly restrictive to say that they must be repealed as soon as the immediate threat has passed. Perhaps a reasonable time ought to be allowed for the retention of 'special powers' to enable things to settle down. Perhaps even the passage of a few years may be permitted before such 'special powers' should cease. Grave disturbances require time to heal.

Yet what was the 'triggering threat' which kicked into place the ISA? There is again no doubt that this is the communist insurgency and communist-related civil disturbances of the 1940s, 1950s and perhaps the 1960s. But, by any reckoning, it simply stretches the imagination too far to argue that this threat and its aftermath, even after a generous allowance of several years to allow the dust to settle, still lingers in Singapore today. The constitutional sense must be this – once the specific threat which gave rise to the special powers and its aftermath have passed on, Parliament is to repeal the legislation, for the rationale of its existence no longer exists. Sure, Parliament is to have some discretion in the matter, and this is enshrined in Article 149(2).[49] Should a fresh threat arise which is of the magnitude envisaged by Article 149, Parliament is at liberty to enact fresh legislation, or perhaps to revive old ones to deal with that threat. This is where it is at odds with the prevailing official thinking. There was indeed an Article 149 'threat' at least until the 1960s; Parliament legitimately enacted or adopted the ISA; it has not been repealed or annulled, so it is validly in force. The reason why it has been kept in the statute books is that, although the original threat has passed, fresh threats, ranging from

48 E.g., the attempt by Nominated Member of Parliament, Kanwaljit Soin (63 SPR 25 July 1994, col 201) which was met by the terse reply that there was 'no question' of repealing it.

49 By this provision, Art 149 legislation ceases to have effect if repealed or if a resolution of annulment is passed by Parliament.

espionage to JI terrorism, continue to arise and special powers are needed to deal with them.[50] The original threat was the key, but once the door was open, anyone could enter. It may be that on occasion, legislation enacted for one reason (and that reason having expired) may be justifiably kept on the books for an entirely different reason which crops up in the meantime. Yet these special powers must, true to the Constitution, remain special and only to deal with problems having a tangible relation to the original threat. Admittedly, if a fresh threat of sufficient magnitude supervenes, while the original threat has not yet been resolved, Parliament may perhaps justifiably and out of efficiency simply keep the special powers intact without going through the trouble of repealing and then re-enacting. But that has not been the case in Singapore. Perhaps also, while the original threat prevails, these special powers may be employed to deal with problems not related to the original threat – for threats of the magnitude envisaged by Article 149 can possibly destabilise society such that an unrelated problem might take on an aspect more grave than it would otherwise have. But that again is no longer the situation in Singapore. The official view would have the ISA kept in the books, but on reserve, to deal with any threat which may arise at any time.[51] But that is the nature of normal legislation and, in my view, would blur the constitutional line between the special and the normal. The effective normalisation of constitutional 'special powers' simply cannot be in keeping with the sense of the Constitution.

Yet there is also no doubt that the authorities do indeed treat the *exercise* of powers under the ISA as 'special' – not in terms of its existence, but in the sense of repeated assurances that the powers will be used only when they think it necessary. Nor do we have any reason not to believe that powers under the ISA have been used only when the authorities genuinely believed that action needed to be taken to protect Singapore society. Contrary to what is felt in some circles, the ISA has never been used on a whim. Yet the inquiry ought not to end there. If we have to accept the normalisation of the ISA, then the precise circumstances of its use must be scrutinised. The principal operative words are 'prejudicial to the security of Singapore' – 'special powers' are not to be used except to deal with activity which is or threatens to be such. Constitutionally, this cannot mean simply anything that is literally prejudicial to the security of Singapore. If one's actions threaten the life of only one person, that is unlikely to qualify, but if it threatens the lives of hundreds of people, it probably might – the threatened prejudice must be of a certain magnitude. This factor is not

50 Minister Wong Kan Seng remarked, in this regard, 'Singapore still has to contend with the threat of ethnic chauvinism, religious extremism, subversion, international terrorism and espionage': 63 SPR 25 July 1994, col 201.

51 A medical metaphor would be that the ISA was originally conceived to be therapeutic, but has now become prophylactic.

normally a problem – no official will make a trivial harm the justification for the use of the ISA. The factor of immediacy or probability that the alleged harm will in fact happen is. The predictive exercise involved in evaluating the probability that the 'prejudice' (of sufficient magnitude) will in fact happen is, of course, not a matter of certainty. Even a criminal conviction rests, not on the elimination of all possibility of innocence, but on the absence of reasonable doubt; a dispute of fact in civil proceedings on a balance of probabilities. But there must come a point where a prediction of prejudice becomes too speculative to be constitutionally countenanced. Thus, a Christian minister might in sermons dwell on the wonders of sharing possessions, as apparently the early Christians did. An equally enthusiastic official might consider this to be 'prejudicial to the security of Singapore' – he might in time win converts to his beliefs, and they might one day make the connection with communism or Marxism, organise themselves and embark on 'united-front activities' to destabilise the present capitalistic social setup, all these resulting in violence and disorder. That this might happen cannot be discounted, but does the likelihood of it happening warrant detention to prevent it from happening? Surely, the high likelihood of supervening events breaking the 'chain of causation', as it were, should make us answer 'no' – the minister might win no converts to his belief, the converts might philosophically acquiesce in the ideal of sharing, but refuse to force others to do likewise, or they might grow up, get married and be 'distracted' by raising a family. Even if some 'movement' gets going, the vast majority of Singaporeans might be too busy making money and enjoying the fruits of their labour to bother about social activism.

Yet this is precisely where official practice is at odds with the foregoing argument. If the methodology employed in the 'Marxist Conspiracy' is anything to go by, it is just this kind of speculation, no doubt in good faith, which went into the decision to use the ISA. Grave problems arise. There can be no end to the human imagination, albeit in good faith. The line between prudence and paranoia can be crossed. In effect the official attitude towards the kind of behaviour which may attract the use of the ISA functions as a super-legal system prescribing what the citizen may or may not do. What is the 'rule' that a reasonable citizen is to distill from official practice? You shall not do anything which might in the near or distant future result in social disorder.

The crux of the problem is this – how is one to participate in a functioning democracy with such a rule in place? Democracy, however else we may argue about it, must involve at least the occasional challenge to established and official beliefs and practices – what else are elections for, if not to allow the people to decide which view to take? If the 'nip in the bud' approach is adopted for the use of the ISA, then it would be impossible to distinguish between legitimate democratic criticism and activity which might, some years hence, result in disorder. There can be no guarantee that

activity critical of established political dogma will not have that result, however well meaning the actor may be. Indeed such activity can be expected to cause argument and contention, if only from those who support the current system. Curiously, there have been consistent official pronouncements that it is not so much the content of what is being done that irks the government, but the *context* in which it is being done. Thus it has often been said that the government does not disallow political criticism, but that must be done under the aegis of a political party, not any other organisation or movement.[52] Quite apart from that fact that this does seem to contradict the professed concern with potential violence and disorder – for it is not easy to see why the probability of disorder is greater or less in one case or the other[53] – this distinction is not consistent with the Constitution. Nowhere in that document is there a greater freedom of speech or association accorded to political parties. The freedom of political criticism cannot be, by the Constitution, less for individuals and entities which are not expressed to be political.

The *Jemaah Islamiyah* detentions, on the other hand, arise not from a 'nip in the bud' approach, but from an aversion to the use of the normal criminal process. Here, the bud was almost in full bloom – the question was not really whether or not to act but how to do so. The option of a criminal trial was more than a realistic course of action – the line between criminal and non- or pre-criminal activity had clearly been crossed, and there was, apparently, ample admissible evidence which probably would not involve divulging sensitive information. Yet that path was not chosen. It is not possible to talk about official motivations with any certainty, but there was a general and 'benevolent' strategy of playing down the incident out of concern for the historic sensitivities of race relations in Singapore. The choice for detention above trial seemed to have been part of this larger plan. No doubt, a due process sacrifice was made – the detainees were denied their right to a trial, the officials could have accused them falsely and the ISA route meant that they could not effectively defend themselves. The issue then becomes this – whether the due process sacrifice was appropriately made. It is likely that there was an official determination that the course of a criminal trial and the attendant publicity thereon could not

52 Then Prime Minister Lee Kuan Yew said, 'there is still time for those who had backed [the Marxist Conspirators to] present an alternative platform and an alternative government and contest against the PAP. *Perfectly above board*. Get an alternative platform – economics, security, defence, social advance, education – publish. And you have got to justify and sell it, which was what we did . . . Nothing to stop you. Nothing to stop all non-communists who want to work the system to do that.' 51 SPR 1 Jun 1988, col 346–7. The government has never detained a sitting Member of Parliament.

53 It might be argued that political criticism performed under a non-political body might successfully deceive people into thinking that the critique was, for example, merely religious and not political – such naïvete must now be rare.

be as safely managed as it could have been in the case of an ISA detention. In a trial, there is limited control over the witnesses the defence may wish to call, and the lines of questioning which may be embarked upon. There was at least a real possibility that the trial might split the nation along racial lines. True, it is speculation, for the feared consequences may well not have happened. However, there is, at least for older Singaporeans, just such a precedent.[54] It would have been a rigidly doctrinaire government who would not have seriously considered the use of preventive detention over a criminal trial.[55]

Extra-judiccial supervision

Perhaps the most contentious issues surround the debate over checks and balances. Just as all have sinned, so too have all made mistakes. Classical 'liberal' constitutionalism would emphasise real and concrete limitations to official power; the Singapore model would focus on the empowerment of the government. This seems to be at the root of the 'rule of law' vs 'rule by law' controversy. Yet the two positions are not as far apart as it may first seem. There was, from the start, recognition that some sort of review process was in order – and this must have stemmed from a sentiment that officials do make mistakes.[56] Yet there are aspects of the institutional design of this review body, called the Advisory Board, which militates against it playing any major role in acting against an official decision. It is advisory and, subject to the exception which follows, its advice can be rejected. Unfortunately there are no publicly available statistics which indicate how often that happens. The sheer secrecy of the proceedings also works against it[57] – for there must be a significant political cost for any government to publicly reject such advice. The Board does not have its own machinery to review in detail how the decisions to detain were arrived at – one surmises that the bulk of the

54 The so-called 'Maria Hertogh Riots' (http://www.moe.gov.sg/ne/sgstory/mariahertogh.htm) sparked off by, perhaps surprisingly, a civil judgement (*Re Maria Huberdina Hertogh* [1951] MLJ 12 (H.C.), 164(C.A.)) which gave Maria to the custody of her Dutch (Catholic, biological) parents over the claims of her (*de facto*) Muslim family.

55 It might similarly be argued that Singapore today is quite different from what it was in 1951, but while the communist/anti-communist divide vanished a long time ago, the racial and religious demographics remain.

56 Unless one takes the rather cynical view that it was meant to be a 'rubber stamping' institution right from the start, appearing to clothe detentions with a legitimacy which does not actually exist.

57 To the government's credit, it has published a fair amount of detail concerning the Advisory Board proceedings in the Jemaah Islamiyah detentions (Government Statement on the Recommendation of the Advisory Board in the Jemaah Islamiyah Case, 30 May 2002, (http://stars.nhb.gov.sg/public/index.html). The same cannot be said of the proceedings in the Marxist Conspiracy.

'evidence' before the Board is selected and constructed by the same officials who were in favour of detention. Yet the detainee does have the right to be informed of the grounds of detention and the allegations of fact which support them.[58] The detainee also has the right to counsel[59] and the opportunity to have a lawyer at Board hearings is routinely given.[60] The Board is chaired by a senior member of the upper Judiciary who therefore enjoys the security of tenure of that appointment.[61] This is not quite a trial by 'due process', but it is perhaps an approximation of it.

Curiously, the government which had appeared to be staunchly of the view that this was quite enough 'supervision' already, decided to work in a Presidential veto, when that office was converted to an 'elected' one.[62] Essentially, when the Advisory Board and the President unite, the government must yield. This supervisory avenue depends, of course, on the strength of the Presidential office, and it is no secret that at the moment there is intense controversy and debate about the extent to which the very restrictive candidature requirements detract from the idea of a popularly elected President.[63] Yet, technically, this change was one which has the potential of correcting mistakes.

58 Art 151, Constitution.

59 *Lee Mau Seng v Minister for Home Affairs* [1971] 2 MLJ 137. The court rejected the broad proposition that the right to counsel (Art 9(3)) was completely ousted by Art 149. However, that right need only be granted within 'reasonable time' and no mention was made of whether the right extended to representation at the proceedings of the Advisory Board.

60 One of the JI detainees appointed a lawyer to make his representations: (Government Statement on the Recommendation of the Advisory Board in the Jemaah Islamiyah Case, 30 May 2002). (http://stars.nhb.gov.sg/public/index.html). It was however unclear whether the detainees' lawyer was allowed to be present when the rest of the 'evidence' was presented to the Board, or whether the lawyer was permitted to cross-examine or otherwise challenge the 'evidence' presented.

61 The Chairman at the time of writing (early 2006), Judge of Appeal Chao Hick Tin, is the nation's most senior Judge after the Chief Justice.

62 Art 151(4), Constitution.

63 The bone of contention is the requirement under Art 19(2)(g)(iv) that a candidate must have for three years held high public office, or a 'similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, *in the opinion of the Presidential Elections Committee*, has given him such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of President'. In the 2005 Presidential Elections, all candidates, apart from the governmentally endorsed incumbent, were disqualified from running: http://en.wikipedia.org/wiki/Singapore_ presidential_election,_2005. This controversy was foreseen at the inception of the Elected President: Kevin Tan, 'The Elected Presidency in Singapore' [1991] Sing JLS 179, pp 190–1.

Judicial review

Perhaps the most remarkable confrontation between the government and the judiciary concerned the theoretical assertion by the judiciary of the right of judicial review of preventive detention decisions. This incident revealed very clearly the contest between the two competing conceptions of constitutionalism. Briefly, after several decades of apparently abiding by the policy of 'non-justiciability' of preventive detention, the Court of Appeal in 1989 declared that the idea of any official power being non-justiciable is contrary to the Constitution.[64] It violated equality and equal protection because a limitless power is licence to arbitrary action. It violated the separation of powers because it is squarely within the judicial sphere to declare a particular official action to be illegal. The government responded quickly, albeit clumsily, by constitutional amendments intended to restore non-justiciability.[65] Although a subsequent Court of Appeal refused to enter into the precise meaning of these amendments,[66] the government's intent was clear – the Judges might test the decision for procedural rectitude, but are to go no further. What underlies this steadfast refusal to countenance judicial review for preventive detention, something which has increasingly found favour in Commonwealth and Common Law political systems,[67] as the (now legislatively overruled) judgement of the Court of Appeal amply demonstrated?

The official pronouncements reveal several lines of reasoning which ought to be no real surprise to those acquainted with administrative law discourse on judicial review. There is the functional objection – the officials are in a better position to assess threats to national security than are Judges. It is said that internal security officials possess the experience and training that are not shared by Judges – so the officials are more likely to arrive at a more accurate perception of the risks involved. The experience and training of the relevant officials is not an open book – and this makes it difficult to

64 *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132. See the extended Note below.

65 Essentially section 8(b)(ii), Internal Security Act which outlaws 'judicial review' of the detention decision (apart from procedural or formal legality).

66 Teo Soh Lung v Minister of Home Affairs [1990] SLR 40 at p 57.

67 Even in this 'age of terrorism', the highest courts of the land have continued to assert a substantive role in reviewing preventive detention measures: *A(FC) v Secretary of State for the Home Department* [2004] UKHL 56 (http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/aandoth-1.htm), House of Lords, United Kingdom; *Hamdi v Rumsfeld* (2004) 542 US 507 (http://supct.law.cornell.edu/supct/search/display.html? terms=hamdiandurl=/supct/html/03-6696.ZO.html), United States Supreme Court.

scrutinise this claim from that angle.[68] Yet experience and training can, as a matter of common experience, be a bane as well as a boon. For example, there is a phenomenon popularly called 'institutional capture' – the official begins to identify with the institution he or she works for, and this skews the personal views of the official in favour of the interests of institution, to the exclusion or down-playing of equally strong but competing interests.[69] So too is experience a two-edged sword – it allows us to reach conclusions more quickly and efficiently, but also enables our prejudices to harden from suspicion to firm belief.[70] Indeed the value of an independent Judiciary is precisely that it does *not* have particular experience and training in whatever issue it has to decide upon. Only then can Judges be neutral and fair to all parties concerned – and this must mean the relative absence of preconceptions and prejudices.[71] Traditional administrative law recognises this dual nature of official experience and training by counselling caution on the part of Judges before they overturn any official decision. Judges are not to interfere unless there is a clear irrationality or disproportionality. This is embodied in the idea of 'unreasonableness' – an official decision is not simply one which the Judge disagrees with, but one which no 'reasonable' official may come to.[72] If we take the example of the JI detainees, a Judge might disagree with the official calculation that bringing the detainees to trial presented a significant risk of long-term harm to race relations – but also think that it is not an unreasonable view to take. In these circumstances, the decision cannot be overturned. There is of course a large degree of elasticity in the concept of

68 See the position of then Minister of Home Affairs, Professor Jayakumar, in sponsoring constitutional amendments to entrench non-justiciability (52 SPR 25 Jan 1989, cols 469–70) where the Minister cites an extraordinary extra-curial opinion of the Singapore bench in 1959, and, more surprisingly, the words of that champion of judicial review in the United Kingdom, Lord Diplock, who was concerned that judges were ill equipped for the exercise of balancing 'competing policy considerations'. Whatever the 1959 bench and Lord Diplock may have been talking about, constitutional courts around the world routinely do little else but balance competing policy considerations. See also then Prime Minister Lee Kuan Yew's revelation of the background of the then Internal Security chief (51 SPR 27 May 1988, col 199–200), who had undergone a local 'Marxism-Leninism' course, and a course for Senior Intelligence Officers in the United Kingdom.

69 It is not unusual, for example, for lawyers, not normally given to partisanship, in representing one party in a dispute to begin to actually believe in the strength of their client's case, and for lawyers representing the opposing party to believe likewise.

70 What one chooses to learn from experience is not pre-determined – some might indeed allow 'experience' to dismantle an initial prejudice, and others might simply use 'experience' selectively to confirm an existing prejudice.

71 Perhaps this was the greatest strength of the common law institution of the jury, once operative in Singapore, but elevated to a constitutional right in the United States. The lay jury comes to court without any experience or training and is therefore relatively free from *professional* prejudices and preconceptions.

72 Such a distinction was urged upon Parliament (ultimately in vain) by government backbencher K Shanmugam (52 SPR 25 Jan 1989, col 508–10), who was anxious that a 'residual right to review' be preserved.

reasonableness, and great play is often made of this by opponents of judicial review.[73] But there is of course uncertainty in even the most basic of judicial tasks. Take the example of applying the criminal standard of proof beyond reasonable doubt in the not unfamiliar case of one witness contradicting another. The uncertainty of the outcome does not lead us to take away the decision from the Judges. Indeed the great amendments of 1989 do not affect judicial review in general, and for the vast majority of official decisions, the Judges are to continue to assess 'reasonableness', apparently without dire consequences. Perhaps the official thinking is that the nation can afford the uncertainty in other cases, but not in situations as threatening as those envisaged by the ISA.[74] The fear is that the Judges will reverse an official decision to detain, and the release of the detainees will wreak untold havoc to society. True, there will be borderline cases – but this is precisely where the doctrine of reasonableness enjoins Judges to defer to the government. We have no reason to believe that our carefully chosen Bench might harbour enough mavericks who are willing to put the nation at any real risk of serious harm. Yet the possibility of difficult cases should not dull us to the existence of areas which are not so grey. For example, if Chia Thye Poh had sued for habeas corpus in the 20th year of his detention and the Judges acceded to his request, it is not easy to understand why his release would have seriously jeopardised the national security of Singapore.[75] So too the 'Marxist Conspirators' – if the government had done nothing when the detainees, after their initial release, repudiated the truth of their televised 'confessions', it requires some imagination to see what great damage that would have caused to the nation.[76]

73 Sin Boon Ann, 'Judges and Administrative Discretion – A Look at *Chng Suan Tze v Minister of Home Affairs* [1989] 2 MLJ ci; and the rebuttal in Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning *Ong*, Awaking *Arumugam*' [1997] Sing JLS 240, fn 10 and 11.

74 Even so, the Judges apparently still exercise the power of review over detentions under the Criminal Law (Temporary Provisions) Act, Cap 67, although it has never been used. It is difficult to believe that the 'Marxist Conspirators' were in any manner more dangerous than the hardened secret society elements normally detained under the CL(TP)A.

75 Then Prime Minister Lee Kuan Yew said that Chia Thye Poh had the choice of freedom – '*All* he has to say is, 'I am against violence as a means to power" '. (51 SPR 27 May 1988, col 195–6). It is difficult to understand how a mere declaration could alter the status of the detainee from one which would have him as being so dangerous that he cannot be released, to one which would allow him complete freedom. For example, Chia could have given the declaration but lied in order to gain his freedom.

76 The official view was that they had become dangerous again because if they no longer thought they had done something wrong, they might continue their activities. Almost all were eventually released when they (under detention) repudiated their repudiation. Just as in Chia's case, it is not easy to understand how such a repudiation, made under detention and at the threat of continued detention, could so transform the supposed risk that the detainees posed to the nation – again, they could have lied.

There is then the legitimacy objection. The elected government must have the final say about what national security requires, not an unelected judiciary.[77] The government has to fight and win elections to stay in power and if they succeed with the public knowing full well how they have used the ISA, then what greater democratic endorsement could there be? Quite apart from the obvious retort that general elections are an unreliable indication of public support for *particular* governmental policies or practices, this issue brings to the fore the tension between the desirability of democracy and the evils of majoritarianism. Majorities are to be presumptively respected, but are capable of doing wrong, sometimes on insufficient information, sometimes because of the strength of irrational or prejudicial emotions aroused. Constitutional law scholars have sought to resolve the dilemma by fashioning the idea of a 'democratic deficit' – Judges are to lean in favour of upholding the actions of the elected government, but may step in where there is reason to believe that the majority may not be behaving fairly. This is and continues to be the basis of the international human rights movement[78] and the near routine incorporation of a Bill of Rights in all modern constitutions – the Singapore Constitution is no exception. Take again the example of the 'Marxist Conspirators'. It might be said that the public knew of the detentions but nonetheless voted for the sitting government in the next elections. Grave difficulties stand in the way of any attempt to found some sort of legitimacy to the exercise. Public judgement is to be respected only if all points of view are adequately presented to it. It is not a secret that the media in Singapore is subject to a very high level of governmental control, and it would not come as a surprise that the media would be unlikely to 'argue against' the government on a matter as important as the use of the ISA.[79] The detainees, after their initial release, did try to present their side of the story to the public, but this was met with another round of detentions, with the possibility of

77 Then Minister of Home Affairs, Professor Jayakumar said that if judicial review were possible, 'Singapore judges will in effect become responsible for and answerable to decisions affecting national security of Singapore because they would then have the final say. It must be so. But this was not, and never was, the intention of the Legislature' (52 SPR 25 Jan 1989, col 469).

78 In the international plane, the tension is between national sovereignty (what nations can do to their own people), and fundamental human rights (what nations cannot do even to their own citizens).

79 The person in charge of Singapore Press Holdings, the dominant media group, is at the time of writing none other than the former Director of the Internal Security Department at the time of the arrest of the 'Marxist Conspirators': http://www.sph.com.sg/invrel/files/2000/board.pdf. It is not the purpose of this piece to discuss the merits or demerits of press freedom. It might well be that a 'constructive' press was more appropriate for Singapore. The point is simply that the more the freedom of speech (and in particular, freedom of the press) is limited, the less one is able (convincingly) to call upon public opinion to legitimize official activity.

release only on condition that the detainees are not to speak to the press on this matter. Under the circumstances, it is difficult to comprehend how the affair could have been fully and fairly thrashed out in public, so that the public may decide whether the detentions were justified. Nor was the branding of the detainees as Marxist with its clear associations with communism conducive to dispassionate assessment by members of the public. All this does not, of course, mean that the detentions were in fact unjustified, but it does mean that we might need to rethink the supposed superior democratic legitimacy of the elected government in their assessment of security risks.

The Constitution vests 'judicial power' exclusively in the Judiciary.[80] The Judges enjoy a constitutional security of tenure like no other official.[81] This must mean at the least that Judges, unelected as they are, are the appropriate decision-making body for some matters. Indeed the legitimacy of the Judges seem to stem from precisely the fact that they do not need to seek re-election. The elected government often argues that there is a need for the ISA because criminal trials, though desirable and preferable, are not possible. Herein must be an admission that the proper and legitimate authority to deal with a security threat, *if it were possible*, is the Judiciary. Yet, curiously, when the Judiciary seeks to reclaim, in part, what is theirs through the agency of judicial review, they are rebuffed. Even more curiously, the Chairman of the ISA Advisory Board on detentions is a senior Judge (at the time of writing), and this is held out to be a guarantee of impartiality and objectivity, and perhaps even legitimacy. It is obvious that the supposed inferior legitimacy of the Judges is not a consistently held position.

A creative controversy?

Try as officialdom might to proclaim the established 'empowerment ethic' as the only possible model of constitutionalism for Singapore,[82] the force of the 'limitation ethic' is likely to grow. The central problem of an extreme empowerment ethic is its inability to generate a sufficiently meaningful concept of constitutionalism – it would place in the *absolute* discretion of the government of the day whether or not to extend the 'special powers'

80 Art 93, Constitution.

81 Art 98, Constitution, contains the usual security of tenure and renders Judges removable without their consent only after an elaborate process.

82 Then Minister of Home Affairs, Professor Jayakumar, said 'It is the settled principles of the subjective test [of no judicial review on substantive grounds] which have enabled the Government to deal effectively with Communists, communalists and other threats to security. It is these settled principles which have enabled us to handle security threats and to maintain stability. And they *will remain essential* to the security of Singapore': 52 SPR 25 Jan 1989, col 469.

to deal with subversion indefinitely, and whether or not to detain anyone indefinitely. Simply, that already is the situation without a constitution. Officialdom would portray any attempt to push for a 'limitation ethic' to be the result of the seduction of foreign liberal ideas completely alien to Singapore.[83] And yet one would be very slow to arrive at such an analysis when the seduction, as officialdom would have it, has led our highest judiciary astray. It is striking that the late Chief Justice Wee Chong Jin authored both the very pro-empowerment decision in *Lee Mau Seng*, and the significantly pro-limitation judgement in *Chng Suan Tze*. If we may dismiss pure caprice, then we must take the judicial shift very seriously. The obvious difference is the passage of time, and with it the radical changes in Singapore society. The broad movement is well captured by the title of founding Prime Minister Lee Kuan Yew's memoirs – From Third World to First.[84] A model of constitutionalism necessary to deal with a determined communist movement prepared to use violence and social disorder, to solve acute problems of housing and job-creation, to weed out pervasive official corruption, to defuse and heal volatile race relations following separation from Malaysia is not necessarily an appropriate model of constitutionalism for modern Singapore, 40 years after independence. True, problems such as sensitivities in race relations, like terrorism, are not completely resolved, but they can never be in the foreseeable future. One can also sympathise with well-meaning officials who argue that if we 'relax' the empowerment ethic, even for a moment, the grave social evils which had been held at bay will rush back like a tsunami through the cracks. But one must also be vigilant that the line can be crossed between prudence and paranoia. Meaningful constitutionalism is not about not taking any risks at all, but about taking calculated risks so that we can deal with the problems arising from optimising liberty – risks which Singapore could not afford in 1965, but which it can well handle today. Perhaps it is time to 'take one bold

83 Minister Professor Jayakumar said, 'the Court [rejected the subjective test of judicial review] because of cases decided in the United Kingdom and other parts of the Commonwealth' as 'they have no choice because, if our courts were to ignore such precedents, the Privy Council in the United Kingdom can and probably will overrule our Court of Appeal' (52 SPR 25 Jan 1989, col 466–7). The truth is that the Court of Appeal had a choice – it was open to it to reject foreign jurisprudence on the grounds that local circumstances are different. The Privy Council might or might not have overturned it, but that was the choice of the Privy Council. Nowhere in the judgement is found any sentiment that the court feared being overturned by the Privy Council. And if indeed that were the primary motivating factor, it would have been sufficient for the Legislature to remove appeals to the Privy Council, leaving the courts free to decide whether or not there ought to be substantive review.

84 Lee Kuan Yew, *From Third World to First: The Singapore Story: 1965–2000: Memoirs of Lee Kuan Yew*, (Singapore: Singapore Press Holdings, Times Editions, 2000).

step to freedom'.[85] If Singapore cannot afford to take it now, it probably will never be able to.

Officialdom in Singapore is increasingly calling for 'paradigm shifts' in economic development, in job security, in governance, and in the acceptance of 'Integrated Resorts'[86] – perhaps it is time for a similar move in the official philosophy on threats to national security. Those who would argue for such a change should not be treated like enemies or fools – they too have as much to lose as anyone else if national security were really threatened. The economic and social landscape of Singapore has changed beyond recognition since 1965; can it be that its official thinking on constitutionalism, exemplified by its attitude towards the ISA and preventive detention, should remain the same?

An excursus – a brief history of the law

Singapore's jurisprudence on judicial review of preventive detention under the ISA is contained in two clusters of cases. The first set – in the 1960s and 1970s – was the result of attempts by opposition Barisan Socialis-related detainees to challenge the use of the ISA by the PAP government. Chief Justice Wee authored all these early decisions. The first of them, *Lim Hock Siew v Minister of the Interior and Defence*,[87] was a curious decision. The detainees were released on a technicality – the President's satisfaction, a condition of lawful detention, was not adequately demonstrated as the wrong person (a Permanent Secretary) had signed the detention orders, and not, as the court held ought to be the case, the President, Minister or the Cabinet Secretary. That, of course, meant that the detainees were liable to be re-detained once the right signatures were obtained.[88] As one detainee,

85 Then opposition member in the State Legislative Assembly, Lee Kuan Yew: Legislative Assembly Debates, Vol 1, 21 Sept 1955, col 725. He went on to declare, in words which few others can express with similar eloquence:

> [A] free government, speaking for the people, deciding its destiny absolutely and unreservedly, could drastically repeal those parts of the Emergency Regulations which militate against the fundamental rights of human beings anywhere in the world [i.e. primarily the power of detention without trial]. *This would not lead to Communism if such a step were accompanied by an equally bold and drastic economic and social reform*. To shrug and doubt is to admit defeat. You may stifle political discontent, but it will come out at some subsequent date in a much more virulent form. If we take our chance now, I say Malaya [of which Singapore was part] can *succeed as an independent and free democracy*.

86 The speech of Prime Minister Lee Hsien Loong on the introduction of big time gambling in Singapore (80 SPR 18 Apr 2005, col 54), is replete with concepts like 're-examining' and 'reinventing'.

87 [1965–68] SLR 697.

88 As compared to a release on substantive grounds which would make re-detention on similar grounds contempt of court.

the eventually famous Chia Thye Poh, had not made the technical challenge, the court proceeded to address the issue of substantive review on grounds of bad faith – the government, the detainees alleged, was using the ISA not so much for national security purposes but as a weapon in the struggle with the opposition Barisan Socialis. Chief Justice Wee, not too elegantly, sidestepped the matter by saying that as it was (formally) the President who made the detention orders, an allegation of bad faith against the government (i.e. the Cabinet) misses the target. That of course would have the practical effect of denying any sort of review at all – for the President (then) was constitutionally obliged to follow the advice of the Cabinet. Thus was a piece of British constitutional fiction used to repel judicial review.

Chief Justice Wee was, in a little over three years, to hear what is perhaps the most important early decision – *Lee Mau Seng v Minister for Home Affairs*.[89] The issue of substantive review was dealt with more squarely. Although a nodding and implicit recognition was made to the *Lim Hock Siew*, the Chief Justice articulated what was the real problem, in his view, of the possibility of substantive review – the 'logical result . . . that a court can substitute its own [judgement] for the subjective satisfaction of the President acting, in accordance with the advice of the Cabinet'.[90] Delivered, as it was, in the early 1970s, before the full flowering of administrative law in Britain and the Commonwealth, it was legally understandable. But its major strength was the deep resonance which this kind of reasoning had with the then deliberate PAP strategy of centralisation of all significant political power in the Executive Government. Yet the Chief Justice was not to leave constitutionalists entirely empty-handed – the constitutional right to counsel, it was held, survives the ISA and had to be allowed to detainees after a reasonable time. Yet in the final analysis, this would not assist detainees in getting what they really want – their freedom – for although detainees may sue to enforce the right to counsel, a wrongful denial does not, it was held, result in an entitlement to habeas corpus. The message was clear – the core detention decision was to be cocooned and insulated from judicial attack, but the courts will be scrupulous about everything else – for example, technical compliance and 'parallel' rights like the right to counsel. The subsequent decision of *Lau Lek Eng v Minister for Home Affairs*[91] reinforced this with the holding that any irregularity in the 'manner and conditions' of an (otherwise) lawful detention does not entitle the detainee to be released.[92] The last decision in the earlier cases – *Wee Toon*

89 [1969–71] SLR 508.
90 Ibid., at p 526.
91 1972] 2 MLJ 4.
92 [1972–74] SLR 300. The court did not see anything amiss with detainees being required to attend 'hobby' classes in the form of tailoring and the like. The court also held that habeas corpus was not the appropriate remedy for complaints about the manner and conditions of detention.

Lip v Minister for Home Affairs[93] – underlined the early judicial attitude. Another challenge – this time on the ground of 'abnormal and punitive conditions' – was rebuffed in that the letter of the law had not been breached – for the ISA permitted the authorities to specify the place and manner of detention. A substantive challenge was met with, of course, the then recent decision of *Lee Mau Seng*.

More than 15 years was to pass before the courts tangled with the ISA again. The detention of the alleged 'Marxist Conspirators' in 1987 resulted in another burst of judicial, and even legislative, activity. Matters began quietly. Two sets of habeas corpus applications were heard in the High Court – *De Souza Kevin Desmond v Minister of Home Affairs*[94] and *Teo Soh Lung v Minister of Home Affairs*.[95] Both were heard by Lai Kew Chai J in the High Court and were disposed off much in the same way as Chief Justice Wee did in the 1960s and 1970s – essentially, the detention decision was 'non-justiciable'. And then it happened – *De Souza's case* went on appeal and became *Chng Suan Tze v Minister for Home Affairs*.[96] The Court of Appeal was, for the first time seized of an ISA matter, and the enigmatic ruling that ensued has kept generations of constitutional law watchers enthralled.

It was a strong Court of Appeal. A single judgement was issued in the name of no less than Chief Justice Wee, joined by Chan Sek Keong J, who was eventually to be Attorney-General and Chief Justice himself, and LP Thean J, who was to retire as permanent Judge of Appeal. It took the legal profession, and perhaps the nation, by storm. A lion's share of the judgement was devoted to the over-ruling of *Lee Mau Seng* and its philosophy of non-justiciability. The Court of Appeal had been inspired by significant shifts towards justiciability in administrative law all across the common law world, but more importantly for constitutional lawyers, the Court of Appeal was to anchor its decision ultimately in the Constitution. Arbitrary power (as all non-reviewable powers must be) is contrary to Article 12 which guarantees equal protection of the law, and Article 93 which vests judicial power in the Judiciary confers on the Judges the right and duty of judicial review of any official power. The Court of Appeal appeared to reach even deeper than the literal words of the Constitution when it invoked the fundamental concept of 'rule of law' in this pronouncement:[97]

> [T]he 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.

93 [1972–74] SLR 303.
94 [1988] SLR 517.
95 [1988] SLR 676.
96 [1988] SLR 132.
97 Ibid., para 86.

Yet a closer reading of the judgement revealed a clear ambivalence. The Court of Appeal was to, so it seemed, qualify itself by also saying that executive decisions based on considerations of national security stand in a different position:[98]

> It is clear that where a decision is based on considerations of national security, judicial review of that decision would be precluded.

It is however unclear precisely what that difference is, except perhaps that more than usual deference ought to be accorded.

Eventually, and surprisingly, the Court of Appeal held that it was unnecessary to review the detentions substantively. The reason was that the detentions were infirm on a technical ground – history was to repeat itself and the wrong person had signed the orders. So the detainees were released and then re-arrested soon after.

The government was sufficiently alarmed by the dicta to push through legislative and constitutional amendments in an attempt to enshrine the prior position of non-justiciability. Two decisions of the High Court, that of FA Chua J in *Teo Soh Lung v Minister for Home Affairs*[99] and of Lai Kew Chai J in *Vincent Cheng v Minister for Home Affairs*[100] was to hold that the government had indeed succeeded in turning back the clock to *Lee Mau Seng* and non-justiciability. Driven thus from pillar to post, the detainees had little choice but to urge upon the court that fascinating creation of Indian constitutional law – that of implied limitations to the power of constitutional amendment. Essentially, this doctrine prescribes that even if the procedural requirements of constitutional amendment are met, attempted amendments which destroy fundamental features of the constitution are nonetheless constitutionally infirm. The two High Court decisions flatly rejected such a recourse for Singapore's Constitution – it was uniquely Indian and could not be imported into Singapore. The final decision in this series, the case of *Teo Soh Lung* on appeal,[101] saw the Court of Appeal delivering another enthralling judgement – this time for what it did not decide. The Court of Appeal, constituted identically to *Chng Suan Tze*, but this time with LP Thean J as the principal author, refused to decide on any of legal issues raised. It held that even if the court could review the detention substantively, the challenge would fail on the facts. This factual focus thus relieved the court from having to decide a number of key issues: whether or not the post-*Chng Suan Tze* amendments

98 Ibid., para 89.
99 [1989] SLR 499. The nature of these amendments are amply set out in the judgment, paras 5–7.
100 [1990] SLR 190.
101 [1990] SLR 40.

actually succeeded in ousting substantive review in entirety;[102] and if as a matter of statutory interpretation, they did, whether they violated any fundamental feature of the constitution;[103] and if they did, whether or not there was a doctrine similar to the Indian one of implied limitations to constitutional amendments.[104] And there matters have rested since 1989. It was an elegant piece of judicial 'kung fu' – realising that it could not withstand the onslaught of the governmental juggernaut, at least at that point in time, the judges retreated by deciding nothing, leaving matters to a future court to resolve, perhaps when both the government and the nation would have become rather less averse to a stronger judicial role in supervising national security decisions such as those under the ISA.

102 This is a live issue, notwithstanding the two High Court decisions. The amendments were not the most happily worded and prescribed that the law would be what it was on the date that *Lee Mau Seng* was decided. This of course does not conclusively say anything because *Lee Mau Seng* was a High Court decision and could not have declared with anything with finality. This is especially significant because the Court of Appeal had held that the position in *Lee Mau Seng* was unconstitutional. In addition, the express saving in the amendment for procedural review opens another door – for the line between substantive and procedural review is thin – e.g. if the detaining authority had, in the view of the court, taken into account an irrelevant consideration, that is as much a procedural defect as it is a substantive one. The introduction of an ouster clause is of course not a barrier in modern administrative law – for it is now orthodoxy that no ouster clause can succeed in preventing at least jurisdictional errors of law.

103 There is evidence that they do indeed breach a fundamental feature of the Singapore Constitution, if *Chng Suan Tze* is to be believed, for nothing short of the 'rule of law' itself demands that all power be reviewable.

104 Attempts to distinguish the Indian cases are unlikely to persuade – the doctrine, at its core, is a shield of last resort against an overenthusiastic government bent on doing anything to get its way – surely, there is no jurisdiction which is immune from this.

9 Writing the Constitution

Forty years of Singapore constitutional scholarship

Kevin YL Tan

Introduction

In Singapore, few law students and fewer legal academics will rank Constitutional Law as their favourite subject. Like oxygen, the Constitution is necessary, but once it is there, we tend to take it for granted and forget about it. In Singapore, Constitutional Law is a subject apart from daily living, indulged in only by academics and scholars. Aside from the odd criminal law or preventive detention case, constitutional arguments are hardly ever vented in our courts. Thankfully, the scholarship on Singapore's Constitution in the past 40 years has been extensive and rigorous and remains in a robust state of health. In this chapter, I will provide a broad bibliographical survey of this literature through the years and conclude with some suggestions for further research and writing.

In this survey, I will focus on writings published after 1965 although passing reference will be made to earlier works, where appropriate. I will begin with a brief description of the state of scholarship in constitutional law before 1965 and thereafter proceed to adopt a thematic approach in assessing the contributions since. The thematic approach will allow the reader to quickly see the main topics of concern and discussion as well as the gaps that might exist in the various facets of the subject.

Constitutional law is as much about law as it is about politics, society and history. As such, while our focus is on legal writings about the Constitution, reference will also be made to non-legal writing which have contributed to our understanding of the subject. It is not possible to list every single work that has been written on every single topic relating to the Singapore Constitution. As such, reference will be made to the more important works which will help illuminate and instruct students of the subject.

Early works

During Singapore's colonial period, few works addressed themselves to the question of governance and constitutionalism. This is quite understandable since Singapore did not truly have its own constitution until 1946.

Furthermore, as a colony, Singapore – and the Straits Settlements for that matter – was really the subject-matter of imperial law which did not evolve autonomously. From a legal perspective, quite possibly the earliest work which attempted to set out the constitutional form of government in Singapore was Sir Walter Napier's *An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements*, a small 50-page booklet first published in 1898.[1] Much of this work concentrates on Singapore's early legal history and the applicable law in Singapore, and Napier devotes all of four pages to the topic of 'Institutions of Government' in which he describes the three formal branches of government.[2]

Following close on the heels of Napier's pioneering work was Sir Roland St John Braddell's magisterial *The Law of the Straits Settlements: A Commentary*, published in 1915.[3] Braddell modestly states in his preface that his volume was intended to bring Napier's book up to date and to expand on it, but he did a lot more than that. This volume is the first coherent exposition of Singapore's (or rather the Straits Settlements') legal system as it stood in 1915. The constitutional arrangements in the Straits Settlements are discussed in considerably greater depth in Braddell's book, and his Chapter 3 covers subjects such as 'The Governor', 'The Executive Council', 'The Legislative Council', and 'Public Officers'. Braddell also devotes the whole of Chapter 4 to the subject of 'The Judiciary and the Bar'. Braddell updated his book in 1931–32 and expanded his subject matter to fill two volumes.[4] Sir Richard Olaf Winstedt, one-time Director of Education and Principal of Raffles College relied much on Braddell's work in preparing his 20-page pamphlet, *The Constitution of the Colony of the Straits Settlements and of the Federated and Unfederated Malay States*[5] which he presented at the fourth bi-annual Conference of the Institute of Pacific Relations, at Hangchow in 1931. This paper is clearly intended for the non-lawyer and sets out the constitutional structure of the Straits Settlements in Winstedt's characteristically lucid style.

Another major work from that early period which must be mentioned here, even though it is not strictly a work on the Constitution of the Straits

1 Sir Walter Napier, *An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements* (Singapore: Fraser and Neave, 1898). This rare volume was later reproduced with an introduction in (1974) 16(1) Mal LR 4–51. Hereinafter, all references to this work will be to the *Malaya Law Review* reprint.

2 Ibid., at pp 13–16.

3 Sir Roland St John Braddell, *The Law of the Straits Settlements: A Commentary* (Singapore: Kelly and Walsh, 1915). This classic first edition was reprinted with an introduction by MB Hooker by Oxford University Press in 1982.

4 Sir Roland St John Braddell, *The Law of the Straits Settlements: A Commentary*, 2nd edn, 2 vols (Singapore: Kelly and Walsh, 1931 and 1932).

5 RO Winstedt, The Constitution of the Colony of the Straits Settlements and of the Federated and Unfederated Malay States (London: Royal Institute of International Affairs, 1931).

Settlements, is James William Norton Kyshe's *A Judicial History of the Straits Settlements 1786–1890* which was originally published as the *Preface* of his four-volume work *Cases Heard and Determined in Her Majesty's Supreme Court of the Straits Settlements, 1808–1890*.[6] This work is extremely valuable in that it traces the development of the Straits judiciary and the legislative changes over an 80-year period and provides important character sketches of the various Recorders and Chief Justices who have graced the courts in the Straits Settlements.

The Straits Settlements disbanded in 1946 and there are no further known works on its constitutional system after Braddell's second edition. The wartime planning for the future of Malaya, and that of Singapore has been dealt with by Mary Turnbull in her 'British Planning for Post-War Malaya'.[7] Singapore remained a Crown Colony up until 1958 and much scholastic attention was instead focused on the Malayan Union that was being formed by the amalgamation of the former Federated Malay States, the Unfederated Malay States and the former Straits Settlements of Penang and Malacca. The literature on these developments is considerable but is, for our purposes, irrelevant.

The first steps towards self-government in Singapore were taken with the appointment of the Constitutional Commission under Sir George Rendel in 1953. Interestingly, this important milestone did not receive more than journalistic attention until 1973 when a history honours student undertook a study of its work and processes.[8] As political forces rushed Singapore headlong towards self-government, throwing the best-laid British plans awry, few legal works were written on the constitutional system. The best of these non-legal works, is Yeo Kim Wah's now classic, *Political Development in Singapore 1945–1955*[9] which documents the rise of nationalism, political parties and political issues during that tumultuous decade. In chapter 2 of his book – which was based on his MA thesis – Yeo provides an excellent discussion of constitutional developments from the 1920s to the constitutional crisis precipitated by Singapore's first Chief Minister, David Marshall in 1955.[10] The book contains a wealth of painstakingly researched information and remains a treasure for anyone hoping to understand legal and political developments during that period.

6 The bulk of Norton Kyshe's judicial history appears in the *Preface* to Volume 1 of the cases while the final chapter appears in Volume 4. The entire work was reprinted with an introduction by MB Hooker in (1969) 11(1) Mal LR

7 CM Turnbull, 'British Planning for Post-War Malaya' (1974) 5(2) Journal of Southeast Asian Studies 239.

8 Ramakrishna Nithianandum, *The Rendel Commission, 1954*, Academic Exercise (University of Singapore: Department of History, 1973).

9 Yeo Kim Wah, *Political Development in Singapore 1945–1955* (Singapore: Singapore University Press, 1973).

10 Ibid., at 52–68.

After three constitutional talks,[11] Singapore was given a new constitution in 1958 under which Singapore would become a self-governing state with Britain retaining control over foreign affairs and defence and with internal security in the joint-control of Britain, Singapore and the Federation of Malaya. This new constitution was the subject-matter of detailed examination by Professor Owen Hood Phillips, formerly constitutional advisor to the Rendel Commission.[12] Hood Phillips' article, 'The Constitution of the State of Singapore'[13] is the most complete and thorough treatment of Singapore's 1958 Constitution. Unfortunately, as it was written just after the passage of the 1958 Order-in-Council, it did not contain any discussion of judicial interpretations of the various provisions. At about this time, a less detailed article on 'Singapore's New Constitution' was published in the *Malayan Law Journal*.[14] It was written by Lionel A Sheridan who had recently been appointed Dean and Professor of Law of the new Faculty of Law at the University of Malaya.

Teaching and learning constitutional law

In 1956, a decision was made at the University of Malaya in Singapore to establish a Law Department. That year, Dr Lionel Astor Sheridan,[15] formerly from Queen's University in Belfast, arrived to become the first Professor of Law and Head of the Law Department.[16] Sheridan, whose primary specialty was equity, very quickly understood the importance of constitutional law as a field of study in the new law school and one of his first tasks was to engage one Miss MC Scharenguivel to make a study of the constitutional history of Malaya.[17] This study was probably not published under Scharenguivel's hand as a literature search has revealed no such publication. Faced with a dearth of local material with which to teach the subject, Sheridan set out to create the materials himself. His major accomplishment was *Malaya and Singapore, The Borneo Territories: The Development of their Laws and Constitutions*[18] published in 1961 as Volume 9 of the acclaimed series *The British Commonwealth: The Development of Its Laws and Constitutions* under the general editorship of Professor George W Keeton.

11 The talks were held in 1956, 1957 and 1958.
12 Professor Owen Hood Phillips (1907–86) was Barber Professor of Jurisprudence and Dean of the Faculty of Law of the University of Birmingham for over 20 years.
13 O Hood Phillips, 'The Constitution of the State of Singapore' [1960] Public Law 50.
14 LA Sheridan, 'Singapore's New Constitution' [1959] MLJ xxv.
15 See Andrew BL Phang, 'Founding Father and Legal Scholar – The Life and Work of Professor LA Sheridan' (1999) Sing JLS 335.
16 See Kevin YL Tan, *Scales of Gold: Fifty Years of Legal Education at the NUS Faculty of Law* (Singapore: Faculty of Law, NUS, 2007), at p 13.
17 Ibid., at p 15.
18 LA Sheridan ed., *Malaya and Singapore, The Borneo Territories: The Development of their Laws and Constitutions* (London: Stevens and Sons, 1961).

This hefty volume, which runs into over 500 pages, is divided into 3 parts: Constitutional Development; Public Law; and Private Law. While Sheridan was the editor of the volume, he had the able assistance of five other contributors: Harry G Calvert, Chua Boon Lan, Punch Coomaraswamy, Reginald Hugh Hickling, and Theodore B Lee.[19] The chapters on the constitutional development of the Federation of Malaya Constitution and the Singapore Constitution, as well as the chapter on the 'Judicial Systems and Legal Professions' were all written by Sheridan himself. This is not a book on the constitution of any of the territories mentioned in the title, but rather a historical account of how the law has developed to 1961. Professor Stanley A de Smith thought Sheridan's volume 'perhaps the best of all' the volumes in the series as 'none has journeyed across unmapped lands so surely as the present volume'.[20]

Sheridan did not stop here. His *Federation of Malaya Constitution*, published in 1961 broke new ground with its text, commentary and annotation methodology.[21] Strictly speaking, it is not a book about Singapore's Constitution, but Singapore spent two years as part of the Federation of Malaysia and several provisions of that Constitution are practically word-for-word the same as those in the present Singapore Constitution (especially those in Part III – Fundamental Liberties and the emergency powers). As such, this volume and its successors[22] continue to be a valuable tool for understanding the development of the provisions and how courts in both jurisdictions have interpreted them.

In 1960, through the auspices of the Asia Foundation, a Chair in Constitutional Law was created at the Faculty of Law of the University of Malaya (which became the University of Singapore in 1962). Professor Harry E Groves, the former Dean of the Southern Texas University Law School was appointed to the Chair as visiting professor for three years.[23] Groves, a constitutional law specialist set about improving the teaching and research of the field. He published a couple of articles offering a comparative

19 With the exception of Hickling, the rest were teaching staff at Sheridan's new law school at the University of Malaya.

20 SA de Smith, 'Review of Malaya and Singapore, The Borneo Territories: The Development of Their Laws and Constitutions' (1962) 38(2) International Affairs 283.

21 LA Sheridan, *Federation of Malaya Constitution: Text, Annotations and Commentary* (Singapore: University of Malaya Law Review, 1961).

22 In the next edition of this work, Sheridan collaborated with his former colleague and successor of Dean at the University of Singapore, Professor Harry E Groves. See LA Sheridan and Harry E Groves, *The Constitution of Malaysia* (New York: Oceana, 1967). The same work is now in its fifth edition: KC Vohrah, Philip TN Koh and Peter SW Ling, *Sheridan and Groves: The Constitution of Malaysia* (Kuala Lumpur: *Malayan Law Journal*, 2004).

23 See Kevin YL Tan, supra, note 16, at p 22.

perspective on aspects of the Malaysian Constitution[24] and in 1964, published his *The Constitution of Malaysia*, the first attempt at a treatise on the subject.[25] The book was published at a time when Singapore was still very much a part of the Federation of Malaysia and it has an excellent introductory chapter which deals with the historical antecedents and events leading first up to the Federation of Malaya (1957) and then the Federation of Malaysia (1963).[26]

Even though Singapore is not singled out for special treatment, instances where the Federal Constitution made provision for Singapore's exceptionalism – such as requirements as to the qualification for Yang di-Pertuan Negara (Head of State),[27] Singapore's revenue provisions,[28] amendments,[29] and citizenship[30] – are all given due regard. In his preface, Groves says that the book 'is directed towards two categories of readers: Malaysians and those otherwise knowledgeable about the country and those persons who may know but little of this new nation'. The book also

> . . . purports to arrange the Articles around the concepts and institutions with which the document is concerned and to show the instrument as it has been interpreted, not alone by the courts where they have done so, but by the legislature, which also interprets the Constitution when it enacts laws, interpretations with which the courts may of course, subsequently disagree on subjects which are justiciable.[31]

For the remainder of the 1960s, no further attempts were made by scholars to produce texts or materials for students in constitutional law. A law student in 1970 would have had to be content with reading parts of Sheridan's *Malaya and Singapore, The Borneo Territories: The Development of their Laws and Constitutions*, alongside relevant commentaries in Sheridan and Groves, *The Constitution of Malaysia*, and selected cases and articles from the law journals and reports.

It was only in 1971 that Shanmugam Jayakumar produced the first version of his casebook on constitutional law, *Constitutional Law Cases*

24 See 'Due Process of Law: A Comparative Study' (1962) 4 Mal LR 1–15; and 'Scandalizing the Court: A Comparative Study' (1963) 5 Mal LR 58.
25 Harry E Groves, *The Constitution of Malaysia* (Singapore: Malaysia Publications Ltd, 1964). This was a much expanded version of his article 'The Constitution of Malaysia' (1963) 5 Mal LR 245.
26 Ibid., at pp 1–31.
27 Ibid., at p 53.
28 Ibid., at pp 146–7.
29 Ibid., at p 155.
30 Ibid., at pp 167–73; and pp 177–9.
31 Ibid., Preface.

from Malaysia and Singapore.[32] Jayakumar joined the Faculty after graduating top of his class in 1963. It is uncertain how Jayakumar's stint at the Yale Law School – where he obtained his LL.M. – influenced his decision to compile a casebook, a distinctly American breed of legal literature. Indeed, up to this point, no casebook has been used in the teaching of constitutional law, and in this respect, Jayakumar's contribution is a significant one. Written at the time when Jayakumar was Vice-Dean of the Faculty, the student-centric orientation of the volume is obvious:

> This casebook has been prepared particularly for the Malaysian and Singapore law student studying local jurisprudence in Constitutional Law. No casebook can of course, be an effective substitute for the original law reports. But students do face certain difficulties which have necessitated the publication of this casebook . . . Although this volume has been prepared for the law student, it is hoped that this single collection of local constitutional law cases will also prove useful for legal practitioners in Malaysia and Singapore.
>
> . . .
>
> . . . It is my view that since the present case-law on the Malaysian and Singapore Constitutions is still in its infancy, *every* judicial comment and clarification becomes significant and should be made available to the reader. With subsequent development of case-law over the years, a more restrictive selection may be justified in future editions of this casebook.[33]

Like most good casebooks, Jayakumar's *Constitutional Law Cases from Malaysia and Singapore* tickles students with penetrating questions and informs the curious readers with notes and references to relevant literature pertaining to the subject matter at hand. A substantially enlarged and improved version of the casebook appeared in 1976.[34] In that edition, Jayakumar made an important point regarding the juxtaposition of Malaysian and Singaporean cases in the same volume:

> As to the inclusion in one casebook of judicial decisions from two separate independent countries, Malaysia and Singapore, I remain convinced of the wisdom of continuing this approach. Not only do many provisions of the Malaysian Constitution still have constitutional force in Singapore, but in the past five years the Courts in both countries

32 S Jayakumar, *Constitutional Law Cases from Malaysia and Singapore* (Singapore: Malayan Law Journal, 1971).

33 Ibid., Preface at iv–v.

34 S Jayakumar, *Constitutional Law Cases from Malaysia and Singapore*, 2nd edn, (Singapore: Malayan Law Journal, 1976).

> have continued to show a willingness to respect and follow constitutional decisions emanating from each other's jurisdiction.[35]

Jayakumar's casebook proved extremely useful and popular with students and even after he left the Law Faculty for government in 1980, Jayakumar continued to be inundated with requests from students to revise his casebook. With the first two editions of Jayakumar's casebook in circulation, the die had been cast. The casebook became, and was to remain the primary means by which students of Singapore constitutional law were to master their subject.

In 1991, three young scholars at the Law Faculty of the National University of Singapore – Kevin Tan, Yeo Tiong Min and Lee Kiat Seng – decided to produce a new casebook to meet the growing needs of students. Their *Constitutional Law in Malaysia and Singapore*[36] marked a further development of the casebook as legal literature. Taking a broad comparative perspective of the subject, the book contains not only relevant excerpts of case law from Malaysia and Singapore, but also from India and other parts of the British Commonwealth. The authors state in their preface:

> In putting this book together, we have tried as far as possible to view the study of constitutional law as one which transcends the traditional (and one might add, artificial) boundaries of history, economics, sociology, politics and law. Constitutional law touches all of these subjects; but it is also larger than all of them. It concerns basic issues of self, state, and society for it deals with rights, obligations and above all, justice.[37]

Beyond the use of judicial decisions, the authors have included extracts from books, articles, and reports to help the student understand the complexities of the subject. With so much packed into its frame, the book was more than twice the size of Jayakumar's second edition. In 1997, Kevin Tan welcomed on board Li-ann Thio as his collaborator in the second edition of this book, as both Yeo and Lee had moved on to other areas of research and teaching:

> Not only has the law changed, Yeo Tiong Min and Lee Kiat Seng, two of the original team of authors of this volume have also moved on to other areas of the law; conflicts and criminal law respectively. Much as they were persuaded to continue with this enterprise, demands of

35 Ibid., Preface.

36 Kevin YL Tan, Yeo Tiong Min and Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (Singapore: Malayan Law Journal, 1991).

37 Ibid., Preface.

> their new disciplines and teaching duties made it impossible for them to do so. This volume thus welcomes on board my new collaborator, Thio Li-ann, who starting teaching constitutional law only after the publication of the first edition of this book, but who has in this short space of time, established herself as one of the most prolific and insightful scholars in the region.[38]

The first edition was substantially revised and expanded, with much comparative material added and it remains the standard casebook in use in both Malaysia and Singapore. As this volume goes to press, the authors are preparing a third edition of this work.

Small monographs have also supplemented the casebook as a teaching tool. In this regard, Jayakumar took over where Sheridan left off and in 1976, published his *Constitutional Law*[39] as the first volume in the *Singapore Law Series*. The series, which was edited by Koh Kheng Lian was 'designed to give an introductory survey of the main areas of the law of Singapore'.[40] It is a small volume with limited objectives and the main text of this book covers just 54 pages, in which 13 chapters on the various aspects of the Constitution are crammed. It also contains five appendices – the State Constitution of Singapore 1963; The Republic of Singapore Independence Act 1965; Provisions of the Constitution of Malaysia applicable to Singapore; a List of cases on the Singapore Constitution and Malaysian cases which are applicable to Singapore; and a Select Bibliography. In its time, this book was widely used and was particularly valuable to students and practitioners alike since Singapore's Constitution was found across many different documents found in the Appendix. Indeed, it was not until 1980 that the Attorney-General was authorized to issue an official reprint of the Constitution incorporating all relevant provisions of the Constitution.[41]

A much more recent effort in writing an introductory text for students and laymen has been Kevin Tan's *Introduction to Singapore's Constitution* which was published in 2005.[42] This is a much bigger book than Jayakumar's 1976 volume. In twelve succinct chapters spanning 246 pages, the reader is quickly introduced to the basic concepts of constitutionalism

38 Kevin YL Tan and Thio Li-ann, *Tan, Yeo and Lee's Constitutional Law in Malaysia and Singapore*, 2nd edn, (Singapore: Butterworths Asia, 1997), Preface, at v.

39 S Jayakumar, *Constitutional Law (With Documentary Materials)* (Singapore: Malaya Law Review, 1976).

40 Ibid., at v.

41 On legal issues brought about by the *Reprint*, RH Hickling, 'Legislation Comment: Reprint of the Constitution of the Republic of Singapore' (1980) 22 Mal LR 142, at 144 and the analysis in Kevin YL Tan, 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day' (1989) 1 S. Ac. LJ 1, at 21 *et seq*.

42 Kevin YL Tan, *Introduction to Singapore's Constitution* (Singapore: Talisman, 2005).

and the basic structure of government in Singapore as well as the fundamental liberties enshrined in the Constitution. It is written in simple language and is aimed at high school as well as university students. In the preface, Tan underscored his motivations for this volume:

> Of all legal subjects, constitutional law is often seen as one of the most difficult and arcane. There are several reasons for this. The subject is difficult in itself. Unlike most law subjects, it cannot be understood by a mere grasp of the technical rules, but requires the student to understand the philosophical and historical backdrop against which each constitutional decision or change is made. Second, like many other law subjects, it is full of jargon. And third, given the paucity of constitutional law litigation in Singapore, few students feel enthusiastic about the subject because they cannot see how they can make a difference, and because it is not a 'practical' subject upon which one might build a lucrative legal practice.
>
> Yet, constitutional law is one of the most important subjects in the legal canon. It affects us in very real ways and it is a subject that cannot be ignored. Indeed, too few people pay attention to this subject because they lack a simple, accessible introductory book to read. I hope this volume will fill that gap.[43]

Overviews

Most books on Singapore law provide a brief introductory chapter on Singapore's legal and constitutional system. These introductory chapters, while useful for setting the scene for the subject matter at hand – be it business law or criminal law – are rudimentary at best. The best introductory overview to the structure of Singapore's current constitutional system is Thio Li-ann's 'The Constitutional Framework of Powers' which appears in *The Singapore Legal System*.[44] It is a succinct yet comprehensive overview of the structure of constitutional government in current-day Singapore. Not only does Thio explain the basic institutions of government under the Constitution, she also examines the key philosophical understandings that have shaped the Singapore Government's views on human nature and its impact on state-individual relations as manifested by the state's unique constitutional arrangements. Another useful reference on the purely legal aspects of the Constitution can be found in Volume I of *Halsbury's*

43 Ibid., at vii.

44 See Thio Li-ann, 'The Constitutional Framework of Powers' in Kevin YL Tan ed., *The Singapore Legal System*, 2nd edn, (Singapore: Singapore University Press, 1999) at pp 67–122.

Laws of Singapore, 'Administrative and Constitutional Law'.[45] This practitioner's volume is noted for its pithy statement of the prevailing law rather than an in-depth analysis or argument over philosophical underpinnings.

For the earlier period, there are several useful historical overviews of the Singapore Constitution. One of the earliest overviews is Mary Turnbull's 'Constitutional Development 1819–1968' which was published in a collection of essays entitled *Modern Singapore*[46] to commemorate the 150th anniversary of the founding of modern Singapore. Turnbull's 16-page chapter presents a chronological perspective of Singapore's constitutional development, starting from 1819. She takes all of 5 pages to get from 1819 to 1945. Much of the discussion after that is on the political creation of Singapore and its attendant constitutional changes. There is not much in the way of documentation and specific references to particular legislation or constitutional provisions and offers the reader more of a political than a constitutional history. It ends with a brief discussion of the Wee Chong Jin Commission and the introduction of changes in the constitution. Interestingly, she ends by saying that 'work is proceeding on drafting a new comprehensive constitution'.[47] A more legalistic and sweeping picture is presented in Philip N Pillai and Kevin Tan's 'Constitutional Development', published in another commemorative volume, *Management of Success: The Moulding of Modern Singapore*.[48]

Kevin Tan has written a number of detailed historical accounts covering almost the entirety of Singapore's constitutional history. The first is 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day' published in the inaugural issue of the *Singapore Academy of Law Journal*.[49] This essay, which surveys the development of Singapore's Constitution from the time of the Straits Settlements, provides thorough documentation of the legal and political processes that have led to the creation of the modern Singapore Constitution. It also deals in some depth with key issues such as Singapore's Separation from Malaysia, constitutional amendments and the 'Reprint' problem. This essay has since been updated and re-published in his edited work, *The Singapore Legal*

45 Chan Sek Keong *et al*., 'Administrative and Constitutional Law', Vol 1 of *Halsbury's Laws of Singapore* (Singapore: Butterworths Asia, 1999).

46 CM Turnbull, 'Constitutional Development 1819–1968' in Ooi Jin Bee and Chiang Hai Ding eds, *Modern Singapore* (Singapore: University of Singapore, 1969) pp 181–96.

47 Ibid., at 94.

48 Philip N Pillai and Kevin Tan Yew Lee, 'Constitutional Development' in KS Sandhu and Paul Wheatley eds., *Management of Success: The Moulding of Modern Singapore* (Singapore: ISEAS, 1989) at pp 647–68.

49 Kevin YL Tan, The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day' (1989) 1 S. Ac. LJ 1.

System[50] and latterly in his *Essays in Singapore Legal History*.[51] The most thorough of his studies has been *The Development of Constitutional Government in Singapore*, his unpublished doctoral dissertation[52] which documents and surveys the creation of constitutional institutions in Singapore from 1945 to 1995.

Reginald Hugh Hickling, former Law Reform Commissioner of Malaysia has also penned a highly-readable essay entitled 'The Origins of Constitutional Government in Singapore'[53] published in his 1992 collection, *Essays in Singapore Law*. The main value of this contribution rests in the personal insights and anecdotes which Hickling – who practiced and taught in Singapore and Malaysia for many decades – shares with his readers.

Constitutionalism

In this section, we consider writings on the broad issues of constitutionalism such as constitutional supremacy, the rule of law, and constitutional interpretation.

Constitutional supremacy

The independent state of Singapore was created in exceptional circumstances. Gaining independence through merger with the Federation of Malaysia, it ceded from the Federation on 9 August 1965 in less than propitious circumstances. The sovereignty of Singapore, both before merger with Malaysia and after,[54] has been the subject of a number of excellent studies.[55] LA Sheridan discusses the legal aspects of merger with Malaysia in two essays: 'Constitutional Problems of Malaysia'[56] and 'From the Federation of Malaya to Malaysia';[57] and Ahmad Ibrahim, Advocate-General of Singapore adds

50 See Kevin YL Tan, 'A Short Legal and Constitutional History of Singapore' in Kevin YL Tan ed., *The Singapore Legal System*, 2nd edn (Singapore: Singapore University Press, 1999) at pp 26–66.

51 Kevin YL Tan, 'A Short Legal and Constitutional History' in Kevin YL Tan ed., *Essays in Legal History* (Singapore: Singapore Academy of Law and Marshall-Cavendish Academic, 2005) at pp 27–72.

52 Kevin YL Tan, *The Development of Constitutional Government in Singapore*, unpublished JSD dissertation (New Haven: Yale Law School, 1995).

53 See RH Hickling, 'The Origins of Constitutional Government in Singapore' in his *Essays in Singapore Law* (Kuala Lumpur: Peladuk Publications, 1992) at pp 1–51.

54 LA Sheridan, 'Constitutional and Legal Implications and Problems in the Separation of Singapore from Malaysia' (1966) 1 Fiat Justitia 47.

55 See for example, Emma Sadka, 'Singapore and the Federation: Problems of Merger' (1962) 1(11) Asian Survey 17–25.

56 LA Sheridan, 'Constitutional Problems of Malaysia' (1964) 13 ICLQ 1349.

57 LA Sheridan, 'From the Federation of Malaya to Malaysia' (1965) 14 J du Droit International 543.

his view in 'The Position of Singapore in Malaysia'.[58] At a more conceptual level, a question has been raised as to whether sovereignty and control over Singapore had been effectively transferred by the Government of Malaysia to the people of Singapore, or whether it vested in Singapore's Parliament. This was the subject of a controversial and conceptually difficult article by Andrew J Harding entitled, 'Parliament and the *Grundnorm* in Singapore'.[59]

The merger, integration, and subsequent separation from Malaysia brought along its own legal problems. Upon independence, Singapore did not have its own fully-functional constitution. Instead, it kept its State Constitution of 1963 and enacted the Republic of Singapore Independence Act to augment it with parts of the Federation of Malaysia Constitution. To compound matters, the constitutional amendment procedure was amended to that of a simple majority. This gives rise to several issues. The first concerns the doctrine of implied amendment. In the case of *McCawley v The King*,[60] the Privy Council held that in a flexible constitution – such as that of Queensland – an ordinary law that is inconsistent with the constitution can impliedly amend the Constitution. This was particularly relevant given the change to Singapore's constitutional amendment procedure. Jayakumar suggested that this doctrine may well have applied to Singapore[61] although this was disputed by Lakshmikanth Rao Penna in his article, 'Diceyan Perspective of Supremacy and the Constitution of Singapore'.[62] Another facet of the implied amendment theory was discussed in the light of the Ceylonese case of *Kariapper v Wijeysingha*[63] where the Privy Council held that a constitutional amendment did not have to declare itself to be such, and so long as the constitutional amendment procedures had been satisfactorily complied with, the Constitution would be duly amended. Penna again disputed this, on his textual reading of Article 5 of the Constitution.

The second issue concerns applicability of the Basic Features doctrine developed by the Indian Supreme Court in *Kesavananda v The State of Kerala*[64] in the local context. The doctrine posits that while a Constitution can and should be amended from time to time to accommodate changing circumstances, it could not be amended to the extent that it destroyed the

58 Ahmad Ibrahim, 'The Position of Singapore in Malaysia' [1964] MLJ cxi.
59 AJ Harding, 'Parliament and the *Grundnorm* in Singapore' (1983) 25 Mal LR 351.
60 [1920] AC 691.
61 See S Jayakumar, 'Legislation Comment: The Constitution (Amendment) Act 1979 (No 10)' (1979) 21 Mal LR 111.
62 LR Penna, 'Diceyan Perspective of Supremacy and the Constitution of Singapore' (1990) 32 Mal LR 207.
63 Andrew Phang, 'The Theory of Implied Amendment in Singapore – A Re-Appraisal' (1980) Law Times 26.
64 AIR 1973 SC 1461.

'basic features' of that constitution. This doctrine was rejected in both the Singapore[65] and Malaysian courts.[66]

The Rule of Law and constitutional interpretation

Philosophical perspectives on what the word 'law' means and what 'law' requires and more specifically, what constitutes the 'Rule of Law' necessarily shape the way we interpret the Constitution. Is law nothing more than positively-enacted law or does it also carry some normative value within its vocabulary? If so, what constitutes this normative value and content? Two excellent articles address this issue at a broad and general level. In chronological terms, the first to appear was Eugene Tan's 'Law and Values in Governance: The Singapore Way'.[67] Tan argues that in Singapore there exists a bifurcated value system when it comes to law: a universal approach insofar as commercial laws are concerned, and a communitarian perspective where public law is concerned. This dichotomous approach to law stems from the role law is expected to play in Singapore. Where public law and governance is concerned, the outlook is distinctly Hobbesian and cultural values – in particular Asian values – infuse the law with communitarian imperatives. However, where commercial issues are concerned, Singapore adopts a distinctly universalist conception of the rule of law.

Thio Li-ann's '*Lex Rex* or *Rex Lex?* Competing Conceptions of the Rule of Law in Singapore',[68] is a most important contribution to the discourse. This massive article, spanning some 76 pages, examines the polarised debate between the formal or 'thin' conception of the rule of law and the substantive or 'thick' conception of the rule of law.[69] Thio provides a broad sweep of the debate, situating it within the development of Singapore's constitutional institutions[70] and the regime's political obsession with economic development and law and order. This pre-occupation with economic security has resulted in a national ideology based on what Thio calls 'pragmatic Confucianism', an oriental version of Plato's *Republic*an world view where the elite philosopher-king (in this case, the Confucian *junzi* or virtuous gentleman-leader) governs benignly.[71] Finally, Thio considers how communitarian

65 See *Teo Soh Lung v MHA* [1989] 2 MLJ 449; and *Vincent Cheng v MHA* [1990] 1 MLJ 449.

66 See *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; and *Phang Chin Hock v PP* [1980] 1 MLJ 70; see also AJ Harding, 'The Death of a Doctrine? *Phang Chin Hock v Public Prosecutor*' (1979) 21 Mal LR 365.

67 Eugene Kheng-Boon Tan, 'Law and Values in Governance: The Singapore Way' [2000] 30 HKLJ 91.

68 Thio Li-ann, '*Lex Rex* or *Rex Lex?* Competing Conceptions of the Rule of Law in Singapore' (2002–03) 20 UCLA Pac Basin LJ 1–76.

69 Ibid., at p 2.

70 Ibid., at pp 45–53.

71 Ibid., at pp 32–7.

values affect judicial review in the courts[72] and concludes that the 'dominant conception of the Rule of Law in Singapore is thus a 'thin' one, where assiduous adherence to the letter of the law and procedures are the order of the day and law is viewed as an instrument for social engineering, a handmaiden to the establishment of a stable political order and a servant to enterprise'.[73] Thio reiterates her basic argument in a much truncated version of this article in her 'Rule of Law Within a Non-Liberal 'Communitarian' Democracy: The Singapore Experience'.[74]

Building on her concerns about the competing conceptions of the Rule of Law in Singapore, Thio has published extensively on how these competing conceptions have panned out in constitutional interpretation and adjudication. Her first major effort was an article entitled 'An 'i' for an 'I': Singapore's Communitarian Model of Constitutional Adjudication' published in the *Hong Kong Law Journal* in 1997. In this important article, she examines the impact of the Asian Values debate on the courts in Singapore and argues that the courts have moved away from the 'balancing of rights' approach in adjudication to a strict liability 'categorization' approach. It is in this article that Thio first develops her arguments against the 'four-walls' approach of constitutional interpretation in which local courts seek to interpret the constitution 'within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia'.[75]

Almost ten years later, Thio expands on this critique and includes Malaysian developments her massive '"Beyond the Four Walls" in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore'.[76] In his 'Comparative Constitutional Law in Singapore',[77] Victor Ramraj argues that the 'four walls' doctrine is dead letter as 'the use of foreign constitutional jurisprudence does not necessarily entail the convergence of constitutional norms' but 'does involve a transnational dialogue that requires courts to lay bare and justify their normative assumptions and to articulate in a

72 Ibid., at pp 64–75.

73 Ibid., at p 75.

74 Thio Li-ann, 'Rule of Law Within a Non-Liberal "Communitarian" Democracy: The Singapore Experience' in Randall Peerenboom ed., *Asian Discourses of the Rule of Law: Theories and Implementation of the Rule of Law in Twelve Asian Countries, France and the US* (London and New York: Routledge, 2004) 183–224.

75 Government of the State of Kelantan v Government of the Federation of Malaysia [1963] MLJ 355.

76 Thio Li-ann, '"Beyond the Four Walls" in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore' (2006) 19(2) *Colum J Asian* L 428–518.

77 Victor V Ramraj, 'Comparative Constitutional Law in Singapore' (2002) 6 Sing JICL302–334.

meaningful and verifiable way the empirical conditions that justify the particular conclusions it reaches'.[78] He concludes that it is now high time for 'Singapore courts to enter the global constitutional dialogue'.[79]

The attack on New York's World Trade Centre on 11 September 2001 transformed the world's attitude towards law and order. When faced with a crisis, most states prioritise security and safety above civil liberties as we have seen in the American response to the attacks. In his 'The Post-September 11 Fallout in Singapore and Malaysia: Prospects for a Accommodative Liberalism',[80] Victor Ramraj argues that 'the new heightened consciousness of terrorism in the region requires a more accommodative, but still distinctly liberal, approach to social and political rights – one which harnesses the strengths of liberal democracy and pluralism in its efforts to suppress both the threat of terrorism and its potential socially diverse consequences'.[81] The paradigm, Ramraj argues, should, and already is 'shifting away from essentialism, cultural relativism, and authoritarianism, so as to accommodate ethnic and religious minorities, prevent divisiveness and ethnic conflict, and respond to concerns about alienation.[82] Ramraj's arguments were challenged by Lim Chin Leng in his 'Race, Multi-Cultural Accommodation and the Constitutions of Singapore and Malaysia'[83] on the grounds that he failed to consider the historical context in which these accommodations were to take place and that it is more important to find practical ways to achieve substantive justice for the various communities in Singapore. This received a rejoinder from Ramraj in his 'Multiculturalism and Accommodative Liberalism Revisited'[84] in which he challenged Lim's assumptions that accommodative liberalism would not protect group rights as well as his 'multi-cultural constitutionalism'.

Institutions

In this section, we examine the literature on various aspects of constitutional institutions – the Legislature, the Executive, the Judiciary, and the Public Service.

78 Ibid., at p 334.
79 Ibid.
80 Victor V Ramraj, 'The Post-September 11 Fallout in Singapore and Malaysia: Prospects for a Accommodative Liberalism' [2003] Sing JLS 459–82.
81 Ibid., at p 460.
82 Ibid., at pp 460–1.
83 CL Lim, 'Race, Multi-Cultural Accommodation and the Constitutions of Singapore and Malaysia' [2004] Sing JLS 117–49.
84 Victor V Ramraj, 'Multiculturalism and Accommodative Liberalism Revisited' [2005] Sing JLS 159–69.

The legislature

Of all the legal institutions in Singapore, Parliament has undergone the biggest transformation. Between 1965 and 1984, anyone studying Singapore's Parliament might well be studying the legislature of any other Westminster-inspired body. Members were elected from individual constituencies under the single-plurality (first-past-the-post) system of voting, and a Prime Minister would be appointed from among the members of Parliament who was most likely to command the confidence of the House. From 1984 to 1990, three major constitutional amendments were made to create three new categories of parliamentarians – Non-Constituency Members of Parliament (NCMPs), Group Representation Constituency MPs, and Nominated MPs. These changes have transformed Singapore's Parliament into one of the most unique in the world.[85]

Good historical accounts of Singapore's legislature can be found in two major essays: Kevin Tan's 'Parliament and the Making of Law in Singapore'[86] and Thio Li-ann's 'The Post-Colonial Constitutional Evolution of the Singapore Legislature'.[87] Both essays provide a broad overview of developments and discuss the impact of some of the more controversial innovations, such as the NCMP,[88] the Group Representation Constituencies (GRCs) and the Nominated Member of Parliament (NMP). Tan's book chapter is more historically focused and also details contemporary parliamentary procedures and processes while Thio's article is more conceptual and she considers the post-colonial developments of Singapore's Parliament in the light of political and constitutional theory and offers suggestions for parliamentary reform. Thio updates her critique in her very readable 'Choosing Representatives: Singapore Does it Her Way'.[89] An earlier work which discusses the role of Singapore's parliamentarians from a non-legal perspective is Chan Heng Chee's 'Legislature and Legislators'[90]

85 On recent attempts to further refine the system in the context of a depoliticised milieu, see Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs' (2002) Sing JLS 328–73, at pp 328–35.

86 Kevin YL Tan, 'Parliament and the Making of Law in Singapore' in Kevin YL Tan ed., *The Singapore Legal System*, 2nd edn (Singapore: Singapore University Press, 1999) 123–59.

87 Thio Li-ann, 'The Post Colonial Constitutional Evolution of the Singapore Legislature' [1993] Sing JLS 80.

88 See VS Winslow, 'Creating A Utopian Parliament' (1984) 28 Mal LR 268.

89 Thio Li-ann, 'Choosing Representatives: Singapore Does It Her Way' in Graham Hassell and Cheryl Saunders, eds, *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (Australia: Allen and Unwin, 1997) 38–58.

90 Chan Heng Chee, Legislature and Legislators' in Jon ST Quah, Chan Heng Chee and Seah Chee Meow, eds, *Government and Politics of Singapore*, (Singapore: Oxford University Press, 1985), at p 71.

while Hussin Mutalib's 'Constitutional-Electoral Reforms and Politics in Singapore' gives a good political overview of the constitutional innovations.[91]

The numerous changes to Singapore's parliamentary system have had a direct impact on the electoral system. A good overview is found in Lua Ee Laine, Disa Sim and Christopher Koh, 'Principles and Practices of Voting: The Singapore Electoral System'.[92] The actual impact of these changes in the 1991 general elections was critically examined by Kevin Tan in his 'Constitutional Implications of the 1991 Singapore General Election'.[93] Tan then went on to suggest reforms to the electoral system in his 'Is Singapore's Electoral System In Need of Reform'.[94] Thio Li-ann provides the best critical analysis of the various changes, their relationship with the municipal government (through the Town Councils) and the right to political participation in her 'The Right to Political Participation in Singapore: Tailor-making a Westminster-modeled Constitution to Fit the Imperatives of "Asian" Democracy'.[95] In this wide-ranging article, Thio argues that:

> Singapore's authoritarian government has sought to construct a version of parliamentary government consonant with a communitarian vision of democracy that prioritises the collective goods of stability and multiracial harmony. . . .
>
> Good men are more important than institutional checks. Thus, the rhetoric of responsibility figures prominently in ordering state-society relations, with the governors morally obliged to care for the citizenry, the press duty-bound to practice responsible journalism to promote nation-building. Even the citizen is urged to vote responsibly, meaning to avoid voting in MPs who may mismanage town council estates or a parliamentary opposition sizeable enough to weaken government. This demonstrates a paternalistic distrust over voting choices.[96]

In an earlier period, the creation of the Council for Minority Rights in 1969 (later renamed the Presidential Council for Minority Rights) as a check against legislative discrimination was the subject of considerable

91 Hussin Mutalib, 'Constitutional-Electoral Reforms and Politics in Singapore' (2002) 27(4) Legislative Studies 659–72.

92 Lua Ee Laine, Disa Sim and Christopher Koh, 'Principles and Practices of Voting: The Singapore Electoral System' (1996) 17 Sing LR 244.

93 Kevin YL Tan, 'Constitutional Implications of the 1991 Singapore General Election' (1992) 13 Sing LR 1.

94 Kevin YL Tan, 'Is Singapore's Electoral System In Need of Reform' (1997) 14 *Commentary* 109–17.

95 Thio Li-ann, 'The Right to Political Participation in Singapore: Tailor-making a Westminster-modeled Constitution to Fit the Imperatives of "Asian" Democracy' (2002) 6 Sing JICL 181–243.

96 Ibid., at p 242.

controversy.[97] The Wee Chong Jin Commission of 1966 made quite a few recommendations for constitutional change, but most of them were rejected by the Government. The one recommendation which the Government acted on was the Commission's recommendation to create a Council of State along the lines of a similar institution in Kenya, to safeguard minority rights and interests. Four essays on this subject appeared in the inaugural issue of the student-run *Singapore Law Review* in 1969. They were penned by Dr Thio Su Mien[98] who was then Dean of the Law Faculty, Singapore's former Chief Minister and top criminal lawyer David Saul Marshall,[99] law student Francis Khoo[100] and political veteran Gerald de Cruz.[101] Most of the writers were concerned with the effectiveness of such a mechanism, fueled by fears that it would turn into a white elephant, or as Marshall put it, a 'white mouse'. The most comprehensive overview of this nascent institution was published in 1971 by S Jayakumar, in his 'Singapore's Presidential Council – An Advisory Organ for Parliament on Human Rights'.[102]

The executive

Up until 1991, Singapore followed Westminster tradition by having a head of state who 'reigns but does not rule'. The titular head of state, the President, had no personal discretionary power save in issues such as the appointment of the Prime Minister and on the dissolution of Parliament, but in 1991, all this changed when the Constitution was amended to transform the presidency into an elected office. The first major legal commentary on these developments was Kevin Tan's 'The Elected Presidency in Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991' which was published very shortly after the constitutional amendments were made.[103] Alongside the Constitution of the Republic of Singapore (Amendment) Act 1991 was passed the Presidential Elections Act 1991 which

97 On minority rights in Singapore generally, see Joshua Castellino and Elvira Dominguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (Oxford: Oxford University Press, 2006).

98 Thio Su Mien, 'The Presidential Council' (1969) 1 Sing LR 2.

99 David S Marshall, 'The Presidential Council' (1969) 1 Sing LR 9.

100 Francis Khoo, 'The Presidential Council' (1969) 1 Sing LR 14.

101 Gerald de Cruz, 'The Presidential Council' (1969) 1 Sing LR 20.

102 S Jayakumar, 'Singapore's Presidential Council – An Advisory Organ for Parliament on Human Rights' (1971) IV (2–3) *Human Rights Journal* 477–92.

103 Kevin YL Tan, 'The Elected Presidency in Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991' [1991] Sing JLS 179–94. See also, Kevin YL Tan, 'The Presidential Executive System in Singapore: Problems and Prospects' in Graham Hassell and Cheryl Saunders, eds, *The Powers and Functions of Executive Government: Studies from the Asia Pacific Region*) (Melbourne: Centre for Comparative Constitutional Studies, The University of Melbourne, 1994) 37–53.

prescribes the procedure for election. This enactment has been the subject of comment by Valentine Winslow in 'Electing the President: The Presidential Elections Act 1991'.[104]

The most complete and thorough study of the Elected Presidency is the multi-disciplinary study, *Managing Political Change in Singapore: The Elected Presidency*[105] which was published in 1997. This volume, edited by legal scholar Kevin Tan and political scientist Lam Peng Er, contains nine chapters on various facets of the elected presidency. Of these, three are by legal scholars: Kevin Tan's 'The Presidency in Singapore: Constitutional Developments';[106] Valentine Winslow's 'The Election of a President in a Parliamentary System: Choosing a Pedigree or a Hybrid?';[107] and Thio Li-ann's 'The Elected President and the Legal Control of Government: *Quis Custodiet Ipsos Custodes*?'[108] There are two contributions by political scientists: Lam Peng Er's 'The Elected Presidency: Towards the Twenty-First Century';[109] and Hussin Mutalib's 'Singapore's First Elected Presidency: The Political Motivations'.[110] The remaining chapters are historian Huang Jianli's 'The Head of State in Singapore: An Historical Perspective';[111] economist Tilak Doshi's 'Chaining the Leviathan: A Public Choice Interpretation of Singapore's Elected Presidency';[112] and businessman Chia Shi Teck's 'Notes from the Margin: Reflections on the First Presidential Election by a Former Nominated Member of Parliament'.[113]

The enormity of the changes drew much comment from non-legal circles as well. Among these were: James Cotton, 'Political Innovation in Singapore: The Presidency, the Leadership and the Party';[114] Gary Rodan, 'Preserving the One-Party State in Contemporary Singapore';[115] and

104 Valentine Winslow, 'Electing The President: The Presidential Elections Act 1991' [1991] Sing JLS 476–81. An attempt to argue that these far-reaching changes affected the 'Basic Features' of the Constitution, see Ravneet Kaur, 'The Basic Features Doctrine and the Elected President Act' (1994) 15 Sing LR 244.

105 Kevin YL Tan and Lam Peng Er eds, *Managing Political Change in Singapore: The Elected Presidency* (London: Routledge, 1997).

106 Ibid., at pp 52–87.

107 Ibid., at pp 88–99.

108 Ibid., at pp 100–43.

109 Ibid., at pp 200–19.

110 Ibid., at pp 167–87.

111 Ibid., at pp 9–51.

112 Ibid., at pp 144–66.

113 Ibid., at pp 188–99.

114 James Cotton, 'Political Innovation in Singapore: The Presidency, the Leadership and the Party' in Garry Rodan ed., *Singapore Changes Guard: Social, Political and Economic Directions in the 1990s* (New York: St Martin's Press, 1993) at pp 3–15.

115 Gary Rodan, 'Preserving the One-Party State in Contemporary Singapore' in Kevin Hewison, Richard Robinson and Gary Rodan, eds, *Southeast Asia in the 1990s* (New South Wales: Allen and Unwin, 1993) 75–108.

Lily Rahim's brief commentary, 'Singapore: Consent, Coercion and Constitutional Engineering'[116]

Institutional tweaking of the Singapore's elected presidency has continued unabated since 1991. Interestingly, the very entrenchment provision which safeguards the erosion of the elected President's powers – Article 5(2A) of the Constitution remains in abeyance. Perhaps the most complex and difficult provisions created by the constitutional amendments pertaining to the elected President are his fiscal control powers. These provisions and their attendant issues have been explicated in a comprehensive if slightly technical article by Yvonne Lee, entitled 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian'.[117] The erosion of the President's power has been the subject of a brief comment by Thio Li-ann in her 'Singapore: (S)electing the President: Diluting Democracy?'[118] in which she considers in particular, the Presidential 'non-election' of 2005.

The interpretation of the President's constitutional powers gave rise to Singapore's first-ever Constitutional Reference in 1995. The issue which arose was whether Presidential assent was required for an amendment to the President's constitutional power. The specially constituted Constitutional Tribunal held that Presidential concurrence was unnecessary, and this decision was heavily criticised by Thio Li-ann in 'Working Out the Presidency: The Rites of Passage'.[119] Her arguments drew a robust response from Attorney-General Chan Sek Keong (as he then was) in his 'Working Out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal'.[120] Both these articles are valuable, not only on account of the legal arguments raised but also because both protagonists were 'insiders' having a ring-side view of the whole drama. Thio was a member of President Ong Teng Cheong's legal team who prepared his case while Chan opposed on behalf of the Government. This decision was also considered in a worthy student contribution by Gary Leonard Low and Daniel Chia, 'Tribunal's Findings on the Powers of the Elected President' published in the *Singapore Law Review*.[121]

Even before the 1991 amendments, scholars were concerned with the extent of the President's discretionary powers in preventive detention.

116 Lily Rahim, 'Singapore: Consent, Coercion and Constitutional Engineering' (1993/94) 70(7) Current Affairs Bulletin 20–6.

117 Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President As a Fiscal Guardian' [2007] Sing JLS 290–322.

118 Thio Li-ann, 'Singapore: (S)electing the President: Diluting Democracy?' (2007) 5 ICON 526–43.

119 Thio Li-ann, 'Working Out the Presidency: The Rites of Passage' [1995] Sing JLS 509.

120 Chan Sek Keong 'Working Out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal' [1996] Sing JLS 1.

121 Gary Leonard Low and Daniel Chia, 'Tribunal's Findings on the Powers of the Elected President' (1995) 16 Sing LR 212.

A case which brought this issue into focus was *Lee Mau Seng v Minister for Home Affairs*[122] where the question of whether the 'personal satisfaction' of the President was necessary for a detention to be valid. This case was the subject of a perceptive commentary by Rowena Daw in her 'Preventive Detention in Singapore: A Comment on the Case of *Lee Mau Seng*'.[123]

The judiciary

Though Singapore's judiciary has gained international accolades for being among the best in the world,[124] many critics have challenged its reputation for impartiality. In his 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore',[125] Australian researcher Ross Worthington argues that the Singapore judiciary 'has been hegemonized by a number of political and bureaucratic strategies'.[126] Worthington sees political conspiracy in every judicial appointment, legislative enactment and judicial decision, but his inability to get some basic facts correct severely damages the credibility of his article.[127] Worthington expands on his thesis in his controversial book-length *Governance in Singapore* which broadens the argument to every single sphere of government and the public sector.[128] Earlier critics of the judiciary in political cases have included: Nancy Batterman and Eric Schwarz, *Silencing All Critics: Human Rights Violations in Singapore*, published by Asia Watch in 1989;[129] and the New York Bar Association's *The Decline in the Rule of Law in Singapore*.[130] Perhaps the most trenchant and sustained attack on the independence of the judiciary comes from a former insider, Francis T Seow, who served as Singapore's

122 [1971] 2 MLJ 137 (H.C., Singapore).

123 Rowena Daw, 'Preventive Detention in Singapore: A Comment on the Case of *Lee Mau Seng*' (1972) 14 Mal LR 276.

124 For example, the Hong Kong-based Political and Economic Risk Consultancy (PERC) has consistently rated Singapore's judicial system among the top three in Asia since 2004.

125 Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore' (2001) 28(4) *Journal of Law and Society* 490–519.

126 Ibid., at p 490.

127 For instance, Worthington asserts that the late Justice Lai Kew Chai remained on the bench beyond the constitutional retirement age of 65 and was 'in his 70s' in 2001. The reality is that Lai had just turned 65 when he died of stomach cancer in 2006.

128 Ross Worthington, *Governance in Singapore* (London: RoutledgeCurzon, 2002).

129 Nancy Batterman and Eric Schwarz, *Silencing All Critics: Human Rights Violations in Singapore* (New York: Asia Watch, 1989).

130 Beatrice S Frank *et al*., *The Decline of the Rule of Law in Singapore and Malaysia:* A Report of the Committee of Human Rights of the Association of the Bar of the City of New York (New York: The Association, 1990); and BS Frank, JC Markowitz, RB McKay and K Roth 'The Decline of the Rule of Law in Malaysia and Singapore' (1991) 46(1) *The Record* 5–63.

Solicitor-General from 1966 to 1972.[131] Seow's first book, *To Catch A Tartar: A Dissident in Lee Kuan Yew's Prison*[132] recounts his legal and political career, including his detention under the Internal Security Act, all the while imputing the lack of a strong, independent judiciary. In his third book which is entitled *Beyond Suspicion? The Singapore Judiciary*,[133] Seow recounts several high-profile political defamation cases – in particular the suit against Tang Liang Hong – to hammer home his disdain for the judiciary.

Not all academic writing has been uniformly critical of the impartiality of Singapore's judiciary. In her '*Primus Inter Pares:* Is the Singapore Judiciary First Among Equals?'[134] Karen Blöchlinger favourably reviews Singapore's judicial reforms during the 1990s and concludes – after her empirical survey – that these reforms have not impeded access to a just resolution of disputes in Singapore. A more recent and detailed study of these reforms is the World Bank-sponsored study by Waleed Haider Malik, entitled *Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons*.[135] Malik studies these reforms through a 'management prism' and considers the 'different legal, judicial, economic, user, and productivity aspects of the judicial system'.[136] Much of the study focuses on the work of the Subordinate Courts. On the role of Singapore's judiciary in interpreting constitutional rights generally, see Jack Lee Tsen-Ta, 'Rediscovering the Constitution'.[137]

The law of criminal contempt has long been used to protect the independence of the courts and in Singapore, the particular crime of 'scandalising the judiciary' remains very much potent law even if it has fallen into disuse elsewhere.[138] One of the first cases where this was discussed was *Attorney-General v Pang Cheng Lian*,[139] which was the subject of a commentary by Francis Trindade and HP Lee.[140] The continued relevance and efficacy of the law of contempt was discussed more critically and in much

131 Seow also served as the President of the Law Society from 1986 to 1987.

132 Francis T Seow, *To Catch A Tartar: A Dissident in Lee Kuan Yew's Prison* (New Haven: Yale Southeast Asian Studies, 1994).

133 Francis T Seow, *Beyond Suspicion? The Singapore Judiciary* (New Haven: Yale Southeast Asian Studies, 2006).

134 Karen Blöchlinger, '*Primus Inter Pares:* Is the Singapore Judiciary First Among Equals?' (2000) 9(3) *Pacific Rim Law and Policy Journal* 591–618.

135 Waleed Haider Malik, Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons (Washington DC: World Bank, 2007).

136 Ibid., at 2.

137 Jack Lee Tsen-Ta, 'Rediscovering the Constitution' (1995) 16 Sing LR 157.

138 For a comparative overview of this crime, see HE Groves, 'Scandalizing the Court: A Comparative Study (1963) 5 Mal LR 58–73.

139 *Attorney-General v Pang Cheng Lian* [1975] 1 MLJ 69 (H.C., Singapore).

140 FA Trindade and HP Lee, 'Freelance Journalists and Contempt of Court' (1975) 17 Mal LR 233.

greater detail in Michael Hor and Colin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore'.[141]

The only other subject matter concerning the judicial branch of government that has attracted the attention of commentators has been the curious High Court decision of *Abdul Wahab bin Sulaiman v The Superintendent of Tanglin Detention Barracks*.[142] In that case, Sinnathuray J held that the military court was a superior court that was not subject to judicial review by the High Court. This decision was clearly wrong and was criticised in two articles: Wilson Wong Wie Sarn, 'Case Comment: *Abdul Wahab Bin Sulaiman v Commandant, Tanglin Detention Barracks*';[143] and Victor Leong Wai Meng and Roland Samosir, 'Forever Immune? *Abdul Wahab b Sulaiman v Commandant Tanglin Detention Barracks*'.[144]

Public service

While public servants are said to hold their offices during the President's pleasure, they are accorded constitutional protection under Part IX of the Constitution. The public service provisions under Singapore's Constitution are practically identical to those of the Malaysian Constitution and as such, the following writings will provide a good overview of the issues in relation to the service. Most contentious issues arising under the rubric of public services are administrative in nature and hence should not detain us. The three major works are: S Jayakumar, 'Protection of Civil Servants: The Scope of Article 135(1) and (2) of the Malaysian Constitution as Developed Through the Cases';[145] FA Trindade, 'The Security of Tenure of Public Servants in Malaysia and Singapore';[146] and VS Winslow, 'The Public Service and Public Servants in Malaysia'.[147] Of changes in an earlier period, see TE Smith, 'The Effect of Recent Constitutional Changes on the Public

141 Michael Hor and Colin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore' [1996] 12 Sing LR 296.

142 *Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1985] 1 MLJ 418.

143 Wilson Wong Wie Sarn, 'Case Comment: *Abdul Wahab Bin Sulaiman v Commandant, Tanglin Detention Barracks*' (1986) 7 Sing LR 60.

144 Victor Leong Wai Meng and Roland Samosir, 'Forever Immune? *Abdul Wahab b Sulaiman v Commandant Tanglin Detention Barracks*' (1986) 27 Mal LR 303.

145 S Jayakumar, 'Protection of Civil Servants: The Scope of Article 135(1) and (2) of the Malaysian Constitution as Developed Through the Cases' [1969] 2 MLJ liv.

146 FA Trindade, 'The Security of Tenure of Public Servants in Malaysia and Singapore' in GW Bartholomew ed, *Malaya Law Review Legal Essays* (Singapore: Malaya Law Review, 1975) 256.

147 VS Winslow, 'The Public Service and Public Servants in Malaysia' in *The Constitution of Malaysia: its Development, 1957–1977*, Mohamed Suffian, HP Lee and FA Trindade eds, (Kuala Lumpur: Oxford University Press, 1978), at p 262.

Service in the Federation of Malaya and Singapore'.[148] There is little else on the subject which attracts little attention in the courts today.[149]

Citizenship

In the formative years of both Malaysia and Singapore, citizenship was a major political issue. The immigrant nature of Singapore society meant that many migrants were either stateless or were unable to claim citizenship of their adopted homes. With the stabilisation of the Singapore state, most of these issues have been worked out and there are hardly any citizenship issues being canvassed in the courts today. Two early and relevant writings offering a good overview of the issues in the formative years are: Visuvanathan Sinnadurai, 'Singapore Citizenship Laws';[150] and Goh Phai Cheng, *Citizenship Laws of Singapore*.[151] The deprivation of citizenship rights under the Federation Constitution came up for consideration in the case of *Lim Lian Geok v Minister of the Interior, Federation of Malaya*[152] and was discussed in a useful case note by Jayakumar in his 'Deprivation of Citizenship'.[153]

Fundamental Liberties[154]

Part IV of the Singapore Constitution is entitled 'Fundamental Liberties' and contains the provisions of what might commonly be referred to as a Bill of Rights. The earliest article to address these constitutional provisions was Hugh Hickling's 'Liberty and Law in Singapore', published in 1979.[155] Hickling was rather pessimistic about the future of human rights in Singaporean society given its respect for Confucian ideas and authority. He observed:

> The trouble with Singapore society may, perhaps, be explained by observing that the law is not seen always to reside in what the lawmakers declare, but in what people suppose the Prime Minister says

148 TE Smith, 'The Effect of Recent Constitutional Changes on the Public Service in the Federation of Malaya and Singapore' (1959) 37 Public Administration 267.

149 One case note on the right to be heard is Thio Su-Mien, 'Dismissal from Public Employment' (1966) 8 Mal LR117.

150 Visuvanathan Sinnadurai, 'Singapore Citizenship Laws' (1970) 12 Mal LR 160.

151 Goh Phai Cheng, *Citizenship Laws of Singapore* (Singapore: Educational Book Publishers, 1970).

152 (1964) 30 MLJ 158.

153 S Jayakumar, 'Deprivation of Citizenship' (1964) 6 Mal LR 178.

154 For a general overview, see Tan Seow Hon, 'The Constitution as "Comforter"? – An Assessment of the Safeguards in Singapore's Constitutional System' (1995) 16 Sing LR 104.

155 RH Hickling, 'Liberty and Law in Singapore' (1979) 21 Mal LR 1.

> it is; this is not, as some Western observers may think, a criticism of authority, still less of the Prime Minister: it is a simple fact of life within a society coloured by Confucian ideas, historically influenced by the practices of British colonial authority, and taking a practical view of the realities of commerce in a competitive world. The inhabitants of, say, Toa Payoh, are not regular readers of the Government *Gazettes,* and they have preoccupations more important, in their eyes, than a concern for human rights. They settle for the best they can contrive.[156]

Little was written between then and the 1990s when there emerged the big Asian Values debate which pit universalist values of human rights against culturally relativistic visions of an alternative Asian reality. Since that time, writings on Singapore's approach to human rights and constitutional liberties have been extensive. Some of the more well-known contributions come from Singapore's diplomats such as Tommy Koh,[157] Kishore Mahbubani[158] and Bilahari Kausikan.[159] Other contributions have included Melanie Chew's 'Human Rights in Singapore: Perceptions and Problems',[160] Eric Jones' 'Asia's Fate: A Response to the Singapore School'[161] and Simon Tay's 'Culture, Human Rights and the Singapore Example'[162] and 'Imagining Freedom'.[163]

156 Ibid., at 23.

157 See Tommy Koh, 'Will There Be a Clash of Cultures?' in Tommy Koh, *The United States and East Asia: Conflict and Cooperation* (Singapore: Times Academic Press, 1995); Tommy Koh, 'The 10 Values that Undergird East Asian Strength and Success' *International Herald Tribune,* 11–12 Dec 1993; and Tommy Koh, 'This Way or That, Get On With Good Government' *International Herald Tribune,* 6 May 1993, at p 6.

158 See the following writings of Kishore Mahbubani, 'The Dangers of Decadence. What the Rest Can Teach the West' (1993) *Foreign Affairs* 14; 'The United States: Go East, Young Man' (1994) Spring, *The Washington Quarterly* 5; 'An Asian Perspective on Human Rights and Freedom of the Press', UN General Assembly, A/Conf 157/PC/63/Add 28, 4 May 1993; 'The West and the Rest' (1992) Summer, *The National Interest* 8; and 'The Pacific Way' (1995) *Foreign Affairs* 100.

159 See the following writings by Bilahari Kausikan, 'The Singapore School' (1994) Summer, *The National Interest* 107; 'Governance That Works' (1997) *Journal of Democracy* 26; 'An Asian Approach to Human Rights' (1995) *Proceedings of the American Society of International Law* 147; 'Asia's Different Standard' (1993) Fall, *Foreign Policy* 24; and 'An East Asian Approach to Human Rights' (1995–96) *Buffalo J. Int*'l L.273.

160 Melanie Chew, 'Human Rights in Singapore: Perceptions and Problems' (1994) 34(11) *Asian Survey* 933–48.

161 Eric Jones, 'Asia's Fate: A Response to the Singapore School' (1994) Spring, *The National Interest* 18

162 Simon SC Tay, 'Culture, Human Rights and the Singapore Example' (1996) 41(4) McGill LJ 743–80.

163 Simon SC Tay, 'Imagining Freedom' in Ban Kah Choon, Anne Pakir and Tong Chee Kiong eds, *Imagining Singapore*, 2nd edn (Singapore Times Academic Press, 2004) 81–105.

Thio Li-ann provides the most succinct and up-to-date discussion on the state of human rights theory and its application in Singapore in her 'Taking Rights Seriously? Singapore and Human Rights Law' which appears in a fascinating collection of essays on human rights in Asia.[164] She also considers Singapore's engagement with three major human rights conventions she acceded to in 1995: the Genocide Convention, the Convention on the Rights of the Child and the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) in her 'Pragmatism and Realism Do Not Mean Abdication: A Critical Inquiry into Singapore's Engagement with International Human Rights Law'.[165] Kevin Tan provides an article by article discussion of the applicability of the Universal Declaration of Human Rights in Singapore in his 'Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection'.[166] Tan also examines the rhetoric and reality in the connection between human rights and economic development in both Singapore and Taiwan in his 'Economic Development and Human Rights in East Asia: Legal Reforms in Singapore and Taiwan' which appears in *The East Asian Challenge for Human Rights*.[167] On the impact of the 1991 Shared Values White Paper on Human Rights discourse in Singapore, see Benedict Sheehy's 'Singapore, "Shared Values" and Law: Non East versus West Constitutional Hermeneutic'.[168]

Life and liberty

The constitutional guarantee to the right to life and liberty under Article 9 of the Constitution has given rise to several academic concerns. We have already encountered the first major issue – which concerns the meaning of the word 'law' – in our discussion of the concept of the Rule of Law.[169]

164 Thio Li-ann, 'Taking Rights Seriously? Singapore and Human Rights Law' in Randy Pereenboom, Albert Chen and Carole Petersen eds, *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Countries, France and the USA* (London: RoutledgeCurzon, 2006) 158–90.

165 Thio Li-ann, 'Pragmatism and Realism Do Not Mean Abdication: A Critical Inquiry into Singapore's Engagement with International Human Rights Law' (2004) 8 SYBIL 41–91.

166 Kevin YL Tan, 'Fifty Years of the Universal Declaration of Human Rights: A Singapore Reflection' (1999) 20 Sing LR 239–80. A shorter version of this article appears in Kevin YL Tan, 'Fifty years of the UDHR: A Singaporean Reflects' in Tan Ngoh Tiong and Kripa Sridharan, eds, *Human Rights Perspectives* (Singapore: United Nations Association of Singapore, 1999) at pp 118–40.

167 Kevin YL Tan, 'Economic Development and Human Rights in East Asia: Legal Reforms in Singapore and Taiwan' in Joanne Bauer and Daniel A Bell eds, *The East Asian Challenge For Human Rights* (Cambridge University Press, 1999) 264–84.

168 Benedict Sheehy, 'Singapore, "Shared Values" and Law: Non East versus West Constitutional Hermeneutic' (2004) 34 HKLJ 67.

169 See text accompanying notes 68 to 77.

The 1981 Privy Council decision in *Ong Ah Chuan v PP*[170] opened the door to this discussion when the Judicial Committee held that

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' . . . refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.[171]

What did the Judicial Committee mean when it spoke of 'fundamental rules of natural justice'? Without going into specifics, their Lordships held that a fundamental rule of natural justice in criminal law 'is that a person should not punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it' and 'that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged'.[172]

Shortly afterwards the Judicial Committee discussed the concept of natural justice in respect of the privilege against self-incrimination in the case of *Haw Tua Tau v PP*,[173] another case on appeal from Singapore. In addition to stating that to satisfy the rules of natural justice a law should 'not be obviously unfair',[174] their Lordships held that it would be 'imprudent' to attempt an exhaustive listing of 'what constitute fundamental rules of natural justice applicable to procedure for determining the guilt of a person charged with a criminal offence'.[175]

Following these two major decisions, several articles examining the impact of these cases were published. The first was TKK Iyer's 'Article 9(1) and Natural Justice'[176] which adopted a comparative approach and considered the meaning of 'natural justice' in the context of several Indian Supreme Court Cases. Iyer argued that though *Haw Tua Tau* restricted the meaning of 'natural justice' expressed earlier in *Ong Ah Chuan*, a review of impugned legislation under Article 9(1) of Singapore's Constitution required the court to consider 'both the substantive and procedural provisions of the impugned law'.[177] Andrew Harding adopts a contrary

170 [1980–81] SLR 48.
171 Ibid., at p 62A–B.
172 Ibid., at p 62E. On the presumption of innocence, see Michael Hor, 'The Presumption of Innocence: A Constitutional Discourse for Singapore' (1995) Sing JLS 365.
173 [1980–81] SLR 73
174 Ibid., at p 76F-G.
175 Ibid.
176 TKK Iyer, 'Article 9(1) and Natural Justice' (1981) 23 Mal LR 213–25.
177 Ibid., at 224.

position in his 'Natural Justice and the Constitution'[178] where he argued that the 'natural justice' referred to in *Ong* and *Haw* can only logically refer to a concept of procedural natural justice and did not carry any substantive connotation. Only in this case will it 'make a substantial contribution to justice in common law jurisdictions, without intruding unnecessarily on the powers of the legislature'.[179]

The words 'in accordance with law' have been distinguished from the words 'due process of the law' under the Indian and American Constitutions. An early comparative study is Harry E Groves, 'Due Process of Law: A Comparative Study'[180] which was based on his inaugural address as Professor of Constitutional Law to the University of Malaya. A more recent comparative contribution to what constitutes due process under the Constitution is Victor Ramraj's 'Four Models of Due Process'[181] which surveys the constitutional jurisprudence of Singapore, India, the United States, South Africa and Canada. Ramraj argues that of the four models of due process described, only the 'procedural-substantive' model which 'imposes limits that are both procedural and substantive' is 'normatively defensible'.[182]

The Court of Appeal decision in *Nguyen Tuong Van v PP* considered the question as to whether the right to life in Article 9 outlawed the death penalty under customary international law. After surveying international state practice, the Court of Appeal held that it did not. This landmark case represented the first time this question was considered in the context of customary international law and was the subject of three thoughtful commentaries: Thio Li-ann's 'The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004)';[183] CL Lim's 'The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v. Public Prosecutor*';[184] and Michael Hor's, 'The Death Penalty in Singapore and International Law'.[185]

178 AJ Harding, 'Natural Justice and the Constitution' (1981) 23 Mal LR 226–36.

179 Ibid., at 236.

180 HE Groves, 'Due Process of Law – A Comparative Study' (1961–62) 45 Marquette Law Review 257.

181 Victor V Ramraj, 'Four Models of Due Process' (2004) 2 ICON 492–524.

182 Ibid., at 493.

183 Thio Li-ann, 'The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004)' (2004) 4(2) OUCLJ 213–26.

184 CL Lim, 'The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*' (2005) Sing JLS 218.

185 Michael Hor, 'The Death Penalty in Singapore and International Law' (2004) 8 SYBIL 105.

The privilege against self-incrimination arose in *PP v Mazlan bin Maidun*[186] where the Court of Criminal Appeal held that the 'right of silence has never been regarded as subsumed under the principles of natural justice'.[187] In 1995, the Court of Appeal seemed to have abandoned the imputation of any rules of natural justice in the determination of what accords with 'law' in *Jabar v Public Prosecutor*.[188] In that case, the Court of Appeal held that it was not concerned with whether any duly enacted law was 'fair, just and reasonable'.[189] For a critical analysis of *Mazlan's* case, see Michael Hor, 'The Privilege Against Self-Incrimination and Fairness to the Accused'[190] where he argued that even though the demise of the privilege against self-incrimination should not be lamented, it is necessary to introduce alternative safeguards in the pre-trial interrogation process. All the above arguments and views have been comprehensively reviewed and re-examined in Thio Li-ann's, 'Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?'[191]

Issues of *habeas corpus* straddle constitutional and administrative law. A good overview of the law in respect of the right to *habeas corpus* in preventive detention cases is HF Rawling's 'Habeas Corpus and Preventive Detention in Singapore and Malaysia'.[192] The precise operation of the relevant constitution provisions – Articles 149 and 150 – are examined in detail in Tan Yock Lin, 'Some Aspects of Preventive Detention in Malaysia and Singapore'.[193] Christine Chinkin's 'Abuse of Discretion in Malaysia and Singapore'[194] examines the extent of judicial and administrative review available in the local courts.

In the field of preventive detention, two important cases stand out: *Lee Mau Seng v Minister for Home Affairs, Singapore and Anor*[195] and *Chng Suan Tze v Minister for Home Affairs*.[196] *Lee Mau Seng* established the principle that the satisfaction of the executive in preventive detention cases was subjective and thus not subject to judicial review. This long-standing

186 [1993] 1 SLR 512.
187 Ibid., at p 516C.
188 [1995] 1 SLR 617.
189 Ibid., at p 631B.
190 Michael Hor, 'The Privilege Against Self-Incrimination and Fairness to the Accused' [1993] Sing JLS 35–56.
191 Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam*?' [1997] Sing JLS 240–90.
192 HF Rawlings, 'Habeas Corpus and Preventive Detention in Singapore and Malaysia' (1983) 25 Mal LR 324.
193 Tan Yock Lin, 'Some Aspects of Preventive Detention in Malaysia and Singapore' (1987) 29 Mal LR 237.
194 CM Chinkin, 'Abuse of Discretion in Malaysia and Singapore' in AJ Harding, ed., *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985) 259.
195 [1971] 2 MLJ 137.
196 [1989] 1 MLJ 69.

decision was overruled in *Chng*'s case which held that such decisions were subject to the objective determination by the courts. A critique of *Lee Mau Seng* is found in Rowena Daw, 'Preventive Detention in Singapore – A Comment on the case of Lee Mau Seng'[197] while *Chng's* case was commented upon in Sin Boon Ann's 'Judges and Administrative Discretion: A Look at *Chng Suan Tze v Minister of Home Affairs and Ors*'.[198]

The final issue that attracted considerable academic debate is on the constitutional right to counsel under Article 9 – when such a right arises, what it entails and when the right may be exercised.[199]

Equality

Equality under the law is guaranteed under Article 12 of the Constitution. This provision is of particular importance given the multi-ethnic and multi-religious make-up of Singapore's population. The Constitution further requires the Government to 'exercise its functions in such manner as to recognize the special position of the Malays' and mandates the Government 'to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language'.[200] The juxtaposition of these two provisions and their impact on Singapore society is examined in Kevin Tan's 'Issues of Multiculturalism in Singapore'[201]

On the actual operation of Article 12, Thio Su Mien's 'Constitutional Discrimination under the Malaysian Constitution'[202] provides an excellent overview and analysis. On a broader level, Thio considers the actual application of the rational classification principle in her comparative piece, 'Equal Protection and Rational Classification'.[203] For a comparative view

197 Rowena Daw, 'Preventive Detention in Singapore – A Comment on the case of Lee Mau Seng' (1972) 14 Mal LR 276.

198 Sin Boon Ann, 'Judges and Administrative Discretion – A Look at *Chng Suan Tze v Minister of Home Affairs and Ors*' [1989] 2 MLJ ci.

199 See generally, Michael Hor in 'The Right To Consult A Lawyer on Arrest' (1989) 3 *CLAS News* 4, and (1989) 4 *CLAS News* 4; Michael Hor, 'The Right to Counsel – The Right to be Informed' (1993) 5 S. Ac. L.J. 141; AJ Harding in 'The Right to Counsel – A Privy Council View' (1980) 22 Mal. LR160; and Boo King Ong, 'Right to Counsel and Missing Lawyers' [1986] 2 MLJ lxxiv.

200 See Art 152(2).

201 Kevin YL Tan, 'Issues of Multiculturalism in Singapore' in Lai Ah Eng, ed., *Beyond Rituals and Riots: Ethnic Pluralism and Social Cohesion in Singapore* (Singapore: Eastern Universities Press, 2004) 98–113.

202 SM Huang-Thio, 'Constitutional Discrimination under the Malaysian Constitution' (1964) 6 Mal LR 69.

203 SM Huang-Thio, 'Equal Protection and Rational Classification' (1963) Public Law 412.

of local provisions and those of India, see Harry E Groves, 'Equal Protection of the Laws in Malaysia and India'.[204]

The specific application of the equality provisions have also been debated in respect of legal aid,[205] sexual orientation,[206] and Singapore's highly controversial graduate mothers scheme in which priorities and incentives are given to graduate mothers to have more children.[207] Rights of equality for women, following Singapore's accession to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) is discussed in great detail in Thio Li-ann's 'The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW'[208] and her 'She's a Woman But She Acts Very Fast: Women, Religion and Law in Singapore'.[209]

Free speech

While the freedom of speech or the lack thereof has generated a great deal of local discussion, especially in relation to the internet, there are not very many writings on this point. There is no good overview article on the area although Michael Hor and Colin Seah's 'Selected Issues in the Freedom of Speech and Expression in Singapore'[210] is a good place to begin research, while Li-ann Thio's 'Singapore: Regulating Political Speech and the Commitment "To Build a Democratic Society" '[211] provides a good background to the creation and operation of Singapore's Speakers' Corner. Thio also deals with the subject of political speech and electioneering in her omnibus piece, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs'.[212]

204 HE Groves, 'Equal Protection of the Laws in Malaysia and India' (1963) 12 Am. J. Comp. L. 355.

205 SM Huang-Thio, 'Legal Aid: A Facet of Equality Before the Law' (1963) 12 ICLQ 1133.

206 Jack Lee, 'Equal Protection and Sexual Orientation', (1995) 16 Sing LR 228.

207 Lee Mei Pheng, 'Breeding the Best and the Brightest' [1984] JMCL 11.

208 Thio Li-ann, 'The Impact of Internationalisation on Domestic Governance: The Transformative Potential of CEDAW' (1997) 1 Sing JICL 248–350.

209 'She's a Woman But She Acts Very Fast: Women, Religion and Law in Singapore' in Carolyn Evans and Amanda Whiting eds, *Mixed Blessings: Law, Religions and Women's Rights in the Asia-Pacific Region* (The Hague: Brill, 2006) 241–77. For recent developments on women's rights, see Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs' (2002) Sing JLS 328–73, at pp 348–52.

210 Michael Hor and Colin Seah, 'Selected Issues in the Freedom of Speech and Expression in Singapore' (1991) 12 Sing LR 298.

211 Thio Li-ann, 'Singapore: Regulating Political Speech and the Commitment "To Build a Democratic Society" ' (2003) 1 ICON 516–24.

212 Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs' (2002) Sing JLS 328–73, at pp 336–40.

The extent to which Singapore's defamation laws impinge on the right to the freedom of speech is considered in Cassandra Chan, 'Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws'.[213] Michael Hor considers in particular, the constitutional freedom of speech issues arising from the case of *JB Jeyaretnam v Lee Kuan Yew*[214] in his 'The Freedom of Speech and Defamation'.[215]

Religious freedom

Much of the legal writing on religious freedom in Singapore has been dominated by the work of one scholar – Thio Li-ann.[216] The best place to start is her latest work, 'Religion in the Public Sphere of Singapore: Wall of Division or Public Square?',[217] an introductory primer which sets out the matrix of state-religion relationships. The broad themes she discusses here are given much more detailed treatment in her 'Control, Co-optation and Co-operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State'.[218] In this piece, Thio argues that religion is co-opted by the state in instances when it 'can bolster or facilitate state programs', thus reflecting the 'pragmatic nature of the continuing experiment in managing religious pluralism and state objectives'.[219] Ultimately, Thio argues, religion 'is subordinated to government priorities and imperatives, within a dominant political culture which has been defined as embodying "paternalism, communitarianism, pragmatism and secularism." '[220]

The Singapore Government has often preferred the use of codes of practice or some other form of soft law to manage state-religion affairs.

213 Cassandra Chan, 'Breaking Singapore's Regrettable Tradition of Chilling Free Speech with Defamation Laws' (2003–04) 26 Loyola of Los Angeles Int'l and Comp L Rev 315–39.

214 [1992] 2 SLR 310.

215 Michael Hor, 'The Freedom of Speech and Defamation' [1992] Sing JLS 542.

216 This is not to say that there are no writings on the subject as such. A notable sociological contributor to the debate has been Joseph B Tamney through his 'Religion and State in Singapore' (1988) 30 Journal of Church and State 109, and which he expanded in his *The Struggle Over Singapore's Soul: Western Modernization and Asian Culture* (Berlin: Walter de Gruyter, 1996). A more recent discussion is Vineeta Sinha, 'Theorising "Talk" About "Religious Pluralism" and "Religious Harmony" in Singapore' (2005) 20(1) Journal of Contemporary Religion 25–40.

217 Thio Li-ann, 'Religion in the Public Sphere of Singapore: Wall of Division or Public Square?' in Bryan S Turner, ed., *Religious Pluralism and Civil Society: A Comparative Analysis*, (Oxford: Bardwell Press, 2008) 73–104.

218 Thio Li-ann, 'Control, Co-Optation and Co-Operation: Managing Religious Harmony in Singapore's Multi-Ethnic, Quasi-Secular State' (2006) 33 Hastings Const LQ 197–253.

219 Ibid., at p 252.

220 Ibid., at p 253.

One of the most important of these was the 2003 Declaration on Religious Harmony which was adopted in the wake of the uncovering of the Jemaah Islamiyah (JI) plot to bomb a number of strategic public targets in Singapore, including Mass Rapid Transit stations and Changi Airport.[221] The workability and impact of this Declaration was examined in Thio's 'Constitutional "Soft Law" and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony'.[222] Thio has also written more specifically about the role of religion and women in Singapore,[223] as well as on the *Colin Chan*[224] case, probably the most high-profile religious rights case to be heard in the Singapore courts.[225]

Conclusion

This brief survey of writings about Singapore's Constitution since 1965 reveals a rich and varied tapestry of solid scholarship. Is there much more that can be asked for? Certainly. For a start, there is yet to appear a full-blown academic treatise on Singapore constitutional law although it is more likely than not that if Thio Li-ann and Kevin Tan put their collective work together and edited them accordingly, such a treatise could be in the offing sooner rather than later. That said, it would perhaps be rather more interesting for each of them to write their own volumes, offering their own personal insights and views on constitutional developments through the years. There is also no article-by-article commentary on the Constitution along the lines of Sheridan and Groves pioneering work for Malaysia[226] or the equivalent of Durga Das Basu's encyclopaedic work for India.[227] Such

221 For a brief discussion on the public order imperatives arising out of 9–11 and the JI threat, see Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs' (2002) Sing JLS 328–73, at pp 352–5.

222 Thio Li-ann, 'Constitutional "Soft Law" and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' [2004] Sing JLS 414–43.

223 Thio Li-ann, 'She's a Woman But She Acts Very Fast: Women, Religion and Law in Singapore' in Carolyn Evans and Amanda Whiting eds, *Mixed Blessings: Law, Religions and Women's Rights in the Asia-Pacific Region* (The Hague: Brill, 2006) 241–77; see also Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs' (2002) Sing JLS 328–73, at pp 355–70.

224 *Chan Hiang Leng Colin and Ors v Minister for Information and the Arts* [1996] 1 SLR 609 (C.A., Singapore).

225 Thio Li-ann, 'The Secular Trumps the Sacred: Constitutional Issues Arising out of Colin Chan' in [1995] 16 Sing LR 26 at pp 45–95.

226 KC Vohrah, Philip TN Koh and Peter SW Ling, *Sheridan and Groves: The Constitution of Malaysia* (Kuala Lumpur: Malayan Law Journal, 2004).

227 Durga Das Basu, *Commentary on the Constitution of India*, 6 edn (Calcutta: SC Sarkar, 1973–89) 15 volumes.

a work would prove most useful not only to students, but to practitioners as well. While there is already considerable literature on the Fundamental Liberties provisions, much more can be done, especially on the interplay between public and private rights, such as the right to free speech versus the right to individual reputation. If the next 40 years is a rich as the last, no one would believe that constitutional law is not the most prestigious and popular of all subjects taught at the law school.

10 In search of the Singapore Constitution

Retrospect and prospect

Li-ann Thio

As Donald Lutz in a perceptive essay notes, US President Thomas Jefferson is well-known for his admonition that every generation should engage in 'revolution' to preserve the blessings of ordered liberty. He points out that the meaning of 'revolution' was quite differently apprehended then, as compared to its contemporary connotation. 'Revolution' 'did not connote a violent break with the past but a thoughtful evolution away from the present'.[1] In other words, to engage in revolution is to have frequent recurrence to fundamental principles, for the purposes of recapturing the principles animating the constitutional system, to reconsider these in light of changing circumstances and commitments and so, to affirm or to amend these principles.

In Hebrew tradition, 40 years marks the passing of a generation. It also marks the attainment of maturity and coming of age. With respect to Singapore, the passage of her first 40 years marks an evolution from a self-professed 'third world' state to a 'first world nation'. This book is motivated by the conviction that it is timely to engage in 'revolution', in considering the origins, development and future trajectories the Singapore Constitution might take.

This concluding chapter discusses various themes pertinent to the making, remaking and interpretation of the Singapore Constitution in an attempt to shed light on the evolution/revolution of the constitution, and the type of structures and principles of good governance that have evolved and are evolving in the Singapore context. It begins with an overview of the major amendments to the constitution in the form of new institutions, and identifies the elected presidency and Group Representation Constituency scheme as the most 'revolutionary' departures from the Westminster parliamentary model. Having established the structures established by the basic Law, the next section discusses the 'spirit' behind the law and how

1 Donald S Lutz, 'Thinking about Constitutionalism at the Start of the Twenty-First Century' (Fall 2000) 30(4) Publius: *The Journal of Federalism* 115.

the elements of power, justice and culture shape a constitution and determine whether this is able to sustain 'constitutionalism'. It notes that while 'cultural factors' may shape constitutional forms and practices, the constitution as a form of legal technology may also 'reconstitute' culture and in that sense effectuate a constitutional revolution. In addition, culture has been an important factor in the indigenisation of the Constitution, particularly in relation to constitutional adjudication where a 'communitarian' judicial ethos is unreceptive to rights-oriented foreign decisions. While local cultural particularities will shape the nature of state-society relations, there is a need to make a distinction between genuinely communitarian norms and statist values. The maturation of Singapore constitutional jurisprudence will also be facilitated by a clear exposition of the nature of 'local conditions' or factors which play a determinative role in the interpretation of the Constitution.

The chapter then discusses the province of constitutional law, in terms of sources of interpretation, and focuses on the non-exhaustive nature of the written text in identifying the sources and nature of the unwritten Constitution. Judicial interpretation in this regard has been inconsistent insofar as there is judicial recourse to extra-textualist readings of the Constitution in declaring unwritten statist principles but less enthusiasm towards declaring unwritten rights. This is so despite cases that state that 'law' in the context of the Constitution relates to a system of law that comports with unwritten but fundamental rules of natural justice. Attempts to invoke these fundamental rules to support expansive constructions of existing Part IV liberties have generally been a barren enterprise. In addition to the continuing evolution of conventions in modified Westminster transplants, in the Singapore context, the sources of constitutional law may arguably be broadened by the category of 'soft' constitutional law. These are written standards which are not legally binding but which have some legal consequences, such as in influencing methods of constitutional interpretation. The chapter briefly examines why this is worth considering as a source of constitutional law, within the context of a hegemonic dominant party state. The chapter proceeds to discuss the extensively rewritten Constitution, and how the flexible quality of a controlled Constitution has allowed the political elite to embark upon constitutional experimentation and to treat novel constitutional institutions such as the elected presidency as evolving works in progress. Not only do interpreters of constitutions have the power to shape constitutional culture, so do those with the power to amend constitutions. Arguably, institutions like the NMP scheme mute the adversarial aspects of Westminster democracy. The shapers of the Constitution can change it to buttress political stability and the status quo, as has been the practical effect of the GRC scheme, which has been revised for extraneous or non-constitutional purposes. They are also empowered to avoid constitutional choices, like a proportional representation electoral system, which can diffuse political power. Through

ouster and notwithstanding clauses, the political branches of government have truncated the role of judicial review over civil liberties where national security issues are at stake, following the parliamentary supremacy logic of trusting elected representatives/governors to act with responsibility and restraint. Even outside of 'security matters', Singapore courts have, in an age of politics, avoided the political thicket in adopting minimalist approaches towards judicial review. Despite having the judicial power to strike down unconstitutional laws, the courts maintain a deferential attitude towards parliament and have eschewed a rights-expansive approach to constitutional interpretation. Certain judicial statements seem to indicate that the primary protector of rights is Parliament, rather than courts, although this view is not universally held.

In closing, this chapter reflects upon the nature of Singapore's evolving revolution, the paths not taken, and expresses the hope that the Constitution will in time to come, anchor a just, orderly, and progressive society. As what is progressive is not self-evident but turns on an underlying public philosophy, it is well to recall GK Chesterton's astute observation that 'Progress is a comparative of which we have not settled the superlative'.[2] As the letter kills and the spirit gives life, we need to practise the discipline of returning to our founding principles, to reconsider, reinforce, modify or affirm them in service of the common weal today. It is time for a revolution.

Cautious beginnings, latter day experimentation

In genesis, the Constitution was a cautious modification of the pre-existing state constitution when Singapore was part of the Malaysian Federation; more revolutionary plans in terms of constitution-making through convening a constituent assembly were scuttled in the face of pressing socio-economic imperatives the young, developing nation grappled with, after its exodus on 9 August 1965. Citizens had no opportunity to shape the basic law. This bred an affective detachment from the fundamental law.

The supreme law of the land, which establishes the basic framework of government, is designed to last, to buttress the stability of the constitutional system. It is for this reason that more onerous amendment procedures are constructed for constitutions than statutes. However, in the Singapore context, the need to secure a special two-thirds parliamentary majority to amend the Constitution posed no significant obstacle to the ruling PAP government, whose technical adherence to legal formalities is legend. Since Independence, the Singapore Government never commanded less than two-thirds of the seats in Parliament. This politically-significant fact has

2 GK Chesterton, Chapter 2, *Heretics* (1905), quotation available at the website of the American Chesterton Society at http://www.chesterton.org/discover/quotations.html.

rendered flexible a formally controlled constitution,[3] allowing the smooth transformation of political will into legal fact. This paved the way for a season of intensive constitutional experimentation and re-design, which peaked in the decade between 1984–94. Since 1965, no less than 38 bills to amend the Constitution have been passed, with all expedition. This experiment has almost exclusively concentrated on institution-building rather than expanding the list of fundamental liberties.

While the constitutional landscape has been altered, the basic form of Westminster parliamentary government, where the chief locus of political power resides in the parliamentary executive, has been kept intact. What Bagehot termed the 'efficient secret of the English Constitution' is reproduced in the Singapore context, where efficiency is celebrated. This relates to 'the nearly complete fusion of the executive and legislative power' through the 'connecting link' of the Cabinet, 'a committee of the legislative body selected to be the executive body'.[4] Effectively, Parliament is co-opted into the government to support it, lessening the ability of parliamentarians to respond to the *vox populi*.

Thus, the transplanted Westminster export has lent itself to the phenomena of 'elective dictatorship', where one political party has enjoyed uninterrupted hegemonic rule since Independence, enabling it to fashion the Constitution to consolidate its power. While the Westminster model is predicated on alternating governments where two or more parties compete for votes – as reflected in clauses relating to the need to retain the confidence of the majority of MPs – this political check has not materialised. The non-emergence of a two-party system flows from the lack of a supportive political culture, including a robust watchdog press and the enjoyment of political liberties which sustains an alert citizenry engaged in the policy-making process.[5] The parliamentary opposition is Lilliputian[6] and oppositional politics, an arena where angels fear to tread. Singapore has never experienced the peaceful transfer of political power through constitutional processes.

The Westminster model, which evolved unconsciously over time, was shaped by dramatic political events such as the 1688 Glorious Revolution which saw the demise of the Stuarts' 'divine right of kings' doctrine. In contrast, the present incarnation of the Singapore Constitution is a product

3 At least since 1979, when the simple majority procedure for amending the Constitution was amended to require a special majority, as entrenched in Article 5 of the Constitution.

4 Walter Bagehot, *The English Constitution* (London: Chapman and Hall, 1867), at p 44.

5 William Dale, 'The Making and Remaking of Commonwealth Constitutions' [1993] 42 ICLQ 67 at pp 69–70.

6 There are currently two elected opposition MPs, in the eleventh session of Parliament.

of deliberate design, engineered by its first Prime Minister, Lee Kuan Yew.[7] This would appear to go against Lord Diplock's observation in *Hinds v The Queen*[8] that new constitutions based on the Westminster model were 'evolutionary not revolutionary' in nature.[9]

As a product of Separation, Singapore's first Constitution was an untidy affair, located in three documents. It was a 'working' Constitution rather than a product of mature deliberation or the fruit of legal nationalism and desire to produce an autochthonous constitution expressing national ideals. Nevertheless, in affirming the new republic's secular identity, the reference to Islam as the official religion of a Malaysian Federation in Article 3 of the Federal Constitution was omitted, as were constitutional definitions of 'Malay' in Article 160 which conflated race with religion. In addition, the Article 15 religious freedom clause is a modified version of the Malaysian Article 11 clause. The Singapore version excluded any reference to the power to enact anti-propagation laws in respect of the Malay community; such special treatment was deemed inconsistent with a secular democracy.[10] So too, Article 46(2) was introduced so that MPs who left the political parties they campaigned under would lose their parliamentary seat; without this anti-hopping clause, the power of the incumbent government would be under threat.[11] Effectively, it was designed to prevent 'floor-crossing' and to thereby buttress political stability. As such, the parliamentarian owes primary loyalty to his party rather than his conscience or constituents.

Subsequent amendments during the era of the 'Constitutional Renaissance'[12] in the 1980s-1990s were also deliberately conceived and executed to meet local particularities, including the fact of a *de facto* one party state. The advent of the Elected Presidency (EP) scheme in 1991 introduced a dualist scheme of democracy, a significant departure from the classic Westminster model with its purely ceremonial head of state. The EP was meant to restrain an irresponsible government from squandering national reserves, given that the parliamentary opposition was too weak

7 Tan observes, at p 90: 'symptomatic of Singapore's legal history is the pre-eminence of Lee in shaping its institutions'. See Kevin Tan, 'The Legalists: Kenny Byrne and Eddie Barker', in *Lee's Lieutenants: Singapore's Old Guard,* PE Lam and Kevin Tan, eds, (Routledge, 1999).

8 [1977] AC 195.

9 [1977] AC 195, at p 212.

10 Para 38, 1966 Constitutional Commission Report, Appendix D, Kevin YL Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore* 2nd edn, (Asia: Butterworths, 1997).

11 Art 54, Federal Constitution of Malaysia, provides for by-elections to be held within 60 days from the date a seat was vacated.

12 See Li-ann Thio, 'Choosing Representatives: Singapore Does it Her Way', in *The People's Representatives: Electoral Systems in the Asia-Pacific Region*, G Hassall and C Saunders, eds, (Allen and Unwin, 1997), at p 43.

to effectively 'check' unsound economic policies, nor in a position to offer substitutes. The composition of the legislature was changed by 1984 and 1991 constitutional amendments which introduced the Non-Constituency MP (NCMP) and the Nominated MP (NMP) scheme, although these were more in the form of an addendum than revolution. The motive was to inject some degree of political pluralism into a PAP-dominated Parliament, to satisfy the growing public appetite for more outlets for political participation. The creation of the constitutional tribunal[13] in 1995 to hear constitutional questions referred to it by the President acting on the advice of the Cabinet, was significant but has played a marginal role in the larger constitutional scheme.[14] Unique provisions also provide for Judicial Commissioners who are appointed to the bench for short time periods, and the appointment of judges to hear specific cases only.[15] This sweeps aside concerns about tenure as a safeguard for judicial independence, in the name of efficiency and expediency.

What was perhaps a more radical break from the past was the alteration to the electoral system, in the form of the Group Representation Constituency (GRC) which now dominates the system. Not only did it revolutionise the one-man-one-vote simple plurality system organised around single-member wards by introducing multi-member constituencies, it represented an initiative designed to protect ethnic minorities through guaranteed legislative representation. These can be seen as reactive amendments, introduced to ameliorate the totalising tendencies of a single-party dominant state, through institutionalising an element of political and ethnic pluralism in aid of a representative legislature. The subsequent evolution of the GRC revolution – by increasing the size of teams from an original three to a ceiling of six – was made for non-constitutional reasons, such as facilitating the running of town councils and community development councils, which are forms of local governance.[16] This demonstrates a pragmatic rather than principled approach towards remaking constitutional institutions. Such developments have been criticised as a technique to buttress the dominant political status quo, which serves a political party, rather than the legitimate national goal of a

13 Art 100, Constitution of the Republic of Singapore.

14 *Constitutional Reference No. 1 of 1995* [1995] 2 SLR 201. Opposition politician JB Jeyaretnam unsuccessfully requested the reference of two questions to the Tribunal, relating to the constitutionality of the Public Entertainments Act and the making of a substantial loan to Indonesia (turning on the interpretation of Art 144): 'Constitutional Tribunal Plea Rejected', *The Straits Times* (Singapore), 30 Jan 1999, at p 54; 'Send USSGD 5b Loan Case to Constitutional Court, says Jeya', *The Straits Times* (Singapore), 24 Nov 1997, at p 28.

15 Art 94(4) and (5).

16 Li-ann Thio, 'The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian' Democracy' (2002) 6 Sing JICL 181 at pp 216–31.

multiracial Parliament. In a remarkably candid statement, Senior Minister Goh Chok Tong acknowledged that a by-product of enlarging GRC team sizes, which does not translate into increased minority representation, was that it helped 'in the recruitment of candidates with Ministerial potential' as few successful Singaporeans would risk their career to enter politics 'without some assurance of a good chance of winning at least their first elections . . .'[17] Contesting as part of a team anchored by a popular minister considerably lessens the risks of electoral failure. This objective, however, is clearly politically partisan.

Thus, 40 years after Independence, what has happened in the making and re-making of the constitutional order has been a revelation. It is apparent that there is nothing inevitable about how constitutions based on the Westminster legal transplant evolve and develop in its translation from temperate to tropical soils.[18] The novel electoral scheme that has emerged is innovative, a form of legal technology which developed independently of the colonial legacy.

Power, justice and culture: The Constitutional Nexus

Constitutionalism is not measured against a static snapshot of a documentary text and the framework it establishes. It is more 'a process, rather than a model – a never-ending process that works out, through experience, the changing hopes and needs of the people living under the Constitution'.[19] In this sense, our search has not been about hunting down the constitutional Holy Grail, in finding an optimal constitutional design. Instead, it has been about suiting the institution to the people and ensuring that certain goals are met. Progress may be measured through performance criteria which might include a constitution which is followed, not ignored, one that rests on the rule of law, one which preserves free elections between competing political parties and sustains the prospect of peaceful political turnover.[20]

Constitutionalism is shaped by the three elements of power, justice and culture, as identified by Lutz. These collectively embody what Montesquieu termed the 'spirit of the laws' which animate a political system and its institutions. Constitutions organise power and address the age-old problem

17 Remarks, South East CDC Appointment Ceremony, 26 June 2006, Arts House, Old Parliament. Reported in Li Xueying, 'GRCs make it easier to find top talent: SM' *The Straits Times* (Singapore), 27 June 2006.

18 See generally Andrew Harding, 'The 'Westminster Model' Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4(2) OUCLJ 143.

19 Lutz, supra, note 1, at p 126.

20 Ibid., p 119.

of reconciling freedom and coercion, to attain ordered liberty based on peace, economic benefits like trade and even civic justice. This power element is evident in the processes and institutional forms structuring the decision-making process; constitutional provisions dealing with power may identify the ultimate source of authority, such as the democratic process, as well as determine the distribution of power, to optimise efficiency while ensuring accountability for potential abuses. These structures seek to direct conflict away from the streets and into political arenas of persuasion and compromise, which is the art of managed politics.[21]

Constitutions may contain basic principles of justice which bind the people or set out their normative aspirations. The 'justice element' in constitutionalism represents 'a political technology' which attempts to marry power with justice, to humanise exercises of power, for example, by an application of the rule of law which requires decision-makers to follow known processes, to give reasons for decisions, or to control power by erecting countervailing power structures. Prohibitions against, for example, retrospective legislation, also curb exercises of power.

Culture relates to 'pre-political' cultural norms or a set of shared values that animate the organisation of human associations, with constitutionalism being 'the most complex form of socio-political organization'.[22] The element of culture is generally found in constitutional preambles, declarations of state principles or policies, citizenship provisions and bills of rights. Cultural elements, which are particularistic in nature, may clash with the justice elements, which are universalistic in orientation. For example, while the rule of law may require the equal treatment of citizens, a constitution may affirm the special indigenous or minority status of a group, and authorise the practice of legal pluralism where different legal regimes apply to distinct groups of people.[23] The Singapore Constitution does not contain any provisions stipulating that the country belongs to a certain 'nation' or ethnic group.[24] However, as a function of history and geo-political pragmatism, Article 152(2) requires the government to exercise its functions in a manner which recognises 'the special position of the Malays' as the indigenous people, and to discharge its responsibility 'to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language'. This provision represents a distancing from the idea of according special rights and privileges to

21 Ibid., p 129.
22 Ibid., pp 127–8.
23 Arts 152, 153.
24 This may be contrasted with, for example, the preamble of the Constitution of the Republic of Croatia which affirms the 'millennial national identity' of the Croatian nation: http://www.constitution.org/cons/croatia.htm.

bumiputera (sons of the soil) which is entrenched in the Malaysian Constitution and has bred a contentious economic policy.[25]

Actors who interpret the Constitution may potentially redefine its underlying cultural mores, to realign might and right. Indeed, a constitutional norm may 'reconstitute' culture and bring about a 'constitutional revolution' in the sense of 'a basic change in the primary public values legitimised and served by law and constitution, values diffused throughout a nation's culture by public and private community means of education, persuasion and coercion, such as schools, religious institutions, the mass media and administrative policies and processes'.[26] For example, the post-war Japanese Constitution inaugurated a shift from the primacy of the state/Emperor, to the primacy of the people or popular sovereignty. So too, the 1966 Constitutional Commission report noted that Singaporeans had put their 'faith' in a 'democratic system of government'[27] This demonstrates that 'culture' is not static and indeed, that adopted government systems may reject pre-existing cultural norms, replacing these with a distinct constitutional culture. For example, in introducing the amendment bill to introduce the NCMP scheme in 1984, then Prime Minister Lee Kuan Yew[28] observed that the Asian tradition was not one of counting heads to decide the leader but was more oriented towards chopping heads to decide questions of power. This has, thankfully, changed.

While not disavowing values from 'European and American civilizations' which 'we have rightly adopted and made our own, such as parliamentary democracy and the rule of law',[29] Singapore has pragmatically adopted a particularist trajectory in terms of institutional design and the principles underlying rights adjudication. 'Culture' has emerged as an important factor, precipitating the indigenisation of the Constitution, in search of an autochthonous legal system. This disavows a 'copycat' mentality of adopting foreign law or structures indiscriminately. Phang JC observed in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board,*[30] that

25 The New Economic Policy was designed to stabilise inter-ethnic relations through its twin objectives of eradicating poverty by raising the income level of all Malaysians and to correct economic imbalances through conferring special privileges to the Malays to help elevate their depressed economic status. See generally Jaclyn Ling-Chien Neo, 'Malay Nationalism, Islamic Supremacy and the Constitutional Bargain in the Multi-ethnic Composition of Malaysia' (2006) 13 Int'l J. on Minority and Group Rights 95–118.

26 Lawrence W. Beer and Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* at pp 3, 7, 10 (University of Washington Press, 1996).

27 Para 74, 1966 Constitutional Commission Report, supra, note 8.

28 44 SPR 25 July 1984, at col 1811 ('it is anathema to Chinese culture that the Emperor's mandate from heaven should depend on the counting of heads').

29 Para 29, Shared Values White Paper (Cmd 1 of 1990).

30 [2005] 4 SLR 604 paras 27–8.

English law 'having been 'exported' to so very many colonies in the past, has now to be cultivated with an acute awareness of the soil in which it has been transplanted'. In assessing its appropriateness, it must be persuasive 'insofar as logic and reasoning are concerned', as this is integral to developing an indigenous legal system 'sensitive to the needs and mores of the society of which it is a part. Only thus can the society concerned develop and even flourish'. Departure is warranted 'where either local conditions and/or reason and logic dictate otherwise'.[31]

Without discounting the existence of universal principles of constitutional morality which serve limited government, Phang JC's observations about the importance of adapting foreign legal transplants to the local context apply to both imported institutions and judicial reasoning. Ultimately, the Constitution as the Basic Law rests upon a background political or public philosophy. In Singapore, 'liberal' constitutionalism has been rejected in favour of a more 'communitarian' conception of constitutionalism or vision of state and society. Indeed, in contrast to attempts to harmonise Singapore commercial law with global best practices, public law has moved along a distinctive trajectory framed by local conditions and distinct values, and informed by 'cultural' traits and political ideology that shape conceptions of social justice.

From the political perspective, government ministers have consistently espoused a distinct style of governance suitable to Singapore's context, where the government enjoys widespread popular support in free elections, on account of its performance legitimacy. In 2005, Prime Minister Lee Hsien Loong stated that Singapore was not headed down the Western liberal model of government, nor was this an aspiration; instead the system would be 'shaped by Singaporeans and their values' and [n]ot any magic formula or Constitution',[32] while noting that there was still openness and transparency since no topic was immune from discussion. A 1994 Judicial Practice Statement also noted the enormous changes to the 'political, social and economic circumstances of Singapore' since Independence and that Singapore law 'should reflect these changes and the fundamental values of Singapore society'.[33]

The idea that 'local conditions' mould laws is not unique to the Singapore constitutional psyche. In the UK, Lord Nicholls in *Reynold v Times Newspaper*[34] noted the difficulty in finding solutions where the task was to protect reputation without a disproportionate incursion into free speech.

31 Ibid.

32 Peh Shing Huei, 'S'pore will set its own political model: PM; Transparency and openness will be hallmarks, even if Western model is out', *The Straits Times* (Singapore) 7 Oct 2005.

33 Practice Statement (Judicial Precedent) (1994) 2 SLR 689.

34 [2001] 2 AC 127 at pp 201–2.

He observed: 'Depending on local conditions, such as legal procedures and the traditions and power of the press, the solution in one country may not be best suited to another country'. As the general press, which served commercial interests, did not always command public confidence, he held that the proposal to entrust the protection of public reputation to the ethics of professional journalism would not be considered a sufficient safeguard.

What is important is that the local conditions upon which developing jurisprudence is based must be elaborated, so that the cogency behind such reasoning may be scrutinised and assessed. This has not always been forthcoming. For example, the Singapore High Court in the leading contempt of court case of *Attorney-General v Wain*[35] underscored the importance of not losing sight of local conditions. However, what 'local conditions' required or demanded was merely asserted as a conclusive basis for determining contempt law in these terms:

> To my mind, the conditions local to Singapore are many and varied. I am not going to touch on the socio-political and economic conditions of our island nation which is markedly different from many other countries.

The only factor singled out was that Singapore judges are both triers of law and fact, given the abolition of jury trials. This grounded the reasoning that speech critical of the judiciary had to be 'firmly dealt with' because such criticism struck

> . . . at the very core of the functions of the judge. Such accusations are harmful to public interest and are clearly calculated to undermine public confidence in the administration of justice and must necessarily lower the authority of the courts.

Such reasoning is unpersuasive. We may argue equally forcefully that as triers of both law and fact, judges should be subject to a higher degree of accountability and bear a thicker institutional skin when it comes to the common law offence of scandalising the court. The reasoning in *Wain* was subsequently affirmed in *AG v Chee Soon Juan;*[36] the learned judge added one further local condition, which was Singapore's small geographical size as this 'renders its courts more susceptible to unjustified attacks'.[37] A Privy Council decision from Mauritius, *Ahnee v Director of Public Prosecutions* was approvingly cited for the provision that the administration of justice

35 [1991] SLR 383, at p 394A–E.
36 [2006] 2 SLR 650, at para 26.
37 Ibid., para 25.

was more vulnerable on small islands, and as such, 'The need for the offence of scandalising the court on a small island is greater'.[38]

Size appears to matter, though it is unclear why. This point warrants elaboration; it is unsatisfactory as a bare assertion. The learned judge, echoed the observations of Yong CJ in *Re Tan Khee Eng John*[39] to the effect that courts in various jurisdictions held different ideas 'about the sort of conduct which may be inimical to the effective administration of justice'; as such it was not 'useful or practicable' to blindly adopt English judicial attitudes. While blind adherence to foreign law or models is unwise, this does not mean that there are no persuasive or cogent arguments raised in foreign jurisdictions which apply locally. It really turns on the specific issue. Certainly, in determining the law on contempt of court, the courts must grapple more fully with the value of critical speech and the function it serves within a constitutional democracy, as a form of accountability. Unwarranted criticism may undermine the administration of justice; but suppressing criticism breeds resentment and suspicion, which can also undermine public confidence in the judicial system. This may also immunise maladministration from criticism, which cannot serve the rule of law. All relevant factors should be judicially identified and the optimal balance struck. Current jurisprudence in this field is somewhat one-sided and it is to be hoped that a fuller consideration of all relevant factors will be subsequently undertaken.

If we tent judicial reasoning to the quick, we can identify another factor which shapes local jurisprudence, an 'anti-local condition' in the form of rejecting common law developments,[40] primarily from England, which have been influenced by the rights-oriented jurisprudence of the European Court of Human Rights. This has recalibrated individual interests upwards, when balanced against competing interests such as public confidence in the administration of justice or in the public reputation of politicians in the field of political libel.[41] However, it is apparent from local decisions[42] that

38 [1999] 2 AC 294 at pp 305–6. See also *McLeod v St Aubyn* [1899] A.C. 549, at p 561 where the Privy Council pejoratively observed that the offence of scandalising the court should be retained 'in small colonies, consisting principally of coloured populations', as it may be 'absolutely necessary to preserve in such a community the dignity of and respect for the Court'. This is discussed extensively in Li-ann Thio, 'Beyond the Four Walls' in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore' (2006) 19.2 Colum J. Asian L 428 at pp 467–71.

39 [1997] 3 SLR 382, at paras 13–14.

40 *AG v Chee Soon Juan* [2006] 2 SLR 650, at para 23. This point significantly influenced the judicial reasoning in *Chee Siok Chin v MHA* [2005] 1 SLR 582, in relation to UK case law on public order: paras 5, 78, 86.

41 *Lingens v Austria* [1986] 8 EHRR 407, *Derbyshire City Council v Times Newspaper* [1993] 1 All ER 1011.

42 *Colin Chan v PP* [1994] 3 SLR 662.

rights are not a 'trump' which override community or state interests. Quite the contrary, it is public order considerations or even efficiency considerations that are valorised, which are effectively treated as 'trumps' in the process of constitutional adjudication. At one time, both the Attorney-General[43] and Chief Justice[44] affirmed the Latin maxim *salus populi suprema lex*. As has been noted:

> The Latin maxim *salus populi suprema lex* (the safety of the people is the supreme law) and *salus republicae suprema lex* (safety of the state is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community.[45]

Obviously, the absence of peace and order would spell the demise not only of internal stability but would cripple international trade, financial markets and even communications technology. Constitutional democracy, as defined by the rule of law and popular sovereignty, cannot flourish in the absence of effective local sovereignty. Order is a precursor to a just order, but it is not an end in itself. However, 'communitarian values' are not the same as statist values which valorise efficiency. Typical of the latter was the justification of a 'total blanket order' on all publications by the Jehovah's Witnesses publishing arm under the Undesirable Publications Act,[46] as any other more proportionate order which paid attention to publication content 'would have been impossible to monitor administratively'.[47] No figures were given in evidence to justify this restriction on the freedom of religious practice. This sect had been de-registered under the Societies Act[48] as their pacifist opposition to national military service was considered a threat to public order; thus, anything they published, however innocuous or unrelated to military service, was banned in the interests of efficiency, while discounting rights of the legal subject.

Ghai insightfully observed that the 'community' and 'state' are different institutions and their conflation destroys community, authentically understood:

> The community ... depends on popular norms developed through forms of consensus which are enforced through mediation and

43 'Law Society Failed to Defend Legal System: A-G', *The Straits Times* (Singapore), 18 Nov 1991, at p 1.

44 *Colin Chan* v. *PP* [1994] 3 SLR 662, at p 678G–H.

45 VR Krishna Iyer, 'A Questionable Instrument' (2002) 18(2) *Frontline*, available at http://www.frontlineonnet.com/fl1902/19020840.htm.

46 Cap 338.

47 *Colin Chan v PP* [1994] 3 SLR 662, at p 687C.

48 Cap 311.

> persuasion. The state is an imposition on society and unless humanized and democratized . . . it relies on edicts, the military, coercion and sanctions. It is tension between them which has underpinned human rights.[49]

At the heart of judicial wariness of a rights-expansive jurisprudence is the apparent fear of excessive individualism. Justice Rajah noted in *Chee Siok Chin v MHA*:[50]

> Permitting unfettered individual rights in a process that is value-neutral is not the rule of law. Indeed, that form of governance could be described as the antithesis of the rule of law – a society premised on individualism and self-interest.

Certainly, individualism, a hedonistic and narcissistic preoccupation with self, manifested in an anti-social disregard for the common good, is undesirable. Rights are self-centric while duties, or inter-personal morality, are other-centric.[51] Hyper-individualism which leads to an exclusive focus on rights is unbalanced and unhealthy, but the principle of individual dignity, of the normative faith in the intrinsic worth of human beings, is distinct from 'individualism' and should not be conflated with it. Both radical individualism and collectivism pose threats to human freedom; man is both an individual and social being, situated in a community, yet more than just a part of it.

A more holistic or balanced approach towards adjudication is evident in how the learned judge identified the relevant parties and their rights and interests in *PP v Koh Song Huat Benjamin*.[52] This case concerned offences under the Sedition Act[53] committed by the authors of two weblogs for speech having a 'seditious tendency'. Section 3(1)(e) defines this as tending 'to promote feelings of ill-will and hostility between different races or classes of the population in Singapore'. Richard Magnus DCJ identified the speaker's right to propagate an online opinion, another person's right to 'freedom from offence' and 'wider public interest considerations'. The idea of 'public interest' was further differentiated in relation to causing harm to 'one racial group' and 'the very fabric of our society', that is, the national community at large.[54] This template of interests could help prevent the lop-sided consideration of any one factor.

49 Yash Ghai, 'Asian Perspectives on Human Rights' (1993) 23(3) HKLJ 341, at p 352.
50 [2006] 1 SLR 582, para 52.
51 Sir John Laws, 'Beyond Rights' (2003) 23(2) OJLS 265–80.
52 [2005] SGDC 272.
53 Cap 290.
54 Ibid., para 8.

The Constitution: Written and unwritten

Broadly understood, a 'constitution' is a term used to describe 'the collection of rules which establish and regulate or govern the government'. These rules are 'partly legal' in being justiciable, that is, recognised and applied by courts, and 'partly non-legal or extra-legal'. The latter takes the form of 'usages, understandings, customs or conventions which courts do not recognise as law but which are not less effective in regulating the government than the rules of law strictly so called'.[55]

From the outset, Singapore's Westminster export departed from its ancestor in being written and thus adopting the principle of constitutional supremacy.[56] The virtue of a written constitution is that it clearly sets out the framework of government and delimits jurisdictional boundaries. It provides an occasion for clarity in drafting constitutional rules, in a single document. For example, the British convention relating to the appointment and termination of the office of Prime Minister, based on the democratic principle of commanding the confidence of the majority of the House, was explicitly constitutionalised in Articles 25 and 26. This does not mean that terms like 'confidence' are bereft of ambiguity; they may still need exposition, through adjudication.[57]

Such occasion for clarity is not, however, always seized upon, as the drafters of Westminster constitutions in 'drafting practice' often left much 'to necessary implication from the adoption in the new constitution of a government structure'. As such the absence of express words 'does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively'.[58] The applicability of constitutional principles such as the separation of powers[59] and rule of law,[60] is thus confirmed by judicial pronouncement.

What happens when there is a supremacy clause stating that any legislation inconsistent with the constitution is void? Who is the final arbiter of the constitutionality of legislation or executive action? Article 93 of the

55 KC Wheare, *Modern Constitutions* (Oxford University Press, 1951), at p 1.

56 Art 4, Supremacy Clause.

57 See, e.g. *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119; *Adegbenro v Akintola* [1962] 1 All Nigerian L. Rep 442.

58 Lord Diplock in *Hinds v The Queen* [1977] AC 195, at p 212.

59 'In Singapore, the Constitution establishes a form of parliamentary government (based on the Westminster model) based on the separation of the legislative, executive and judicial powers. Each arm of the government operates independently of the other and each should not interfere with the functions of the other.' *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207, at para 43.

60 *Chng Suan Tze v MHA* [1988] 1 MLJ 133, at p 156B–C, affirmed in *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR 709, at p 714.

Constitution vests 'judicial power' in the Supreme Court, but does not define its scope. The Constitution nowhere provides that the Supreme Court should authoritatively determine what the Constitution means. The power of constitutional review is something the Supreme Court assumed for itself, in true *Marbury v Madison*[61] like fashion, in cases like *Colin Chan v Public Prosecutor,*[62] *Taw Cheng Kong v PP,*[63] and *Law Society of Singapore v Tan Guat Neo Phyllis.*[64]

Theoretically, Singapore judges play a larger role than their British compatriots in protecting fundamental liberties, since Acts of Parliament are subject to scrutiny for constitutional validity. However, the efficacy of judicial review is circumscribed by ouster clauses which courts have broadly construed,[65] as well as 'notwithstanding' clauses.[66] This is compounded by the fact that the leading interpretive theory prioritises statist imperatives over civil liberties, with this 'communitarianism' justified by reference to local culture.[67]

Unwritten powers, principles and rights

The written constitution is thus not an exhaustive source of constitutional law. For example, the question as to whether Parliament may enact extra-territorial laws, may be answered by referencing international law. The Court of Appeal did so in *Taw Cheng Kong v PP*[68] in declaring that upon achieving independent statehood, the Singapore Parliament had full plenary legislative power.

The Constitution does not state any explicit principles of constitutional government, though these may be part of the unwritten constitution, implied from theory, original intent, textual structure or inherent in the conception of 'law', as judicially defined. In *Nappalli Peter Williams v ITE*,

61 5 US 137 (1803). However, constitutional review may also be justified on the basis of a natural law conception of law as a constitutional restraint, a form of common law constitutionalism where the courts enforce 'higher law' principles extant in the common law, such as 'common right or reason' and require legislation to conform to these principles: see *Dr. Bonham's case* (1609) 8 Co. Rep 107, at 118a.

62 Yong CJ noted in *Chan Hiang Leng Colin* v. *PP* [1994] 3 SLR 662, at p 681B–C: 'The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution.'

63 [1998] 1 SLR 943. The Court of Appeal [1998] 2 SLR 410 overturned the High Court decision, but not on the point of judicial review of the constitutionality of legislation.

64 [2007] SGHC 207, at para 43.

65 E.g. *Teo Soh Lung* v. *Minister of Home Affairs* [1989] 2 MLJ 449, in relation to the ISA.

66 Art 149.

67 Thio Li-ann, 'An i for an I': Singapore's Communitarian Model of Constitutional Adjudication' (1997) 27 HKLJ 152–86.

68 [1998] 2 SLR 410, at p 423.

the Court of Appeal described the model of State-Religion relations as 'accommodative secularism' whereupon religious freedom 'is premised on removing restrictions to one's choice of religious beliefs'.[69]

In addition, there have been occasions when the Courts have demonstrated some degree of judicial creativity in elevating statutory policy to the level of a 'fundamental tenet' even out-weighing a constitutional right. In *Colin Chan v PP*[70] the defence counsel argued that the Jehovah's Witnesses were a respectable religious group whose fundamental tenets could not have been in any sense objectionable and contrary to public order and the public interest.[71] In response, Yong CJ declared that national service – which is regulated by the Enlistment Act[72] – was 'a fundamental tenet in Singapore' and that '[a]nything which detracts from this should not and cannot be upheld'.[73] He even chided the Canadian QC for the latter's unfamiliarity with the context of Singapore society. While national service may be an important legislative goal, it is not a constitutionally-imposed duty. To accord it quasi-constitutional status that trumps a constitutionally protected religious liberty flies in the face of principled constitutional reasoning. Religious liberty is not absolute, but to confer an apparent 'higher law' status to ordinary statutory rules is to embrace the logic of parliamentary supremacy and to completely disregard the constitutional supremacy clause in Article 4.

There is also remarkable inconsistency in interpretive methodology which may explain a judicial bias for statist values. In *Colin Chan v PP,*[74] Yong CJ drew a distinction between religious beliefs which 'ought to have proper protection' and religiously inspired action which 'must conform with the general law relating to public order and social protection'. He appeared to assume the conclusiveness of the Legislature's determination of the correct balance between liberty and order. That being so, there was no need to undertake a further balancing exercise from a rights-oriented perspective, which would be consistent with the admonition to construe Part IV liberties generously.[75] In fact, one might argue that Yong CJ adopted a categorical, no-balancing approach in declaring an unwritten statist value as the primary trump in adjudicatory exercises:

> The sovereignty, integrity and unity are undoubtedly the paramount mandate of the Constitution and anything, including religious belief

69 [1999] 2 SLR 569, at p 576.
70 [1994] 3 SLR 662, at p 678.
71 Ibid., at pp 677–8.
72 Cap 93.
73 Supra, note 69, at p 678A–B.
74 Ibid., at p 684.
75 Lord Wilberforce, *MHA v Fisher* [1980] AC 319, at p 329, cited in *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

> and practices which tend to run counter to these objectives must be restrained.

This exercise in extra-textualism stands at odds with the rejection of the Indian Basic Features[76] doctrine in *Teo Soh Lung v MHA*.[77] Indeed, Yong CJ roundly rejected an extra-textualist approach in *Mazlan v pp*[78] In that case, the issue was whether Article 9(1), which prohibits the deprivation of liberty 'save in accordance with the law', contained an implicit constitutional right to silence. In the process of securing convictions, the police must act 'in accordance with law'.[79] The issue was whether Article 9(1) was violated when the police officers failed to observe statutory safeguards to ensure the recording of reliable statements. While recognising that 'law' in Article 9(1) referred to principles of natural justice, Yong CJ stated that the right of silence was never 'subsumed under the principles of natural justice' but was 'largely evidential in nature'. He concluded:

> To say that the right of silence is a constitutional right would be to elevate an evidential rule to constitutional status despite its having been given no explicit expression in the Constitution. Such an elevation requires in the interpretation of Article 9(1) a degree of adventurous extrapolation which we do not consider justified. It is not a mere matter of balancing the prejudice to the administration of justice resulting from depriving the court of relevant and important evidence against the interest protected by this right.[80]

In applying a strict textualist approach, Yong CJ declared that 'if the legislature had intended to guarantee full protection for it', it would have been given 'specific Parliamentary expression', as it did for the Article 9(3)-enshrined right to be informed of the grounds of arrest.[81] This approach indicates resistance towards finding un-enumerated rights through developing supporting or subsidiary rights to strengthen individual due process rights. Such resistance does not appear when the courts declare unwritten statist principles designed to consolidate public order. So too, in *Sun Hongyu v PP*[82] Yong CJ refused to read into Article 9(3), the right of an accused person to be informed that he had a constitutional right to be

76 *Kesavananda Bharathi v Union of India,* AIR 1973 SC 1461 (Supreme Court, India). This held that certain basic features are immune from amendment.
77 [1989] 2 MLJ 449.
78 [1993] 1 SLR 512.
79 [1993] 1 SLR 512, at p 516A–B.
80 [1993] 1 SLR 512, at p 516C–D.
81 [1993] 1 SLR 512, at p 516H.
82 [2005] 2 SLR 750, at p 760.

represented by legal counsel of his choice. This does not even entail the creation of a 'new right', which subjects the courts to accusations of judicial legislation. All that is called for is a more generous construction of an existing liberty, designed to make it effective as a constitutional guarantee.

Judicial reticence in implying or declaring implied or unenumerated rights may be contrasted with the approach in other common law jurisdictions in finding unwritten rights. For example, the Australian High Court drew linkages between an implied freedom of political communication and democratic government in *Nationwide New Pty Ltd v Wills*.[83] It is open to Singapore courts to declare un-enumerated fundamental rights, following Privy Council decisions that Commonwealth Constitutions 'declare' rather than create rights, which were already recognised at law at the commencement of the Constitution.[84] In addition, the English concept of residual liberties, of the freedom to act in a manner except where this 'is prohibited by law or which encroaches upon the rights of others',[85] applies.

In a seminal appeal from Singapore, the Privy Council delivered a judgment which had the potential to set a more rights-oriented course towards adjudication. In *Ong Ah Chuan v Public Prosecutor,*[86] two things are noteworthy for their potential role in developing rights jurisprudence. First, in terms of judicial attitude, courts should take a protective or pro-individual approach towards generously construing Part IV liberties;[87] second, the word 'law' in any Westminster-based Constitution did not simply mean duly-enacted law but rather referred to

> . . . a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.
>
> It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.

Otherwise, the purported entrenchment of fundamental liberties 'would be little better than a mockery'.[88] 'Law' was not forged in a vacuum but had to cohere with the normative framework that embraced the 'fundamental

83 (1992) 177 CLR 1.
84 *Riley v AG of Jamaica* [1983] AC 719, at p 729 D–G.
85 *Cheong Seok Leng v PP* [1988] SLR 565, at p 579D.
86 [1980–81] SLR 48.
87 [1980–81] SLR 48, at p 61C–D.
88 [1980–81] SLR 48, at p 62A–E.

rules of natural justice', although it was unclear whether these fundamental rules were substantive or procedural in nature.[89]

In this and subsequent cases, the 'fundamental rules of natural justice' have been invoked in at least three ways. In *Ong Ah Chuan v PP*, it was used as a minimal standard against which to determine if a statutory regime – through a 'presumption of guilt' – violated the fundamental rule of natural justice in criminal law 'that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it'. This goes to the fairness in how a trial is conducted, or procedural due process. The Privy Council considered it misleading to describe the fundamental rule as a 'presumption of innocence', stating that what was needed was evidence which was 'logically probative of facts sufficient to constitute the offence with which the accused is charged'. As the presumption of guilt was rebuttable, their Lordships saw 'no constitutional objection' to the statutory presumption concerning the reason for possessing controlled drugs.[90] This case thus elucidated the minimal content of a procedurally fair regime in relation to the deprivation of life and liberty.

Second, in *Mazlan,* 'fundamental rules of natural justice' were unsuccessfully invoked as a basis for implying facilitative or auxiliary rights, designed to give effect to existing constitutional due process rights. Lastly, these fundamental rules were invoked in *Jabar v PP*[91] to support the argument that the 'death row phenomenon', of a prolonged delay between sentencing and execution of a death sentence, would render the deprivation of life one not in accordance with 'law' under Article 9(1). In fact, counsel for the defence sought to impute a substantive standard of humanity into the meaning of 'law', to outlaw certain modes of punishment. This may be seen as a 'backdoor way' to declare a new or implied right[92] – a prohibition against cruel, inhumane treatment. However, the Court of Appeal, exemplifying the height of positivist reasoning, declared it was not concerned whether law was 'fair, just and reasonable'.[93]

In sum, the potential that 'fundamental rights of natural justice' might have exerted towards developing a rights-oriented jurisprudence has not yet been realised. Nonetheless, the door is not shut to the possibility that

89 See Andrew Harding, 'Natural Justice and the Constitution' (1981) 23 Mal LR 226; TKK Iyer, 'Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore' (1981) 23 Mal LR 213. Notably, these principles have not been substantially developed since 1981. See Thio Li-ann, 'Trends in Constitutional Interpretation: Oppugning *Ong*, Awakening *Arumugam*?' [1997] Sing JLS 240.

90 [1980–81] SLR 48, at p 62.

91 [1995] 1 SLR 617 (C.A. Singapore).

92 Notably, the Wee Commission in 1966 had recommended the inclusion of a new right prohibiting torture and inhumane treatment: supra, note 8, para 40.

93 [1995] 1 SLR 617, at p 631.

the Constitution may contain unwritten rights. In 2001, when Parliament debated the nature of the right to vote – which is regulated under the Parliamentary Elections Act[94] – the Home Affairs Minister, after receiving advice from the Attorney General, declared:

> We have a parliamentary form of government. The Constitution provides for a regular General Election to make up a Parliament, and establishes representative democracy in Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right.[95]

This opens the door to finding implied constitutional rights, such as a fundamental right to vote. This may be justified on the ground that voting rights are historically associated with representative democracies and that constitutionalising the right to vote is desirable, as voting is integral to the democratic process.[96]

Conventions

A constitution is not an exhaustive instrument; reference back to Westminster practice or procedure is still resorted to, especially in matters of parliamentary privileges and immunities. Indeed, pursuant to Article 63, Parliament enacted the Parliamentary Privileges and Immunities Act,[97] section 3 of which provides that parliamentary privileges and immunities are to be the same as those associated with the English House of Commons at the advent of the Republic of Singapore.

The constitutionalisation of conventions – those rules of political morality or customary law – does not preclude the development of indigenous conventions, arising from the inter-relationship between new constitutional institutions or novel situations. For example, Law Minister Jayakumar declared that the government had 'made it a practice to always seek the President's views whenever it intends to move Constitutional amendments that affect the relevant provisions'.[98] In addition, then Prime Minister Goh

94 Cap 218.

95 'Kan Seng clears the air on votes' *The Straits Times* (Singapore), 17 May 2001 at H13; 73 SPR 16 May 2001, 'Is Voting a Privilege or a Right'', at col 1726.

96 See Thio Li-ann, 'Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and Tudungs, Women and Wrongs' (2002) Sing JLS 328–73 at pp 340–8.

97 Cap 217.

98 This related to clauses covered by the Art 5(2A) amendment procedure which has yet to be brought into force: Law Minister S Jayakumar, Art 5(2A) of the Constitution (Operation of Constitutional Provisions), 82 SPR 12 Feb 2007.

Chok Tong was open to the idea of appointing unelected people, such as NMPs to Cabinet; rather than laying down rules, he thought it 'far better to leave to convention and practice to evolve'.[99] This 'additional flexibility' of possibly choosing NMPs to serve Cabinet positions would be 'very useful for Singapore to have',[100] citing precedents from Thailand and Japan.

How will Westminster conventions interact with new constitutional powers? For example, the Westminster head of state has the constitutional office 'to be consulted, to encourage and to warn'; this is not written into the Singapore constitution. In 1991, the head of state was transformed into an elective office with discretionary powers to withhold assent to certain cabinet decisions, especially in relation to financial matters drawing down on past national reserves. This departed from the constitutionally recognised Westminster convention that the President 'acts on the advice of the Cabinet', embodied in Article 21(1).

A putative convention is likely to be stillborn where a course of action elicits negative reactions. For example, Article 21(2)(i) is ambiguous in conferring personal discretion on the President to perform 'any other function the performance of which the President is authorised by this Constitution to act in his discretion'. Though the Constitution neither prohibits nor permits it, can the President, by calling a press conference to announce his displeasure with the Cabinet over legal or policy matters, give birth to a new convention? This is what President Ong Teng Cheong did in 1999, in holding a press conference where he aired grievances of difficulties he encountered in executing his constitutional office. The refutation of these grievances before Parliament and the subsequent conclusion of a white paper[101] setting out 'harmonious' methods for President-Cabinet interaction suggest that an act cannot be accepted as custom in the face of Cabinet opposition.[102]

However, the ambivalence between forging ahead with new practices and sticking to tried and tested custom is apparent in the rather odd wording of Article 100. This provides that 'The President may refer' to a constitutional tribunal 'for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise'. This power to request an advisory opinion was associated with the elected presidency regime. When it was contended that the President had or should have the power to initiate references to the constitutional tribunal, the government refuted this claim on two main grounds. First, the President

99 Goh Chok Tong, 55 SPR, 29 Mar 1990 cols 1013, at 1014, 1042–4.

100 Goh Chok Tong, ibid., col 1046.

101 The Principles for Determining and Safeguarding the Accumulated Reserves of the Government and the Fifth Schedule Statutory Boards and Government Companies, (Cmd. 5 of 1999).

102 Goh Chok Tong, 70 SPR, 17 Aug 1999, cols 2031–35.

was supposed to be a reactive institution and so should not have pro-active powers.[103] Second, Article 100 was meant to fill a constitutional lacuna. While the impetus for Article 100 was the government's decision to meet the President's desire to test the system – in particular the meaning of Article 22H, which implicated the scope of presidential powers – the Article 100 procedure would allow the government to refer *any* constitutional question to the tribunal. Thus, Article 100 was drafted 'following the Malaysian precedent' which had 'worked for them' thus making it 'safe for us to follow them.[104] This was criticised as defective[105]as the President lacked power to refer a question to the tribunal where he saw a constitutional ambiguity, if the cabinet did not so assent. A power of reference would have strengthened the institutional role of the President, further treading down the path of constitutional autochthony inaugurated by the introduction of this institution and manifesting a commitment to developing strong countervailing institutions.

Soft constitutional law – Extending the province of constitutional law

The great constitutional law scholar Sir Ivor Jennings warned that a public lawyer cannot understand a constitution apart from 'the social conditions that produce it and its consequences for the people who are governed by it'.[106] As such, the mere study of the constitutional text obscures 'fundamental changes' taking place and reduces the constitutional lawyer to explaining 'a political system which exists on paper and not in practice'.[107]

In Singapore, the PAP's hegemonic rule since Independence has produced what might be called 'soft' constitutional norms that influence the interpretation and application of law by public realm actors and generate expectations amongst citizens. For examples, the opinions of leading government ministers, contained in policy statements, are easily translated into law and programmes. Other forms of constitutional soft law may include opinions of the Attorney-General, which are presumptively correct readings of the law, Government White Papers, guidelines,[108] declarations[109]

103 63 SPR 25 Aug 1994, col 417, at 454.
104 Ibid.
105 Ibid., at col 438.
106 W Ivor Jennings, *The Law and the Constitution* (University of London Press, 1956), 4th edn., at xv.
107 Jennings, ibid., at xiv.
108 'Tripartite Guidelines on Non-discriminatory Job Advertisements' (Mar 1999), online: Ministry of Manpower Press Room <http://www.mom.gov.sg/MOM/LRD/Procedures/688_jobdisc.pdf>.
109 See Thio Li-ann, 'Constitutional 'Soft' Law and the Management of Religious Liberty and Order: The 2003 Declaration on Religious Harmony' (2004) Sing JLS 414–43.

and codes of conduct. Although such documents are juridically non-binding and are not in the strict sense 'law', they may nonetheless have some legal effect or exert political or legal influence over the actions and behaviour of constitutional actors. For example, the EP and government agreed to a set of principles to govern their working relationship and these were embodied in a White Paper, which expressly stated that the principles are a guide and will cease to bind when one party makes a unilateral decision to that effect. Unlike conventions, constitutional soft law norms are the product of deliberate authorship, standards reduced to written form, rather than derived from custom or past practice. Such norms may influence constitutional interpretation, and it has been argued that the communitarian values in the Shared Values White Paper[110] have quasi-constitutional status, like a preamble, in the adjudicatory context.[111] Such informal rules may be a product of a cultural preference for consensual or diplomatic methods of dispute resolution, rather than the 'winner takes all' result of adversarial adjudicatory systems.

The rewritten Constitution: Of rigidity, restraint and realignment

Constitutional amendment provisions are a concession to the need for change rather than staticity. This is balanced against the desire for certainty and stability as reflected in placing 'obstacles of varying difficulty' in 'the path of those who would lay rash hands upon the ark of the constitution'.[112] From 1965 to 1979, only a simple majority was required to amend the Constitution, thus giving maximum power to the government to amend the Constitution in the same way it would enact an ordinary statute. The special two-thirds parliamentary majority was restored in 1979 because it was thought that 'all consequential amendments' necessitated by 'our constitutional advancement' had been brought into effect.[113] Constitution-making, it appeared, was to enter a season of dormancy.

This was not the case. Following the breaching of the PAP's parliamentary monopoly in the 1981 Anson by-elections, a slew of constitutional amendments took place in rapid succession. A two-third parliamentary

110 Cmd 1 of 1991.

111 Benedict Sheehy, 'Singapore, 'Shared Values' and Law: Non East versus West Constitutional Hermeneutic' (2004) 34 HKLJ 67. The pro-communitarian approach towards balancing individual rights and community interests, which is protective of and accords paramountcy to state interests is evident in *Chan Hiang Leng Colin v pp* See Thio Li-ann, 'An I for an i: Singapore's Communitarian Model of Constitutional Adjudication' (1997) 27 HKLJ 152.

112 *McCawley v The King* [1920] AC 691 (P.C., on appeal from Australia).

113 Law Minister EW Barker, *Singapore Parliamentary Debates Official Report*, 30 Mar 1979, at 296.

majority requirement posed no obstacle and constitutional re-making could be effected at Parliament's will, effectively turning the basic law into an ordinary Act of Parliament. Thus, the constitutional changes, that included the introduction of the Non-Constituency MP (NCMP) (1984), the Group Representation Constituency (1998), the Nominated Member of Parliament (NMP) (1990) and the Elected Presidency (EP) (1991) sought to strengthen rather than weaken parliamentary government, although the EP was cast as a countervailing mechanism against the potential abuses of power within a dominant party state.

Indeed, even though the EP is 'one of the most heavily amended institutions' it is still being 're-made'.[114] The general effect has been to downsize presidential powers or to weave more checks and balances to override presidential vetos into the system.[115] The flexible nature of the Constitution permitted the continuous refining and remaking of the EP scheme to deal with contingencies unforeseen at its introduction.[116] It remains very much a work in progress. Insofar as the EP was a revolutionary break from the Westminster model, its subsequent remaking demonstrates an evolution within a revolution. Notably, the presidential 'veto' over government transactions which draw down on past reserves was abridged in relation to defence spending.[117]

This desire to maintain the amendability of the EP scheme is evident in Parliament's decision not to bring Article 5(2A) of the Constitution – which has been 'suspended' since 1991 – into force.[118] If brought into force, any constitutional amendment relating to the EP would be subject to a more onerous amendment procedure that may even involve a popular referendum. Treatment of the EP scheme as an on-going experiment reveals a pragmatic or reactive attitude towards constitution re-making, rather than a systematic or comprehensive reconsideration of constitutional arrangements.

Those who interpret and those who wield power to amend the Constitution can change its underlying cultural norms. For example, various aspects of the Westminster model presumes a system of adversarial politics

114 Yvonne CL Lee, 'Under Lock and Key: The Evolving Role of the Elected President as a Fiscal Guardian' [2007] Sing JLS 290, at p 291.

115 If for example, the President withholds assent to a Supply Bill, under article 148D contrary to the recommendation of the Council of Presidential Advisers, Parliament may overrule the President's decision by passing a resolution to this effect which has the support of two-thirds of the elected members of Parliament.

116 The current Art 5A for example is a product of the mis-drafting of Art 22H. See PM Mr. Goh Chok Tong, 66 SPR 28 Oct 1996, cols 763–4.

117 Art 151A.

118 See Yvonne CL Lee, supra, note 114 at pp 291–3, footnotes 16–18. In 2007, then Law Minister Jayakumar stated that 'some years of experience' would be required in relation to testing a planned new constitutional definition of 'Net Investment Income', indicating no plans to bring Art 5(2A) into force: 82 SPR 12 Feb 2007, col 10.

requiring direct confrontation, an instance being where Parliament holds the Cabinet accountable through parliamentary question time or through 'no confidence' motions. However, in Singapore, the system was modified by the introduction of the NCMP and NMP schemes to meet the perceived demand of voters for political opposition, by providing 'more opportunities for political participation and to evolve a more consensual style of government where alternative views are heard and constructive dissent accommodated'.[119] A Special Parliamentary Select Committee in selecting NMPs is constitutionally required 'to reflect as wide a range of independent and non-partisan views as possible'. This institutionalisation of consensual politics through creating alternative entry-points to the deliberative process is meant to promote consultation, without engendering political contestation, which can translate into a loss of popular support and seats at the electoral polls.

Indeed, the choice of an electoral system can alter a political environment and change the way a constitution works. For example, in New Zealand, the introduction of the Mixed Member Proportional (MMP) Representation system resulted in weak government and created the need for cross-party agreement for political initiatives to succeed. The government was thus forced to govern in the interests of all, not just its supporters, thus promoting political pluralism as a democratic value. As electoral systems determine the distribution of political power, it is not surprising that amendments to Singapore's electoral system served to consolidate and centralise political power, rather than to strengthen parliamentary opposition and enhance the access of under-represented groups to the political process.

The Singapore government has consistently opposed suggestions to introduce proportional representation as a method of enhancing minority representation, as this tends to produce weak coalition governments and could exacerbate racial politics; it has thus resorted to the GRC system which, while guaranteeing some degree of minority representation, has not in its operation undermined political stability, defined by reference to the perpetuation of a dominant party state.[120] To date, Singapore has not witnessed an alternation of power between two (or more) competing political parties. This state of affairs appears to have been consolidated by the GRC scheme as, since its introduction in 1988, the opposition parties have never successfully contested a GRC ward. At present, 75 parliamentary

119 Goh Chok Tong, 54 SPR 29 Nov 1989, col 695.

120 Li-ann Thio, 'The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to fit the Imperatives of 'Asian' Democracy' (2002) 6 Sing JICL 181 at pp 229–32 (discussing how the GRC system priorities stability over democratic choice and political pluralism).

seats come from GRC wards;[121] thus, the major political check of the ballot box remains weak.

The rewriting of the Constitution has brought about a re-alignment of powers. For example, the creation of the EP may be seen as an attempt to bring into being a greater separation of powers by bifurcating the executive through a functional division of powers. What is interesting is the backdrop of the apparent clash between political ideology and constitutional principle. The government-authored statement of national ideology as embodied in the Shared Values White Paper declared:

> Many Confucian ideals are relevant to Singapore . . . The concept of government by honourable men (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.[122]

The idea of the Confucian *junzi* or Madisonian angel, of a wise, benevolent and responsible ruler or Platonic philosopher-king, goes against the realistic appraisal of the susceptibility of the human person to corruption. James Madison in the *Federalist Papers* observed that 'What is government itself but the greatest of all reflections on human nature? If angels were to govern men, neither external nor internal controls on government would be necessary'.[123] Lee Kuan Yew seems to agree with this view of human nature, as 'human beings, regrettable though it may be, are inherently vicious and have to be restrained from their viciousness'.[124]

While PAP ideology is rooted in an exhortation to 'trust' our governors, the EP scheme is premised on a distrust of human nature, it being designed to check the untrammelled powers of the parliamentary executive.[125] Presidential candidates have to satisfy exceedingly stringent pre-selection criteria; aside from holding stipulated high public office or being the chief executive officer of a company with a paid-up capital of S$100 million, a

121 At present, there is a statutory requirement that at least 8 electoral divisions are not GRCs and that at a minimum at least 25 per cent of MPs must come from GRCs, of which, 60 per cent of the GRCs must feature a Malay candidate while the remainder must feature candidates from the Indian or other minority communities: section 8A Parliamentary Elections Act (Cap 218).

122 Para 41, Shared Values white paper (Cmd. 1 of 1991).

123 *The Federalist No. 51* (James Madison) (Jacob E. Cook ed., 1961).

124 Han Fook Kwang, ed., *Lee Kuan Yew: The Man and His Ideas*, at p 194 (Times Edition: 1997).

125 Li-ann Thio, 'The Elected President and the Legal Control of Government: Quis Custodiet Ipsos Custodies?' in *Managing Political Change in Singapore, The Elected Presidency*, Kevin YL Tan and PE Lam, eds, (Routledge, 1997) at pp 100–44.

Presidential Elections Committee (PEC) has to be satisfied a candidate 'is a person of integrity, good character and reputation'.[126] Rather than subjecting presidential candidates to a direct voting process, candidates must be awarded a 'certificate of eligibility' by the PEC; the onerous criteria and pre-selection filter may be seen as institutional safeguards to ensure the eventual candidates are cast in the image of the ideal President, who is somewhat akin to the *junzi* ideal of being both honourable and possessing financial acuity, to immunise the process from the risk of 'unsuitable' candidates.

Constitutional amendments have been deployed to reassign powers, altering the scheme of checks and balances. This is apparent in constitutional and statutory amendments designed to limit judicial review, replacing this legal check with alternative, and less effective, political checks. This is contrary to the rule of law which the Court of Appeal defined thus: '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'.[127]

Under Article 149 of the Constitution, which is located in Part XII (Special Powers against Subversion and Emergency Powers), Parliament may enact laws to deal with matters 'prejudicial to the security of Singapore', including the Internal Security Act (ISA),[128] a British legacy. Under Article 149(1), legislative provisions are valid notwithstanding their inconsistency with Articles 9, 11, 12, 13 or 14 or would, apart from this Article, be outside the legislative power of Parliament. Essentially, this 'notwithstanding' clause makes what would otherwise be unlawful, lawful. Parliament may lawfully suspend constitutional liberties such as the right to life and personal liberty, the prohibition against retrospective legislation, the equal protection clause, the freedom of movement and freedom of speech, assembly and association. The justification for putting the 'state above law' is necessity. However, the problem with conferring such extraordinary legislative powers is the prospect of abuse, particularly where it is couched in such open-textured terms as 'prejudicial to the security of Singapore'.

Article 149(3) was amended in the aftermath of the so-called Marxist conspiracy which concerned the issuance of preventive detention orders under the ISA. The Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* rendered a bold and principled decision which applied an 'objective' test to the legality of a detention order. It noted that if subjectively couched discretion was not subject to judicial review, that discretion 'would be in actual fact as arbitrary as if the provisions themselves do not restrict the

126 Art 19(2).
127 *Chng Suan Tze v MHA* [1988] SLR 132, at p 156B–C.
128 Cap 143.

discretion to any purpose . . . to suggest otherwise would in our view be naïve'.[129]

Nevertheless, the Court in declaring the applicability of judicial review was self-restrained in calibrating downwards or applying a less intense degree of review as national security considerations were involved and deference to executive assessment was warranted. The judicial role was not to evaluate the evidence underlying a decision but to ensure that the decision, which restricts rights, was in fact based on grounds of national security, as opposed to unrelated grounds.[130] Deeming this decision 'interventionist' the government swiftly acted to overrule it by constitutional and legislative amendments to the ISA, which reinstated the 'subjective' test of review applied in the 13 May 1971 precedent of *Lee Mau Seng v MHA*.[131] Judicial review was truncated to ensuring compliance with procedural requirements, under section 8B(2) of the amended ISA. Recognising this might breach Article 93, which vests judicial power in the Supreme Court, the amended Article 149(3) provided that:

> If, in respect of any proceedings whether instituted before or after 27th January 1989, any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister by any law referred to in this Article, such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate any law enacted pursuant to this clause.

The executive preference that judges stay out of 'security' questions has evidently influenced subsequent judicial reasoning, in respect to analogous laws such as the Criminal Law Temporary Provisions Act,[132] where the High Court considered the judicial process ill-suited to reviewing ministerial decisions to secure 'public safety, peace and good order'.[133]

The 'notwithstanding clause'[134] in Article 149 has the effect of exempting anti-subversion laws from the rule of law, judicially enforced. Where the

129 [1989] 1 MLJ 69, at p 155C.

130 [1989] 1 MLJ 69, at p 83F–H.

131 [1971] 2 MLJ 137.

132 Cap 67.

133 *Re Wong Sin Yee* [2007] SGHC 147 (finding that the Minister did not act irrationally in issuing a detention order).

134 This has also been applied in relation to the GRC scheme, which potentially contravenes the Art 12 equal protection clause. While 'one man one vote' applies whether you reside in a GRC or SMC, clearly there is a disparity in voting power depending on geographical location, as the votes of citizens may have the capacity to send 1, 4, 5 or 6 candidates to Parliament. To immunise the GRC scheme from Art 12, Art 39A(3) provides that nothing in relation to the GRC scheme 'shall be invalid on the ground of inconsistency with Art 12 or be considered to be a differentiating measure under Art 78'.

making of such 'Special Powers' laws is concerned, the Constitution is not supreme, Parliament is. Precluding the courts from reviewing security laws which may potentially violate many fundamental liberties cuts against the grain of constitutionalism; this is because an integral principle is that on constitutional questions, courts cannot be excluded. In reacting to concerns of abuses of power by ministers without check, an additional function unrelated to fiscal matters was tagged on to the elected President.[135] The office was given powers to 'veto' ISA detention orders provided the non-elected ISA Advisory Board[136] disagreed with a ministerial decision to issue or vary an order. If the Advisory Board is *ad idem* with the minister, the EP is bereft of a role in rights protection,[137] which shows the limited nature of this political check in protecting rights.

Thus, rather than trusting in judicial self-restraint in security issues, the Constitution was amended to indicate clearly to the courts that they were not the final arbiters on security matters, even where constitutional rights were involved, and that their role was limited to procedural review. This shows an executive preference for weak political checks over robust legal checks and the ability to order the constitution to suit this preference.

Constitutional law in an age of politics

The Singapore judiciary has assiduously avoided being caught in the political thicket and has avoided the hubris of judges in other jurisdictions whose decisions have been criticised as naked judicial ambition and excessive activism.[138] It has thus sought a divergent path in interpreting rights in an age of 'transnational judicial conversations' (primarily between courts in liberal democracies),[139] eschewing the heightened judicialisation associated with some constitutional courts, which raises questions relating to judicial review and the democratic deficit.

However, the judiciary has generally not engaged in the robust protection of individual rights. This is evident from the deference accorded to government assessment of state or community interests and the judicial refusal to declare auxiliary rights to support and give life to existing constitutional liberties. Instead, 'public order' considerations have emerged

135 The EP's role over ISA order was only mentioned in the Second White Paper (Safeguarding Financial Assets and The Integrity of the Public Service, (Cmd 11 of 1990).

136 Art 151(4).

137 Li-ann Thio, '*Lex Rex or Rex Lex*: Competing Conceptions of the Rule of Law in Singapore' (2002) 20 UCLA Pac Basin LJ 1 at pp 52–8.

138 E.g. the attempt by the Massachusetts Supreme Judicial Court in *Goodridge v. Dept. of Public Health*, 798 NE2d 941 (Mass. 2003) to redefine the institution of marriage.

139 Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights', (2000) 20 OJLS 499.

as a trump, reflecting the government's view that Asian societies like Singapore 'generally give greater importance to the larger interests of the community',[140] unlike individual rights-oriented Western societies in striking a balance between individual and societal rights.

This buttresses the dominance of parliamentary government and the positivism associated with legislative (or executive) supremacy. Indeed, certain judicial statements may be read as an abdication of a rights-protective role, constricting the judicial role to the narrow check of ensuring that rules are followed or legislation is validly enacted. Anything beyond this would be construed as 'unwarranted judicial legislation', as the High Court seemed to indicate in *Rajeevan Edakalavan v Public Prosecutor*.[141] It declared: 'The duty of the judge is to adjudicate and interpret the laws passed by parliament with the aim of ensuring that justice is upheld. He is in no position to expand the scope of or imply into the Constitution and other legislation his own interpretation of the provisions which is clearly contrary to parliament's intention'.[142] This exemplifies a form of constitutional positivism, as practised by Singapore courts, although there are contrary indications. In *Nguyen Tuong Van v PP*, Kan J stated there was 'room for debate' as to whether the courts were confined to asking whether a law merely complied 'with the processes for passing an Act' or whether more robust review availed in the form of evaluating the 'constitutional validity' of the Act, that is, whether it complied with constitutional values.[143] The Court of Appeal in *Nguyen* also accepted that it was a facet of judicial responsibility to apply established unwritten customary international law norms which was 'necessarily concomitant with the civil and civilised society which every citizen of Singapore must endeavour to preserve and protect'.[144]

What must be underscored here is that the court in *Rajeevan* was not dealing with a controversial new right, such as a putative 'right' to same-sex marriage; instead, it was invited to 'broaden' the scope of existing rights, to find a right to be told of the Article 9(3) right to counsel, which may be construed as a generous interpretation of this constitutional guarantee. In what may be considered an over-abundance of caution, the High Court stated that broadening an existing right was a matter not fit for judicial interpretation as it belonged in the 'political and legislative arena'. This is because parliamentarians are elected and entrusted with the task of acting 'fairly, justly and reasonably'. In a burst of populist rhetoric, the High Court declared:

140 DPM S Jayakumar, infra, note 154.
141 [1998] 1 SLR 815, at p 822H.
142 Ibid.
143 [2004] 2 SLR 328, at p 352.
144 [2005] 1 SLR 103, at p 127.

> The right lies in the people to determine if any law passed by parliament goes against the principles of justice or otherwise. This right, the people exercise through the ballot box. The judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective. If anybody has the right to decide, it is the people of Singapore. The sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in parliament who are the ones chosen by us to address our concerns. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part.[145]

Not only does this reasoning stifle the development of a purposive rights-oriented approach towards interpreting the Constitution, it presumes a representative political system and that the ballot box is a sufficiently muscular check on a government unresponsive to electoral will. The courts in apprehending their role perhaps feel more at home with the British 'Government-Parliament Oriented Model for Protecting Human Rights',[146] which rests on the trust of the English people that their Parliament will act reasonably and with self-restraint, in relation to individual rights, to safeguard common morality and to play fairly by the rules of the game.[147] In contrast, American-style judicial review, which rests on an inherent suspicion of political authorities, aims to weaken the efficiency of the legislative and executive government branches of government. However, the British idea of trust assumes the possibility of electoral control over an unresponsive Parliament. This is distinct from a trust in government by honourable gentlemen, i.e. in the inherent goodness and responsibility of gentlemen-rulers, an ideal espoused by the PAP government.

At this stage of Singapore's political history, only the most sanguine person would dare prophesy the advent of a two-party system in the next few decades. This is an object lesson in the fact that merely transplanting institutions and processes alone does not guarantee their effective functioning in another context or the reproduction of Westminster democracy in Singapore. A supportive culture is necessary and where this is absent, a hybrid emerges from the mismatch of institution and culture.

Thus, the Singapore model of constitutionalism and rights protection may be characterised as an Anglo-American hybrid. It adopts the American form of a more extensive form of judicial review over the action of political

145 [1998] 1 SLR 815, at p 823D–H.

146 Ariel L Bendor and Zeev Segal, 'Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model' (2002) 17 Am. U. Int'l L Rev. 683, at p 705.

147 Bendor and Segal, ibid., at pp 700–2.

bodies and the British deference to parliamentary intent. The element of local culture in the form of a communitarian ethos and the desire to maintain a strong government may well be what sustains the deference to governors, bearing in mind that in the Confucian conception, law is less a restraint, and more an instrument which facilitates statist goals. A robust form of human rights constitutionalism is unlikely to emerge; any gravitation towards an approach more supportive of individual rights will likely be accompanied by a responsibilities-oriented discourse,[148] a protective approach towards non-constitutional interests like reputation or freedom from harassment,[149] as well as a continued emphasis on the imperatives of efficiency, particularly where national security is concerned.

Conclusion: The evolving revolution

Apart from popular acceptance and support, constitutions, as a form of legal technology designed to reconcile might with right, are just paper tigers. The Singapore Constitution is not a People's constitution – at best, popular involvement was indirect. The Constitution is more Parliament's constitution, and its chief architects have been the ruling elite. Indeed, the argument has been raised that a dominant or *de facto* one party state is democratic, respectful of popular sovereignty, insofar as the government's ability 'to carry consistently a large section of the population with it' is maintained. This is because 'so long as the base of authority was one man one vote, it was not possible to go against the train of the whole community with policies which did not win their acceptance'.[150] It is unclear how accurately the re-engineered electoral system is able to gauge popular support; one man still has one vote, but that vote carries differentiated voting power.

Nonetheless, a primary function of a constitution in a heterogeneous society is to maintain peace between distinct religious and racial groups. In the 40 years of its existence, Singapore has been relatively successful in securing this objective, in a region of military coups, people's revolts and countries seeing a succession of constitutional instruments.[151] To this end, a premium has been placed on public order and national security, which has entailed a contraction of rights.

148 *Colin Chan v PP* [1994] 3 SLR 662 at pp 684–5; *Chee Siok Chin v MHA* [2006] 1 SLR 582 at pp 631–2.

149 *Chee Siok Chin v MHA* [2006] 1 SLR 582, at p 632 ('All persons have a general right to be protected from insults, abuse or harassment.')

150 PM Lee Kuan Yew, 17 Mar 1967, quoted in Tae Yul Nam, 'Singapore's One party System: Its Relationship to Democracy and Political Stability' (1969–70) Pacific Affairs 465–80, at p 469.

151 See Kevin YL Tan, 'The Making and Remaking of Constitutional Orders in Southeast Asia: An Overview' (2002) 6 Sing JICL 1–41.

From the official perspective, the rule of law is apprehended primarily in narrow and formal terms, not speaking to the content of laws:

> First, there should be clear limits to the power of the state. A government exercises its authority through publicly disclosed laws that are adopted and enforced by an independent judiciary in accordance with established and accepted procedures. Secondly, no one is above the law; there is equality before the law. Thirdly, protection of the rights of the individual.[152]

A primary objective of the rule of law is to keep law and order, which is closely aligned to the goal of preserving social security as a predicate for economic growth and continuing development. In seeking to sustain a low crime rate, the government takes a 'strong stand' towards law and order, and has retained the death penalty and corporal punishment to serve this ends. The courts have rejected challenges regarding the constitutionality of the mandatory death penalty, or that death by hanging violates a customary human rights norm prohibiting cruel, inhumane treatment.[153] A 2006 *Straits Times* survey indicates that 96 per cent of respondents supported the death penalty. The liberty-security trade-off that dogs the world in the post 9–11 era in relation to terrorism is dealt with in Singapore, through existing preventive detention laws. Terrorism is considered 'a flagrant disregard of the rule of law' and the application of executive powers in this security area entails a minimal role for judicial review. This is because trials are not considered feasible 'within the constraints of terrorist intelligence and counter terrorist activity'. Terrorism is seen as a particular threat to Singapore's multicultural society, though security laws do not mean 'detention without process', as there are some non-legal checks in play. Indeed, since terrorists might seek to exploit religious-racial cleavages, efforts to maintain racial and religious harmony are an 'important tenet' in approaching the rule of law.[154]

The rule of law is also appreciated as a commitment to the primacy of general law which is legitimate through secular processes. While Article 152 of the Constitution affirms the religious and cultural identity of the Malay community as indigenous people of Singapore, it does not contain any special minority rights. Instead, the prevailing philosophy is that the interests of minority communities are best secured by protecting the equal rights of all citizens, regardless of race or religion. Article 12 is the norm

152 DPM S Jayakumar, 'The Meaning and Importance of the Rule of Law' IBA Rule of Law Symposium, 19 Oct 2007, available at http://notesappinternet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-785D9X?OpenDocument

153 *Nguyen Tuong Van v. PP* (2005) 1 SLR 103.

154 Supra, note 154.

that secures equal basic protection for all;[155] the GRC is a way of institutionalising multiracial politics and reflects the constitutional recognition that ours is a multiracial society. The Presidential Council on Religious Harmony and the Presidential Council for Minority Rights also have a role in mediating ethnic-religious peace, the former being established by the Maintenance of Religious Harmony Act[156] while the latter is a constitutional creation.

One might fairly observe that the evolution of the Singapore Constitution in the past 40 years flows from the consequence of one compelling political fact: that of a dominant party state which is able to change a controlled constitution at will. As constitutionalism is evidenced by a limited government, one may wonder whether constitutionalism in Singapore is a reality or a myth, where the exercise of power follows procedure to the letter. Constitutionalism is not mere legalism; it resides in meaningful legal restraints.

Singapore may be seen as somewhat of a miracle, as an 'improbable nation'[157] which has, in the space of one generation, ascended from the ranks of the Third to the First World, in terms of economic and human development. Constitutional development has not been driven by a master blueprint that seeks to build an optimal design; instead, it has been driven broadly by what the government considers to be in the best interests of the nation, which includes, in its view, a dominant party strong state which best serves the interests of effective and efficient government. The dominant ethos is that of pragmatism, which 'does not deny the existence of truth' but 'posits that truth is discovered through experience. For a pragmatist, the 'ought' is the 'is'. Description is prescription'.[158]

This evolution has followed a largely particularist trajectory, both in terms of institution-building and constitutional cases. The press is conceptualised as a national partner, rather than a 'fourth estate', which practices responsible journalism in service of supporting national policy. The political branches of government have refused to relinquish control of the power to appoint and terminate a superior judge's tenure of office to a judicial commission; neither have they been willing to cede control by creating an independent elections commission. The Elections department falls within the ambit of the Prime Minister's Office and is subject to the

155 S Rajaratnam, *Singapore Parliamentary Debates Official Report*, 16 Mar 1967 at cols 1353–72.

156 Cap 167A.

157 As described by PM Lee Hsien Loong, 'S'pore will set its own political model: PM; Transparency and openness will be hallmarks, even if Western model is out', *The Straits Times* (Singapore) 7 Oct 2005.

158 Roger P Alford, 'In search of a Theory for Constitutional Comparativism' (2005) UCLA Law Review 639, at p 693.

'self-regulation' model of adhering to a code of conduct. This focuses more on the ethics of right behaviour rather than accountability mechanisms for malfeasance. This approach buttresses the centralisation of power in the parliamentary executive, which the Westminster model is already pre-inclined to, in the absence of a parliamentary opposition ready to take the reins of government at the next elections.

In terms of rights, Singapore has departed from general trends observed in other jurisdictions, which relate to the adoption of a longer list of bill of rights, including socio-economic and group rights. This Singapore has resisted. The accession to human rights treaties, such as the Convention for the Elimination of All Forms of Discrimination against Women in 1995, has not yielded any constitutional amendments. In contrast, 'gender' was added as a prohibited ground of discrimination in relation to Article 8 of the Malaysian constitution, which is *in pari materia* with Article 12 of the Singapore Constitution.[159]

Neither are the courts a focal point for pursuing social justice claims; that lies within the province of the elected branch. Thus, Singapore's approach towards human welfare is framed more in terms of human development than human rights; the former focuses on government-run programmes to secure basic needs in relation to social welfare issues like housing, education and health. While rights are justiciable, programmes are not, and concerns with accountability arise. While erecting a constitutional tribunal under Article 100 in 1995, to which the cabinet alone could refer constitutional questions, the government has rejected proposals for a constitutional court which citizens can address claims to.[160] It considers the ordinary courts sufficient for this purpose, which is typical of common law jurisdictions. Unlike other ASEAN states, Singapore has not adopted any rights-dedicated national human rights institutions[161] or other rights-oversight bodies that have been proposed, like an Ombudsman or commissions for racial or gender equality. This anti-institutionalism in terms of rights protection reflects the lack of a robust rights culture, where the preference is that complaints be handled not through litigation but *ad hoc* petition and mediation. Dedicated rights bodies serve as focal points for

159 Para 45, Malaysia, Initial and Second Periodic Report to CEDAW Committee, CEDAW/C/MYS/1–2, (12 April 2004): 'Art 8 of the Federal Constitution clearly embodies the spirit of Art 7 of the Universal Declaration of Human Rights. The principle of non-discrimination contained in *CEDAW* was incorporated into the Federal Constitution with the amendment of Art 8(2) to state that no discrimination is to be made on the ground of gender.'

160 76 SPR 13 Mar 2003 (Budget: Judicature), cols 672–9.

161 Philip Eldridge, 'Emerging Roles of National Human Rights Institutions in Southeast Asia' (2002) 14(3) Pacifica Review 209–26.

specific human rights concerns, and perhaps this institutional deficit reflects a desire to discourage a rights-oriented culture.[162]

Revolution

The word 'revolution' entered into the lexicon of Western political discourse with the events associated with the 1688 Glorious Revolution in England. This marked a shift in interest towards establishing genuinely new foundations to constitute a political order, towards 'the possibilities of dissolution and reconstruction within existing societies, an interest in *revolution* . . .'[163] The pragmatism evident in Singapore's constitutional development seeks not to recreate a new society, *tabula rasa*, but to make incremental modifications.

In our revolution or recurrence to fundamental principles, it is well to reaffirm our multiracial identity as well as the constitutional commitment to a secular democracy which recognises the sovereignty of the people, rather than the sovereignty of the state as the fount of legitimacy. While our structures rest on the accepted principle of separation of powers, a focus on ensuring the efficacy of mechanisms of accountability would strengthen our form of constitutional government. In terms of protecting the rights and interests of Singaporeans, improvements could be made in terms of creating rights-oriented institutions or entrenching additional rights in the constitution, such as the right to vote and the prohibition against torture. This is in aid of the fundamental principle of human dignity and the intrinsic worth of the human person. The respect for the individual does not necessarily entail the embrace of individualistic conceptions of man and society; clearly, man lives in community, as no man is an island. However, more attention could be paid, particularly in constitutional interpretation, to the need to give sufficient protection to constitutional rights, rather than assuming that the legislature strikes the correct balance between liberty and security. Thus would vindicate the promise in *Ong Ah Chuan v PP* that the judiciary should adopt the role of robustly guarding individual rights, rather than be an impartial umpire between competing state and individual concerns.

Constitutional law is not about the search for truth or beauty, moral salvation or divine inspiration. Its goals are far more modest – to identify the fundamental principles that should organise human society, and to give them practical effect through the construction of institutions and

162 Thio Li-ann, '"Pragmatism and Realism do not mean abdication": A Critical Inquiry into Singapore's Engagement with International Human Rights Law' (2004) 8 SYBIL 41 at pp 58–61.

163 Oliver O'Donovan, 'Government as Judgment', (1999) 92 *First Things* 36–44.

safeguarding rights. A constitution cannot legislate good government into being, but it can help curb the excesses of bad government.

In the first 40 years of nationhood, the government has taken the lead in 'evolving' the Constitution to suit local particularities, in part acting as a borrower and in part as an innovator. Efficiency, order and the common good have generally triumphed over rights claims. It is heartening that the third Chief Justice, Chan Sek Keong observed at his welcome reference that while the values of justice and efficiency were not antithetical in 'the general run of cases' as justice can be 'dispensed efficiency', the 'fair administration of justice must ultimately trump court efficiency and convenience, where the two are in direct conflict'.[164]

The power-justice-culture elements in the constitution may well change with the exigencies of a new season, as the next generation continues to work out its own constitutional salvation.[165]

164 Chief Justice Chan Sek Keong, Welcome Reference, 22 Apr 2006, available at http://app.lsc.gov.sg/data/Welcome%20Ref%20Response-CJ%20_22%20Apr%2006_.pdf

165 *McCawley v The King* (1920) 28 CLR 106, at p 117.

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